right when he says that that plea cannot be entertained, and I think we should adhere.

LORD M'LAREN — I concur with Lord Adam, and have little to add.

The first proposition maintained by Mr Anderson is that suspension of a charge with its warrant is a legal and competent mode of obtaining review of a decree upon its merits.

There was, no doubt, a period in the history of our process law when that proposition might have been affirmed. I think it is laid down in the institutional writers that decrees both of inferior courts and of the Lords Ordinary might be reviewed by way of suspension.

I should desire to reserve my opinion upon the question how far such procedure would be still competent in view of the radical changes introduced by the Court of Session Act 1868, in the mode of dealing with judgments of inferior courts. But supposing the proposition to be well founded it does not appear to me that any proper application of the kind is before us. We are not asked to review a judgment finding the defender liable for aliment on his own admission (which was the only matter before the Sheriff), but we are asked to set aside the decree upon grounds which were not before the Sheriff, and I fail to see how an application of the kind can be regarded as a mode of reviewing the decision of the Sheriff.

While the Lord Ordinary was no doubt quite entitled to suspend, no one opposing, he was I think also right in rejecting the complainer's first plea-in-law and the argument founded upon it.

LORD KINNEAR — I am of the same opinion. I quite agree with Lord M'Laren that it is unnecessary for the purpose of this case to consider how far the process of suspension of a final decree of an inferior court is now available as a process of review. Assuming it to be so, I confess I should be disposed to recal the note of suspension now before us as presenting to the Court, not an appeal against a judgment of the Sheriff on its merits, but a note of suspension of a charge for the purpose of staying diligence. However that may be, I think the true and sufficient ground of judgment is that which has been already stated. The charge and warrant of imprisonment complained of is a charge proceeding upon a warrant granted upon a petition to the Sheriff under the special provisions of the statute. The sum which the complainer has been charged to pay has now been paid, and therefore the warrant is exhausted because it has been satisfied, and that seems to me a perfectly sufficient ground for suspending a charge and warrant for imprisonment. But that being done, the only ground on which we are asked to consider anything further upon the complainer's application is that the decree which was obtained against him was obtained by fraud of the pursuer of the action. That is not a ground of review of the Sheriff's judgment on its merits, but a reason for setting aside the judgment on grounds altogether extrinsic to the process. I agree that that is not a competent process for raising any such question, and therefore that the Lord Ordinary's judgment must be adhered to.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Complainer — A. M. Anderson. Agent — Mungo Headrick, Solicitor.

Counsel for the Respondents—J. C. Watt. Agent—George Jack, S.S.C.

Saturday, May 29.

SECOND DIVISION.

[Sheriff of Roxburghshire.

HALL *v.* HUBNER.

Reparation—Landlord and Tenant—Defective Premises — Latent Defect — Decayed Stair in House.

The wife of a tenant of a house raised an action against the landlord to recover damages for injuries sustained by falling through a wooden stair into a cellar below. She averred that her husband had been tenant of the house for thirty years, that the wood of the stair was after the accident discovered to be in a decayed, rotten, and ruinous condition, that the defender was well aware of the dangerous state of the stair, that the pursuer's husband had frequently complained to the defender's factor and asked him to have the stair repaired or renewed, and that about a month before the accident it had been inspected by the factor's clerk.

The Court *allowed* an issue.

Webster v. *Brown*, May 12, 1892, 19 R. 765, *distinguished.*

Mrs Agnes Logan or Hall, wife of and residing with James Hall, poulterer, 22 Roxburgh Street, Kelso, with consent and concurrence of her husband, raised in the Sheriff Court at Jedburgh an action of damages for £500 against Mrs Jane Humble or Hubner, 13 Strathearn Road, Edinburgh.

The pursuer averred—"(Cond. 2) In the month of September 1895, and for thirty years or thereby previous thereto, the said James Hall was one of the female defender's tenants in said property. He occupied a dwelling-house in one part of it, which is No. 22, and also a shop, which is No. 24, both Roxburgh Street, Kelso. There is internal communication between the said house and shop. The defender is the proprietrix of both places, and received the rents for them from the said James Hall. The entrance to the dwelling-house was by means of a lobby entering from the street

(and a side door communicating with the shop), and a staircase leading from the lobby to the dwelling-house, which is on the second and third flats. The staircase was enclosed on both sides by the walls of the building. Those walls are of stone or brick and plaster, and were quite smooth to the touch. The steps of the stair were wood, and consisted of thirteen in number, measuring about 13 feet from top to bottom, and from 3 feet to 3 feet 4 inches wide. There was no hand-rail on either side of the stair. The wood which formed the steps of said stair was, when the injuries after received were sustained, discovered to be in a decayed, rotten, and ruinous condition. (Cond. 3) On or about the 28th September 1895, and between eight and nine o'clock in the evening, the pursuer was in the course of going down from her said husband's dwelling-house to his said shop. When she had reached the middle of the stair, and when on the sixth step thereof counting from the bottom, that step, owing to its decayed, rotten, and ruinous state, suddenly and without any warning broke or gave way, and having no handrail or other means of checking her descent, she violently went down 3 feet 6 inches or thereby into a cellar below. The pursuer was much hurt. . . . (Cond. 4) The ruinous state of the said stair, which resulted in the injuries sustained by the pursuer as aforesaid, was occasioned by the female defender's culpable and reckless neglect to have the stair referred to thoroughly repaired or entirely renewed. The staircase was in a defective and dangerous condition, and the defenders were personally well aware of the dangerous, dilapidated, and ruinous state of the stair. The said James Hall, the pursuer's husband, frequently complained to Mr Thomas David Crichton Smith, solicitor, Kelso, the defenders' factor at Kelso, to whom she entrusted the management of said property, and asked him to have the stair repaired or renewed, and specially did he do so in or about the month of August 1895, when Mr Robert Moodie Grieve, principal clerk to the said Mr Thomas David Crichton Smith, visited and inspected the said stair, and was then at least fully aware of the defective, ruinous, and dangerous state of the stair. The female defender entirely renewed the steps of said stair after the pursuer had received the serious injuries before condescended on. It was the female defender's duty to have the said stair in a safe condition for the use of the occupants of the premises, but she neglected this, with the present result. By her own culpable neglect, and that of her factor or agent, for whom she is responsible, the serious injuries to the pursuer took place."

The pursuer pleaded, *inter alia*—"(1) The female defender being the owner of the stair and staircase in question, was and is legally bound to maintain it in a safe condition, and the pursuer's injuries having been caused through her failure to do so, she is liable in reparation as prayed for."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient in law to support the conclusions of the petition."

On 8th March 1897 the Sheriff-Substitute (BAILLIE) sustained the first plea-in-law for the defender and dismissed the action.

"*Note.*—The pursuer avers that she sustained serious injuries on 28th September 1895 through the breaking of a stair of the house in which she and her husband, the tenant thereof, were then living—a house in which, on the uncontradicted averment of the defender, the proprietrix, they had been living for over thirty years. She further avers that the stair was in a decayed, rotten, and ruinous condition, that her husband frequently, and in particular during the month of August 1895, complained to the defenders' factor, and that the accident occurred owing to the condition of this stair. My sole difficulty has been that the defender denies that any complaints were made as to the condition of the stair; but whether these complaints were made or not, I think it is clear from the pursuer's averments that for some time prior to the accident she was aware of the state of the stair, and that, knowing this, she and her husband chose to remain on in the occupation of the house. I am therefore of opinion that this case falls within the rule laid down in *Webster* v. *Brown*, 19 R. 765, and *Shields* v. *Dalziel*. February 2, 1897, 4 Scots Law Times 257, and that I must hold her averments irrelevant."

The pursuer appealed to the Sheriff (VARY CAMPBELL), who on 22nd March 1897 sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and before answer allowed to both parties a proof of their averments.

Note.—"I do not think that I can refuse an inquiry in this case. It does not appear to me that the case is ruled by the decisions referred to in the note of the Sheriff-Substitute. The pursuer is not the tenant of the premises, and the defect alleged is an emerging defect, of which it is averred by the pursuer that notice was given to the landlord. I think the true basis of the case consists in distinct proof of *culpa* as against the landlord, and the defender has on record various pleas as to the knowledge or contributory negligence of the pursuer, which may yet become available upon the true state of facts being ascertained."

The defender appealed, and argued—The judgment of the Sheriff-Substitute was sound and ought to be reverted to. The case was ruled by *Webster* v. *Brown*, May 12, 1892, 19 R. 765. In both cases the pursuer had continued to occupy the house in the face of a known danger. The only distinction that the Sheriff drew between *Webster* v. *Brown* and the present case was that in the former the pursuer was the tenant, while in the present case the pursuer was the tenant's wife. But the wife must either be considered as identical with her husband, the tenant, in which event there was no distinction between the two cases, or she must be considered to be a stranger, in which case her remedy was against the tenant and not against the proprietor.

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