pieces of wood; its whole width was not more than 18 inches, and it had no rail or protection at either side. (Cond. 5) The said James Waterson commenced his work by carrying two buckets of covering composition from the quay towards the 'Sergipe,' and had got as far as the gangway between the two ships when, owing to the insufficiency or defective condition or arrangement of said gangway, he fell from it into the dock, and was drowned or killed." The pursuer then averred that a constable on duty at the dock, and some of the defenders' men, had complained to the defenders' foreman of the state of the gangway. "(Cond. 8) The death of the said James Waterson, as aforesaid, was due to the fault and negligence of the defenders, the said Henry Murray & Co., or those for whom they are responsible. In particular, it was due to defects in the condition of the ways connected with or used in the business of the defenders, the said Henry Murray & Co., and to these defects not being remedied, owing to their negligence, or the negligence of some person in their service entrusted by them with the duty of seeing that the ways were in proper condition. There was a duty on the part of the defenders, the said Henry Murray & Co., to see that the said gangway was sufficient for the purposes for which the deceased was using it at the time of the accident; but they neglected this duty, and allowed deceased to use said gangway as it was."

The defenders denied fault, and pleaded (1) that these staements were irrelevant.

The Sheriff-Substitute (GEBBIE) pronounced this interlocutor:—"Sustains the defenders' first plea-in-law, and assoilzies them from the conclusions of the action as laid."

"*Note.*—The fault through which the pursuer lost her husband, who fell from a gangway leading to a vessel on board which he was to work, seems to be that the condition or arrangement of the gangway was insufficient or defective. There is, however, as it appears to me, no specific averment in what respect it was so. Such an allegation is essential in an action of this description, and without it no relevant case is stated. The record is far from being skilfully prepared. Indeed, the fact—if it was a fact—of the deceased having been engaged in a common employment under the defenders, is so meagrely stated, that the greatest difficulty is felt in regard to the relevancy of that branch of the case; also, there is nothing like the full and precise statement upon that matter which is found in the recent case of *Morrison* v. *Baird & Co.*, Dec. 2, 1882, 10 R. 271."

The pursuer appealed to the Court of Session.

The Court, after hearing pursuer's counsel, without delivering opinions, affirmed the Sheriff's judgment.

The pursuer then moved that the action should be dismissed, and pointed out that the Sheriff instead of dismissing it had assoilzied the defenders from the conclusions of the action as laid.

The Court refused the motion, and held (following the case of *Russel* v. *Gillespie*, July 22, 1859, 21 D. (H.L.) 13) that this interlocutor could not be pleaded as *res judicata* in bar of another action, because it only assoilzied the defenders from the conclusions of the action "as laid."

Counsel for Pursuer (Appellant)—Watt. Agent—Alexander Clark, S.S.C.

Counsel for Defender (Respondent)—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, July 1.

SECOND DIVISION.

BUCHANAN BROTHERS *v.* THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY.

Insurance—Fire Insurance—Insurance on Rent—Rent-Clause—Period of Untenantableness.

The proprietors of premises held a policy of insurance with the Liverpool Company against loss by fire for a certain amount, and also against loss of rent for £500 on twelve months' rent of the premises. The policy contained this provision—"The insurance on rent is recoverable only in the event of the above building being so damaged or destroyed by fire as to become untenantable; the said insurance to cover the rent of said building from the time of such accident until the period of reinstatement or of perfect repair, and in the proportion which the period of untenantableness bears to the term of rent which is insured, not exceeding twelve months' rent." The total yearly rent of the premises was £2345. A fire occurred in the premises, causing a loss of rents from untenantableness for a portion of a year of £856, 2s. 2d. Half of this sum was recovered by the insured under a separate policy with another company. The Liverpool company refused to pay the remaining half of this amount, viz., £428, 1s. 1d., and tendered payment of the proportion which the sum insured on rent bore to the total yearly rental and the period of untenantableness, being a sum of £190, 7s. 11d. *Held* that the company's construciion of the clause was right, and that they were only liable to pay the sum tendered.

John Buchanan & Brothers, wholesale confectioners in Glasgow, proprietors of 49–53 Buchanan Street, and 44 to 46 Mitchell Street, obtained on 9th November 1877 from the Liverpool & London & Globe Insurance Company a policy of insurance against loss by fire over these premises to the extent of £8000 on the buildings and £500 on twelve months' rent thereof. The total year's rent of the buildings amounted to £2345. They also, on the 20th of the same month, obtained another fire policy over the same subjects from the Royal Insurance Company for £11,000 over the building and £500 on twelve months' rent thereof. In the policy of the Liverpool & London & Globe Company there was this clause—"The insurance on rent is recoverable only in the event of the above building being so damaged or destroyed by fire as to become untenantable; the said insurance to cover the rent of said building from the time of such accident until the period of reinstatement or of perfect repair, and in the proportion which the period of untenantableness bears to the term of rent which is insured, not exceeding twelve months' rent."

On 3d November 1883 (both policies being still

in force), a fire occurred on the premises, causing damage to the buildings, which was admitted by both companies to amount in all to £5727, 13s. 2d., payable according to allocation in respect of the proportional liabilities—£4592, 0s. 7d. by the Royal, and £1135, 12s. 7d. by the Liverpool & London & Globe Company. The amount of loss of rent was admitted by both companies to amount to £856, 2s. 2d. The half of the amount of the loss of rent, viz., £428, 1s. 1d., was paid by the Royal Insurance Company as their proportion of the loss. The Liverpool & London & Globe Company refused to pay the remaining sum of £428, 1s. 1d., and tendered payment of £190, 7s. 11d. as the amount of their liability, on the ground that they were only liable to pay the loss sustained on rent in the proportion which the sum insured bore to the total yearly rental and the period of untenantableness.

This sum of £190, 7s. 11d. was correctly calculated, assuming the company's construction of the policy to be correct.

The period during which part of the building was untenantable was six months, another eight, and another three months.

John Buchanan & Brothers then raised this action in the Sheriff Court at Glasgow against the Company for payment of £428, 1s. 1d., which they averred was the sum due to them in respect of loss of rents from the fire under their policy with the company.

They pleaded—"(1) The defenders having [along], with the Royal Insurance Company, insured one year's rents of the pursuers' buildings for £500 each, are liable under their said policy for the sum sued for, being one-half of the said loss. (3) The pursuers are entitled, under the policy before set forth, to decree against the defenders as craved."

The defenders judicially tendered and consigned £190, 7s. 11d. conform to their former offer, and pleaded—"(3) The defenders are only liable to pay the pursuers the loss sustained on rents in the proportion which the sum insured on rents bears to the total yearly rental and the period of untenantableness, and having offered payment of and consigned the sum due by them on this principle, they are entitled to absolvitor, with costs. (4) The pursuers having only insured £500 on a year's rents, although the actual yearly rental of the property was very much greater, must be held to have agreed to hold, as between them and the defenders, £500 as the year's rents, and the defenders are only liable to pay the proportion of this sum applicable to the period of untenantableness, and having tendered payment of and consigned such proportion, they are entitled to absolvitor, with costs."

The Sheriff-Substitute (Guthrie) decerned against the defenders for the admitted sum of £190, 7s. 11d., finding no expenses due.

"*Note.*— . . . The . . question relates to the construction of a memorandum affixed to the policy, bearing, 'The insurance on rent is recoverable only in the event of the above building being so damaged or destroyed by fire as to become untenantable; the said insurance to cover the rent of said building from the time of such accident until the period of reinstatement or of perfect repair, and in the proportion which the period of untenantableness bears to the term of rent which is insured, not exceeding twelve months' rent.' I am not surprised that the insured should have been misled by this clause. When it comes to be examined with care, it proves to be simply a way of applying the ordinary average clause to the insurance of rent. The insurance is to 'cover the rent of said building . . . in the proportion which the period of untenantableness bears to the term of rent insured,' or more correctly, in the proportions which the rents lost bear to the amount insured. *Ex figura verborum* it almost seems as if the rent of the building is covered in the proportion which the period of untenantableness bears to the term of the rent insured, *i.e.*, in the proportion which one period of time bears to another period of time. But if we scan the exceedingly ill-chosen words more closely, it is obvious that the proportion sought is not between two periods of time, but between the rents lost and the total sum insured on rent. This appears from the words at the end, 'not exceeding twelve months' rent,' so that to complete the clause it should be read thus: 'In the proportion which (the rents of) the period of untenantableness bear to the term of rent (or rather the amount of rent) which is insured, not exceeding,' &c.

"In working out the arithmetical problem there is a little complication arising from the fact that in the premises insured in this case there are different periods of untenantableness in different parts of the buildings yielding different rents; but the assessors in their report, which both parties accept (except in regard to this question of construction), have arrived at an entirely correct result according to the meaning which I put upon the memorandum on the policy. I have only to add, that I do not think the clause can really bear any other construction when duly considered, and that the pursuers' plea of personal bar is not supported by any sufficient averments. I cannot see why this average clause should not have been framed in the ordinary and recognised forms of such clauses; and as the litigation seems to me to have been due to the manner in which the defenders prepared their policy, I think it would be hard to find the pursuers liable in expenses."

The pursuers appealed to the Court of Session, and argued—An average or valued policy, for which the defenders contended, was unusual in fire insurance, and not to be presumed. The rent-clause could not bear the construction which the defenders put upon it. It meant that the pursuers were entitled to the whole £500 if the half of the loss of rents amounted to that sum, for any period, however short, and then the policy was exhausted.

The defenders replied—The pursuers' contention might be the result aimed at in some fire policies, but it was inconsistent with and excluded here by the terms of the rent-clause, which would bear no other construction than that which the Sheriff-Substitute had put upon it.

At advising—

Lord Young—The question in this case is capable of being stated quite distinctly in a sentence. The rent of the pursuers' premises was insured by the defenders' office for £500, and for a term of twelve months. A fire occurred, and there was a loss of rent to a larger amount than £500. The pursuers were insured with other offices than the defenders, but that does

not interfere with the question between the present parties. The insured say, "We are entitled to £428, because rent to that amount has been lost." On the other hand, the office say—"No, you are entitled only to so much of the loss of rent as is the proportion between the amount insured and the whole amount of your rent." In short, the insured say they are entitled to the loss of rent up to £500, within whatever period the loss occurred; while the insurers say—"No, the period of time in which the loss occurred is material, for there is a clause in the policy which makes the amount of the £500 payable proportionate to the period during which the premises were untenantable."

The whole term of the policy is twelve months, and the loss of rent is attributed to the untenantableness of the premises for a period short of twelve months; and according to the terms of the policy the £500 is to be recoverable in proportion to the time the premises were rendered untenantable. The clause on which this contention is founded has been so often read in the course of the debate that I shall not read it again. I read it to mean that the £500 is to be the full amount payable in respect of loss of rent for the whole period of twelve months, and that the insured are to be paid for loss for any less period during which the premises may remain untenantable in the proportion which that period bears to the whole term insured, namely, twelve months. And indeed these are the very words—"in the proportion which the period of untenantableness bears to the term of rent which is insured, not exceeding twelve months' rent." That is the construction which the Sheriff-Substitute has put upon it, and I think it is the right one. But not only do I think his construction is the right one, but I cannot share the difficulties he expresses in coming to it. I do not think the language used can bear the interpretation which he suggests might have been put upon it by the insured. If I thought it was misleading—if I thought it could be read by the insured as meaning that the whole amount of the insurance was to be paid without any reference to the time of untenantableness—I should have unhesitatingly decided against the insurance office, for, *in dubio*, I should construe every clause in a policy of insurance prepared by insurers in their own favour against them and in favour of the insured. But I do not think that is the case with this clause. I think the Sheriff-Substitute's construction is the clear and the only one, and I am therefore prepared to affirm his judgment.

Lord Rutherfurd Clark—I confess that I have very considerable doubts about this case, but as they are not shared by your Lordships it is not necessary for me to say much. If it had been declared by the parties that they agreed on £500 as the amount to be paid in respect of loss of rents in any case, whatever the proportional amount might be, then the pursuers must necessarily prevail; and I do not see how they can make out their case except on that ground. Now, I concur in thinking that the clause necessarily bears the construction put upon it by the company, and unless I can find that it necessarily bears it I should construe it against the company.

Lord Kinnear concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuers (Appellants)—Mackintosh—Guthrie. Agent—George Andrew, S.S.C.

Counsel for Defenders (Respondents)—Trayner—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

YEATS AND OTHERS (PHILIP'S TRUSTEES) *v.* REID.

Sale—Sale by Auction—Conditions of Sale—Horse—Unsoundness—Warranty.

The trustees of a deceased person sold effects belonging to him by auction. One of the conditions of sale was—"Purchasers must satisfy themselves with the condition, quality, and description of the subjects previous to bidding, as no lot will be taken back or exchanged, or any other abatement made from the purchase price." One of the subjects exposed was a horse which was known to the exposers to have certain defects which were not disclosed by them but which might have been discovered by examination. They gave no warranty of soundness, and made no representation about the animal. The purchaser having after the horse was delivered to him discovered the defects, refused to keep or pay for it. *Held*, in an action by the exposers for the price, that the sale being with all faults, there was no fraud on the exposers' part in not disclosing the defects, and that the purchaser was bound to pay the price.

On 14th May 1883, James Reid, post-horse master, Royal Hotel, Peterhead, bought at a public sale by auction of certain bestial and effects on the farm of Easter Aquharney, belonging to the estate of the deceased Alexander Philip of Yonderton, and sold by his trustees, a brown horse for the price of £44, and gave a cheque for the price. Next day he sent his servant for the horse, and after examining it immediately put it into neutral custody and stopped payment of the cheque.

The trustees and executors of Philip then raised the present action in the Sheriff Court at Peterhead for payment of £44 as the price of the horse.

Reid defended the action, stating—"(Stat. 2) At the time of the sale the horse was unsound, and practically useless. He was a wind-sucker and crib-biter, and also (and this is the fault more particularly complained of) from his birth he suffered from disease of the urethra, had great difficulty in passing water, and was deformed about the sheath. All these defects were well known to the pursuers and the auctioneer. (Stat. 3) The pursuers and the auctioneers did not disclose, as they were bound to do, to the defender and other intending purchasers, the fact