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.

David Sandeman & Son, wine merchants, occupied on a ten years' lease the basement flats of certain premises in Glasgow, one portion of which belonged to Graham and others, and the other to Duncan's trustees. The sunk flats were connected with each other by openings in the gable wall, and were occupied as a bonded store by Sandeman & Son.

On 13th April 1896 Sandeman & Son discovered that the whole premises so occupied by them were flooded to a depth of 3 feet 6 inches by water entering from that portion of the flat belonging to Duncan's trustees; and on 20th November 1896 they raised an action against Duncan's trustees concluding for payment of £4000 in name of damages for injury resulting to their stock of wines from the influx of water.

Duncan's trustees lodged defences to this action, in which they denied liability *in toto*.

On 10th March 1897 the Lord Ordinary (KYLLACHY) allowed parties a proof of their averments bearing on the question of damage; and on 1st June the First Division recalled this interlocutor and allowed a proof at large.

Meanwhile on 18th December 1896 Duncan's trustees raised an action against A. & P. Steven, hydraulic engineers, Glasgow, to have them ordained to free and relieve the pursuers of the action raised against them by Sandeman & Son, or otherwise to make payment to the pursuers of £6000.

The substance of the pursuers' averments was that they had employed the defenders to remove an old hoist in their premises and to construct a new one, that it was the duty of the defenders to close or disconnect a pipe which had supplied the old hoist with water from the street main, and which was not required for the new lift, and to instruct the Glasgow Waterworks Corporation to cut away the valve connection with the street main; that the defenders had broken off the pipe and stopped it with a plug of wood, and had failed to instruct the Waterworks Corporation to disconnect the street main; that the street valve was negligently left open by the defenders, and that consequently water came in from the main, the cellar became flooded, and serious damage was done to Sandeman's stock of wine.

The pursuers averred that "they have suffered and will suffer loss and damage through the negligent and untradesmanlike conduct of the defenders."

The defenders denied the pursuers' averments.

The pursuers pleaded—"(1) The said flooding having occurred through the fault and negligence of the defenders, and through their failure to implement their contract with the pursuers in an efficient and tradesmanlike manner, the defenders are bound to relieve the pursuers of the consequences thereof. (2) The action at the instance of Messrs Sandeman having been brought against the present pursuers in consequence of the said flooding caused by the defenders' said negligence and failure as aforesaid, the pursuers are entitled to relief as concluded for. (3) Alternatively, the pursuers having suffered loss and damage to the extent sued for through the fault of the defenders, and through their failure to complete their contract with the pursuers in a careful and tradesmanlike manner, the defenders are liable in reparation therefor, and the pursuers are entitled to decree in terms of the alternative conclusions of the summons."

The defenders pleaded—"(1) The action is incompetent, *et separatim*, premature."

On 10th March 1897 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Sustains the defences in so far as directed against the conclusions for relief, and dismisses these conclusions, and decerns; but with respect to the alternative conclusion for damage, before further answer allows parties a proof of their averments, and the pursuers a conjunct probation."

Opinion.—"In this case I agree with the argument of the defenders that the action as an action of relief is irrelevant. I should for myself be prepared to accept the test of the competency of such actions expressed by Lord Neaves in the case of *Colt* v. *Caledonian Railway Company*, 21 D. 1108, 3 M'Q. 833. But in any view it seems to me to be settled that the claim of relief and the claim from which relief is sought must at least be commensurate, and I think that is not the case with the claims here. They are not, in my opinion, commensurate in the sense explained in the case of *Colt*, and also in the more recent case of *Ovington*, 2 Macph. 1066.

"I apprehend, however, that this point is really of no practical importance, because the pursuers have a good conclusion for damages, and I am of opinion that they have sufficiently averred a *prima facie* case of breach of contract, and have also made averments of damage, which I cannot upon their statement pronounce to be necessarily irrelevant. I desire to reserve as much as possible all questions of measure of damages, which questions in cases of this kind are sometimes delicate, but I am not prepared to accept the defender's argument that if damages fall to be paid under the principal action to the Messrs Sandeman, the fact of such damages being incurred may not form a relevant and material element in assessing the damages due for the defenders' alleged breach of contract."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong. The conclusions for relief were competent, though no doubt a proof was necessary. [LORD KINNEAR—But if you are entitled to relief, you are not required to prove anything. If you are entitled only to reparation for wrong you must prove the injury, but an action of relief is irrespective of any evidence, and the very fact of there being a decree against you gives you a right.] No doubt, but if there were two persons attacked in respect of a wrong done, and one only, say the employer, was sued, he would have recourse against the person

employed by him—*Pollock* v. *Wilkie*, July 17, 1856, 18 D. 1311. The claims here were commensurate—*Colt* v. *Caledonian Railway Company*, 1860, 21 D. 1108, 3 M'Q. 833; *Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066; *Gardiner* v. *Main*, November 29, 1894, 22 R. 100; and *Highgate & Company* v. *Magistrates of Paisley*, July 9, 1896, 23 R. 992, also referred to.

Argued for the defenders—The action of relief was incompetent. In the first place the pursuers did not admit liability to Sandeman & Son, but denied it. In the second place, the two claims were not commensurate, Sandeman's claim upon the pursuers being founded on the obligation to warrant the premises water-tight contained in the lease, and on alleged personal fault on the pursuers' part, while the pursuers' claim was founded on negligence and fault on the part of the defenders. The defenders could not step in and defend the action raised by Sandeman against the pursuers. The ground of action as between landlord and tenant was a violation of the maxim *sic utere tuo;* as between the landlord and the defenders the ground of action was negligence in performing a certain work. In any event, the two actions could not proceed together, one proof would not do for both, and the present action must be either dismissed or sisted. [It is unnecessary to recapitulate the defenders argument on the relevancy of the pursuers' averments as to fault and damage.]

At advising—

LORD PRESIDENT—The Lord Ordinary has stated what, I think, is a sufficient reason for dismissing the conclusions for relief; but, in my opinion, the action is open to a more radical objection.

The only damage alleged, or suggested, as having been sustained by the present pursuers, arises out of the claim against them by the Messrs Sandeman. The flooding is not said to have done their cellar any harm, and it is only because it hurt the Sandemans' wine that any loss can arise to the pursuers at all. But then they can suffer through this injury to the Sandemans only if they are legally liable for it. In this action they do not say either that they are liable, or that they have been found liable for the Sandemans' loss. On the contrary, they say only that they are sued by the Sandemans in an action to which they refer; and when that action is referred to, it appears that in it they deny all liability to the Sandemans. It is to be presumed that the present pursuers, if, as they say, they are not liable to the Sandemans, will be assoilzied from that action with expenses. It follows that, on the pursuers own showing, they have suffered, and will suffer, no loss whatever.

On this short and, as I think, conclusive ground, I consider that the conclusion for damages ought in the Lord Ordinary's interlocutor to have shared the fate of the conclusions for relief.

What has been said in no way prejudices any claim, whether of relief or of damages, which the present pursuers may ultimately find that they have, after the determination of Messrs Sandemans' claim. It is quite possible that, if the pursuers are found liable to the Sandemans, they may have a claim of relief against the defenders; but this must depend upon the grounds and nature of that liability. I make this remark because, while the Lord Ordinary, whose judgment is under review, had, in the Sandemans' action, practically decided that the present pursuers (the landlords) were liable for the flooding on a specified legal ground, this Division has recalled that interlocutor and has sent the whole case to proof. This circumstance, although it is no more, illustrates the extreme difficulty of supporting the present interlocutor, which, treating the two actions as independent, sends the present action to proof, irrespective altogether of the result, or the dependence, of the other.

I shall only add one observation of a practical kind. I am well aware that in practice it is sometimes an anxious question what a man should do who is sued for damages (and of course my remarks apply to questions of damages)—and does not think that he is liable (but is not sure), but at all events feels confident that if he is legally liable the ultimate liability rests with another. My judgment to-day does not in the least way suggest that in such cases notice should not be given of the claim or such further invitation as is not unusual for concerted opposition to the claim. But in order to save such a right of recourse it is not necessary to come into Court with a claim of relief or damages until liability is either admitted or established, and if anyone comes into Court with a premature action, his having an intelligible motive for doing so cannot exempt his action from the fate which attends irrelevancy.

I am for recalling the Lord Ordinary's interlocutor and dismissing the action.

LORD ADAM and LORD KINNEAR concurred.

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

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—H. Johnston — Cook. Agents — Dove, Lockhart, & Smart, S.S.C.