Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK—If I thought that this case was similar to that of *Webster* v. *Brown*, I would arrive at the same result. But the circumstances are different. In *Webster* what happened was this. A tenant continued to use stone stairs leading to her house, which were so worn as to be obviously dangerous, judged both by the eye and by the feeling of the foot, long after entering upon her tenancy, and did not take the course which was open to her of rejecting the tenancy. She knew the danger because it was obvious to all, and therefore she was held to have taken the risk. Here the case is different. The stairs were of wood, and had been used with safety for years, and to outward appearance may have been the same as before. But by constant use they had got into a state of decay and had become not strong enough for the work they had to do. I think this is a case for inquiry. It may turn out that the landlord is not to blame, but I do not think that in the circumstances stated on record we can decide that she is not without inquiry.

LORD YOUNG—I am of the same opinion. This house has been let to the same tenant for thirty years, the lease I suppose being renewed from year to year. I have no doubt that the house was let as being in tenantable and inhabitable condition. A house is not necessarily uninhabitable merely because the surface of stairs therein are much worn by long use. But if the stairs become so rotten with age that they may give way at any moment, the house ceases to be a tenantable house, inhabitable with safety. It has got into an uninhabitable and discreditable condition. The present is, I think, a clear case for inquiry.

LORD MONCREIFF—I am also of opinion that there should be inquiry.

LORD TRAYNER was absent.

The Court appointed issues to be lodged for the trial of the cause.

Counsel for Pursuer — Watt — Abel. Agents—W. & J. L. Officer, W.S.

Counsel for Defender—Salvesen—Cook. Agents—W. & J. Burness, W.S.

Tuesday, June 1.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SCOTT, SIMPSON, & WALLIS *v.* FORREST & TURNBULL.

Process — Proof — Terms of Interlocutor Allowing Proof—Diligence for Recovery of Writs.

In an action of damages for refusing to take up certain bills of lading according to contract, the defender averred that a large quantity of the goods represented by the bills of lading was in bad condition. The pursuer made no averment or admission about the condition of the goods, but founded on his contract with the defender, under which all disputes were to be referred to arbitration, and averred that the arbiter, upon a submission to him, had decided that the defender was bound to take up the bills of lading and retire them, which the defender had nevertheless declined to do.

On this record the Lord Ordinary (Kincairney) before answer allowed the pursuer "a proof of his averments on record, and to the defender a conjunct probation," and this interlocutor was not reclaimed against within six days. Subsequently the Lord Ordinary granted a diligence to the defender for the recovery of documents showing the condition of the goods at the date of shipment.

Held that the motion for such a diligence must be refused on the ground that the interlocutor allowing proof had become final, and that its terms excluded from the proof the question of the condition of the goods.

On 11th September 1896, Scott, Simpson, & Wallis, merchants, London, raised an action against Forrest & Turnbull, merchants, Leith, concluding for payment of £42, 1s. 4d.

The averments of the pursuers are thus summarised by the Lord Ordinary—"The pursuers aver that on 6th August 1896 they sold to the defenders 400 bags of sugar known by the name of Russian crystals; that on 18th August they forwarded an invoice of 288 bags; that the bills of lading were presented to the defenders on 19th August; that the defenders refused to take up the bills of lading or pay the amount in the invoice; that the pursuers presented a new invoice, the price in which, including interest and charges incurred, amounted to £337, 16s. 11d.; that the defenders still declined to take up the bills of lading, whereupon the pursuers re-sold the sugar for the sum of £295, 17s. 6d., and they now conclude for payment of £42, 1s. 4d., being the difference between these two sums, as damages for breach by the defenders of the contract libelled."

The pursuers further averred that their contract with the defenders contained a clause to the effect that the contract was subject to the rules of the Refined Sugar Association.

These rules provide that "all disputes from time to time arising out of any such contract, including any question of law arising in the proceedings . . . shall be referred to arbitration in accordance with these rules." Certain tribunals are appointed by the rules, and it is provided that "the obtaining a reward from either tribunal shall be a condition-precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract."

The pursuers, lastly, averred that "they

submitted the dispute which had arisen out of said contract with the defenders to the council of the Refined Sugar Association as arbitrators, and the council, by award dated 28th August 1896, decided that they had jurisdiction to decide the dispute within the terms of the rules of the Association, and that the buyers should retire the bills of lading plus interest at 5 per cent. per annum from date of first presentation, plus all charges incurred;" but that the defenders still refused to take up the bills of lading.

Neither the contract nor the bills of lading were produced. The date of sale was stated to be on or after the 28th August. There was no averment or admission by the pursuers on record as to the state of the sugar.

The defenders in answer stated that they refused to take up the bills of lading because they bore a marking, "several bags wet, damp, and weak, several with holes," and they further averred that of the 288 bags tendered, 98, including their contents, were soaking wet and many others were holed.

With reference to the pursuers' averments as to arbitration, the defenders "admitted that the pursuers wrote certain letters to the council of the Refined Sugar Association, and that said council issued a pretended award, to which reference is made. Explained that the present action is not one for the enforcement of said award, but is an action of damages for alleged breach of contract, and that, assuming the general rules founded on by the pursuers to be applicable, they have not complied with the same."

The pursuers pleaded—"(1) The defenders having committed a breach of the contract libelled, the pursuers are entitled to decree for the loss, damage, and expense thereby incurred to them."

The defenders pleaded—"(2) The sugar contained in the said bill of lading not being in conformity with the contract between the parties, the defenders were not bound to accept for or pay the invoice price of same. (3) The defenders not being in breach of their contract, the present action is unfounded."

On 6th February 1897 the Lord Ordinary pronounced the following interlocutor:—Before further answer allows the pursuers a proof of their averments on record, and to the defenders a conjunct probation."

This interlocutor was not reclaimed against within six days.

The defenders then lodged a specification calling for the production of certain documents shewing, *inter alia*, the condition of the sugar at the date of shipment.

The Lord Ordinary refused certain articles therein, but on 11th March granted diligence for the recovery of the books and writings called for in the other articles.

Opinion—[*After setting forth parties' averments and quoting certain of the rules of the Refined Sugar Association, his Lordship proceeded*]—"The pursuers do not aver what the question submitted was, nor the connection of the defenders with the submission. But that is truly of no consequence, because this is not an action to enforce the award, but an ordinary action of damages. The pursuers have no plea-in-law based on these provisions about arbitration. On the other hand, the defenders do not rest any plea on the regulations about arbitrations; and therefore it appears to me that this case raises no question about the effect of the clauses of arbitration nor about the award. I rather think the averments and pleas on that subject are irrelevant.

"But the pursuers refer to and rest mainly on the 21st and 25th clauses of that part of the rules which is entitled 'Contract conditions for all Russian Refined Sugars and Crystals sold f.o.b., also c.i.f.' Section 21 is to this effect:—'Subject as aforesaid, documents must be taken up on presentation, without prejudice to the question in dispute to be referred to the council, failing which, sellers may re-sell the sugar for account of whom it may concern, as provided in rule 25.'

"Rule 25 provides that should a bill of lading not be taken up by four o'clock on the day of presentation for payment, the seller 'shall have a right to sell the sugar on the next day after one p.m.,' and that any difference in price, with interest, expenses, and charges incurred, shall be paid by the defaulting party.

"The pursuers maintain that in respect of clause 21 the defenders were bound to take up the bills of lading when presented, and that they, the pursuers, had followed the course authorised by clause 25.

"The defenders dispute the application of the rules; they point to another rule as applicable to the circumstances. They say that the bills of lading which shewed that the goods were damaged could not be regarded as documents tendered under the contract, and that they were entitled to reject the goods as not merchantable on the face of the documents. On the question of their right to reject goods which were not merchantable they referred to the case of *Jones*, 1868, 3 Q.B. 197, and to *Gardiner* v. *Gray*, 1815, 3 Campbell 144, and *Lang* v. *Fidgeon*, 1815, 3 Campbell 169. But I doubt the necessity of going back on these decisions, having in view section 14, sub-section 2, of the Sale of Goods Act 1892 (56 and 57 Vict. cap. 71), providing that in the circumstances there stated there is an implied condition that goods sold shall be of merchantable quality.

"Now, as I have said, I have not the contract before me, and do not feel able to decide with any confidence what is the precise regulation which is applicable to the circumstances, nor whether the pursuers in selling the goods acted on the powers which these regulations conferred. I think that I am not in a position to decide this case on the mere words of the regulations without having the contract before me, and without ascertaining the exact circumstances under which the goods were rejected and sold. I am therefore of opinion that, without deciding these points, there should be a proof before further answer."

The defenders reclaimed, and argued—The Lord Ordinary here had attempted to do what had been decided to be incompetent in the case of *Duke of Hamilton's Trustees* v. *Woodside Coal Company*, January 9, 1897, 34 S.L.R. 257, viz., after allowing a proof in unrestricted terms, to limit its scope by cutting and carving on the specification. The phrase "conjunct probation" in the interlocutor of 4th February implied that the defenders were entitled to meet the pursuers' case in any way they could. If that construction was wrong, the interlocutor of 4th February should be recalled. There had been no definite act on the part of the defenders to bar them from challenging that interlocutor, such as there was in the case of *Craig* v. *Jex Blake*, March 16, 1871, 9 Macph. 715.

Argued for the pursuers—The specification should be refused *in toto*. The form of the interlocutor of 4th February allowed to the pursuers a proof of their averments, &c. The pursuers made no averments as to the condition of the sugar, which was really not in the case at all; and the specification was consequently irrelevant.

At advising—

LORD PRESIDENT—The interlocutor of 4th February 1897 was not reclaimed against within six days, and is therefore final. To it, accordingly, we must look for the scope of the proof which is to be taken in this cause; and by its limits must be determined what writings are relevant to the inquiry, and may therefore be recovered by diligence.

Now, that interlocutor does not allow a proof of the whole averments on record. The well-established formula for such an allowance is to allow the parties a proof of their respective averments and to the pursuer a conjunct probation. What has been done in this case is to allow the pursuers a proof of their averments on record and to the defenders a conjunct probation. The reason, or at least an adequate reason, for this limitation of the order for proof is to be found in the nature of the controversy and the state of the record. It seems to me that no relevant answer is made by the defenders to the pursuer's averments that the council of the Refined Sugar Association was, under the contract, the proper judge of whether the buyers were bound to retire the bills of lading, and did decide that question, and that the question whether the sugar tendered was conform to contract is not in the case. The action is one of damages, but the ground of liability is the defenders having failed to retire the bills of lading when ordered to do so by the council, and the merits of the council's decision cannot be questioned. Accordingly, the condition of the argument is that the buyers were bound to pay for the sugar whatever its condition may have been in point of fact.

The specification before us is manifestly framed on a totally different view of the limits of the proof to that which I have stated, and is quite inappropriate to what I hold to be its true scope as determined by the interlocutor of 4th February. Some articles of the specification are legitimate enough, and if the defenders present a remodelled specification I do not doubt that they will obtain a diligence. But it is not in accordance with our practice in the Inner House to patch up specifications which proceed on wrong principles, and in the meantime I think our proper course is to recal the Lord Ordinary's interlocutor, to refuse the motion for a diligence to recover the writings mentioned in the specification, and to remit to the Lord Ordinary to proceed.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent, also concurred.

The Court recalled the interlocutor of the Lord Ordinary, refused the motion for a diligence, and remitted to the Lord Ordinary to proceed.

Counsel for Pursuers—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—Cooper. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, June 1.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUNCAN'S TRUSTEES *v.* A. & P. STEVEN.

Relief — Reparation — Action for Relief against Claim not Established or Admitted.

A, the tenant of a cellar, raised an action of damages against B, the landlord, for injury caused to his wine by a flow of water into the cellar from a pipe situated on B's premises. B denied all liability, and immediately thereafter raised an action of relief and damages against C, a hydraulic engineer, in respect of negligence in performing certain work which he was employed to do by B, and the failure to carry out which in a proper manner was alleged by B to be the cause of the influx of water. The only damage averred by B was damage to A's stock of wine.

Held (varying the judgment of the Lord Ordinary) that B's action of relief and damages against C must be dismissed as premature, in respect that B denied liability to A, and that the validity of A's claim against B had not yet been decided.

Observed (*per* Lord President) that for one who is sued for damages on the ground of *culpa* it is not necessary in order to preserve his right of recourse against the real wrongdoer to come into Court with an action of relief or damages until liability is either admitted or established.