daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytoun, Linlithgow, share and share alike, and to their respective heirs and assignees." But she qualified these general words by a clause of declaration to the effect that what she thus gave to her daughters was an alimentary provision, and that the *jus mariti* and right of administration of their husbands were to be excluded, and that they should not be liable for the deeds or subject to the legal diligence of their own or their husband's creditors, and the trustees were directed "to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions" so as to carry out these intentions of the testatrix. I think there can be no doubt that by the first provision which I have quoted the daughters of the testatrix became entitled each to one-half of the fee of the estate. The trustees are directed to divide it between them, and although there is no direction in words to pay their halves over to them, there is no other way in which a division between them of the fee could be made, and unless the deed has that meaning there is no disposal of the estate of Mrs Jane Lesslie by it. But while it is thus certain that the testatrix disposed of her estate in favour of her daughters she had evidently a desire that it should as much as possible be protected for them, and accordingly she gave the special direction which I have quoted as to the investment of the funds. I am unable to see how that direction can be carried out. To invest the funds in such a way as to make them alimentary only would be practically the creation of a new trust, and the restriction of the rights of the daughters to a liferent. For unless they were restricted to a liferent, it would be impossible to protect the property given to them by the will from the claims of creditors or the deeds of the ladies themselves. But there is no power to create a new trust of this description, and even if it could be created, power could not be given to it to turn the gift to these ladies into a mere alimentary provision, protected from attack for the beneficiaries' liabilities and from the acts of the ladies themselves.

I am therefore of opinion that the questions put to us must be answered, the first and second in the affirmative generally, and the third in the negative. As regards the testatrix's exclusion of the husbands' *jus mariti* and right of administration, it appears to me that the precedent set by the decision in the case of *Allan* should be followed, and that the receipts for the shares of the ladies who take the fee should bear that the *jus mariti* and right of administration of their husbands are excluded.

Lord Young concurred.

Lord Lee—I was anxious to look into the case of *Balderston* v. *Fulton* and the other cases of that class before coming to a decision, but having now had the opportunity of examining them I have no doubt that the opinion expressed by your Lordship is the correct one.

There is no question now about the fee. The only question is, whether payment is to be postponed, whether in fact the trust is to be kept up.

The peculiarity of this case is that there is no ulterior destination beyond the two ladies. There is therefore nothing to be protected by keeping up the trust. The direction is that the money is to be divided between the daughters of the testatrix. In these circumstances *Balderston* v. *Fulton* cannot be founded upon as an authority for keeping up the trust. The cases of *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639, and *Rennie* v. *Ritchie*, April 25, 1845, 4 Bell's App. 221, are quite distinct and distinguishable, because they are cases of annuity. I therefore concur with your Lordship's opinion.

Lord Rutherfurd Clark was absent when the case was heard.

The Court answered the first and second questions in the affirmative and the second in the negative.

Counsel for the First Parties—Strachan. Agent—J. Logan Mack, S.S.C.

Counsel for the Second Parties (Trustees)—Adam. Agents—Mack & Grant, S.S.C.

Wednesday, May 29.

SECOND DIVISION.

RAMSAY *v.* ROBIN, M'MILLAN, & COMPANY.

Reparation—Master and Servant—Fault—Known Risk—New Trial.

An employer who supplies his men with the usual appliances necessary for their work will not be liable in damages if in a place not belonging to the employer where these appliances are unsuitable the workmen adopt a recognised method of manual labour without making any complaint or requesting other appliances.

A cellarman was injured while storing barrels along with three other skilled workmen in a cellar, which was too small for the use of "skeggs," and in which consequently the barrels were tiered by hand labour. The cellar did not belong to the employers. In an action of damages against his employers, on the ground that they had not provided the necessary appliances, it appeared that hand labour was a recognised method of tiering where skeggs could not be used, although a block-and-tackle was sometimes used, and that the pursuer had never complained or asked for further appliances. The pursuer obtained a verdict. On a motion for a new trial, the Court set aside the verdict, *holding* that there was no evidence of fault.

Simon Ramsay, 333 High Street, Edinburgh, brought an action against Messrs Robin, M'Millan, & Company, brewers, Summerhall, Causewayside, Edinburgh, for £800 as damages for an accident sustained by him upon 28th July 1886 while in their employment as a cellarman.

The pursuer averred that "the accident occurred through the fault of the defenders. The cellar in question was of very small dimensions, and there

was insufficient space for the pursuer and those he was assisting to store the barrels to move safely in lifting the barrels at the time of the accident in the manner the defenders had ordered and directed the work to be done. The floor of the cellar was uneven. . . . There was no window in the cellar. The only light in it was from a small gas jet. . . . It was the duty of the defenders to have had more gaslight in the cellar, as well as to have erected a small crane or hoist in it. . . . They also culpably and recklessly failed and neglected to supply either a hoist or skeggs or ropes or any other necessary appliances for having the work of storing the barrels performed safely at the time of the accident to the pursuer."

The case was tried before LORD M'LAREN and a jury upon 12th July 1888.

From the evidence it appeared that the defenders were under contract to supply the Fish Bar at the Edinburgh International Exhibition during the summer of 1886 with beer. The cellar in which the barrels were stored was small, with a somewhat uneven floor, and was lighted only by the door and a single gas jet. The barrels were tiered by four cellarmen, who hoisted them to their places upon their shoulders, as the premises were too small and confined for the use of "skeggs"—the slides usually employed for altering the position of barrels—with which the defenders always supplied their men. There was no block-and-tackle in the cellar, but neither the pursuer nor any of his fellow-workmen had ever complained to the defenders or requested other appliances. The cellar did not belong to the defenders, but they had put in an extra roof to screen the beer from the heat of the sun. On 28th July 1886, while the pursuer and three other men were hoisting a barrel on to the second tier, the barrel canted over and crushed the pursuer's head between it and the next barrel, inflicting upon him serious injury.

The jury returned a verdict for the pursuer, on the ground that the defenders were in fault in not supplying mechanical appliances, and assessed the damages at £200.

The defenders moved for a new trial, and argued that the case should never have been allowed to go to a jury. No fault was specified upon record or by the jury for which the defenders were responsible. All necessary appliances had been supplied. Tiering by manual labour was a well-known and recognised method where skeggs could not be used. If the premises had belonged to the defenders they might have erected a block-and-tackle though that was unnecessary. The pursuer and the other three men were skilled workmen, knew their work, had undertaken it, and had never made any complaints or requested further assistance. The pursuer had run a well-known risk, and had suffered by a pure accident.

The pursuer showed cause, and argued—Tiering without mechanical appliances was very dangerous. Other minor accidents had happened in this cellar. The defenders should have had a block-and-tackle erected. The cellar was, if not theirs, entirely under their control. They had put on a roof which was a more extensive alteration. They should have had the cellar better lighted and the floor improved—*Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Grant* v. *Drysdale*, July 12, 1883, 10 R. 1159; *Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

At advising—

LORD JUSTICE-CLERK—The operation performed by the injured man and those with him was the ordinary one of delivering hogsheads of beer for their master to a customer. It was not the case of storing barrels within the works of the employer, where there might have been a jury question whether he had supplied his workmen with sufficient appliances. In sending out beer to be delivered it is sufficient for an employer if he send with the beer men accustomed to the work, and such appliances as are usually employed in putting beer into cellars. Here the lorry was sent out in the usual way with experienced men and with the usual "skeggs." When these workmen arrive at the premises they find that the beer cannot be stored by means of the "skeggs" because the premises are not large enough, and I may say that up to this point no fault is alleged on the part of the master. At this point, if the experienced workmen thought that without further appliances they could not place the beer in the cellar with safety, it was their clear duty to return to their master, tell him the position of matters, and ask him either to supply other appliances, or to come and see for himself what ought to be done. Instead of doing that they adopt a mode quite common although more risky, namely, the four men use their own strength to hoist the barrels of beer up on the top of each other. It is clearly proved that such a mode of storing beer-barrels is perfectly recognised, and is quite proper, although it is not the best method. In any case, the men chose that mode; they took the risk, and in raising the barrels one of their number—the pursuer—unfortunately met with the injury for which he wishes to receive damages.

I fail to see anything to justify the jury in finding that the accident was due to the fault of the defenders. I understand the jury stated to the Judge who tried the case that they were of opinion that the employer had not provided sufficient appliances; their view is however entirely inconsistent with the evidence. I do not see wherein the alleged fault lay. It has been suggested now for the first time that the shed was under the control of and in fact belonged to the defenders. If it had been so it would have made the case entirely different, for if the premises had been their own the brewers could have put up what appliances they pleased, and it would have been a proper jury question whether they had put up all the appliances necessary for safety to their workmen. It was said that into the cellar which was not their own they should have inserted a beam so as to allow of a block and tackle being used. If that argument were sound it would come to this that in every case where customers' premises do not admit of the use of skeggs such a beam is to be erected, which is manifestly absurd.

I think therefore the verdict is bad and should be set aside.

LORD YOUNG—I am of the same opinion, and I am further of opinion that no good case has been stated on record. I would like also to add that my opinion is totally irrespective of the facts as

to the contract under which this beer was delivered. I do not think its terms can possibly affect this case. I suppose the pursuer and the other men never dreamt of inquiring as to the nature of that contract, and I further think that any such inquiry on their part would have been ridiculous.

The case is simply this. The pursuer was a cellarman. He had been in the employment of these brewers, storing beer for them in cellars, since February 1875. It did not appear how long before that he had been similarly employed, but even during the time he has been with the defenders he must have had ample experience for learning the proper modes and the risks incident to his employment. The defenders had to send beer to this place for the convenience of the Exhibition. However dark it may have been, it is not unlawful to put beer into a dark cellar. It could be seen by the cellarman, and the defenders who put the beer in were not to do it with their own hands but by perfectly qualified men. They had put beer into this cellar for months. What was the fault? That there was no window, no gas, and no machinery in the cellar, and that it was too small for the use of skeggs? I am of opinion there was no *culpa* at common law at all, and my opinion is not altered by the judgment of twelve jurymen who thought there was fault. I do not think it was a jury question at all. If it was a jury question it was fully laid before them, and we have no case for interfering with their judgment. We are interfering with the verdict because it was not a question for a jury at all.

I desire to say further that I distinguish cases of this sort altogether from cases where you have got machinery, or where workmen have to work underground. There the Legislature has interfered on behalf of human safety, and even the common law has interfered in protection of workmen, because in such cases they cannot judge for themselves. But where wine is being stored in a cellar, or boxes are being hoisted on to a cab, I incur no liability for accidents if I employ experienced men to do the work, who undertake it with its risks.

Lord Rutherfurd Clark concurred.

Lord Lee—If the cellar had been hired by the defenders it would have been a jury question whether there was or was not failure on their part to provide proper appliances, but as the cellar did not belong to the defenders, I agree with your Lordships that the verdict cannot stand.

Lord M'Laren—I would just like to say a word upon the question of whether there is here any issuable matter. Though that question is not strictly before the Court and was not argued before us, it has been made matter of observation from the bench by one of your Lordships. As it happened, when I allowed an issue I was quite ignorant, both theoretically and practically, as to the customary manner of storing beer, and it seemed to me that lifting barrels of beer might be a dangerous method, and that it was a jury question whether the defenders had or had not failed to furnish the proper appliances, and if they had, whether they were not responsible for the accident. I therefore do not concur in Lord Young's observation to the effect that the case was not one for a jury, and further, I have a strong impression that if I had held that there was no issuable matter, this Division would probably have sent the case back to me for proof. Upon the case as it now comes before us, I may say I think it would have been a question for a jury if the premises had belonged to the defenders. In the general case, where operations are performed in the employer's own premises, he must provide the customary appliances for the safety of his workmen. If the operations are performed in premises which do not belong to him, I think it is a question of circumstances whether he shall be held bound to inform himself personally on the subject. For example, if it had been the case of building a bridge or of fitting up engines in a vessel, it might not have been sufficient for the employer to stay at home and to plead that he had sent out proper workmen and the usual tools. But these cases are entirely different from the present, where we have delivery of goods with the ordinary appliances. In such a case it was the duty of the men to go and complain to their employer if they wanted more help. Wherever skeggs can be used they ought to be used. Where they cannot be used barrels are hoisted on the shoulders of four men, or a block-and-tackle may be used, but the latter method is exceptional and not a usual or necessary one.

It therefore appears to me that upon the weight of the evidence that the jury were wrong in their view that other mechanical appliances ought to have been provided, and I think we must order a new trial.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuers—Rhind—Salvesen. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders—Jameson—Shaw. Agents—Watt & Anderson, S.S.C.

Thursday, May 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CROUCHER *v* INGLIS.

Process—Issue—Interlocutor Approving and Fixing Day of Trial—Motion to Vary Issue—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28.

An interlocutor approved of issues as adjusted, and fixed a day for the trial of the cause. *Held* that the defender was not thereby precluded from moving the Court to vary the terms of the said issues, and an objection that the motion was made too late *repelled.*

Craig v. *Jex Blake*, 9 Macph. 715, *distinguished.*

In January 1889 Charles Croucher, residing at Kirkton of Auchterhouse, Forfarshire, sued the Rev. William Inglis, minister of the parish of Auchterhouse, for £500 in name of reparation and *solatium.*