think that the law in England goes further in that direction than we have ever gone, but even in England that rule of law is not administered without qualification. Suppose that there was a contract entered into by anyone for the supply of a large quantity of a certain commodity, and there was a failure towards the end of the contract. The contractor was not able to deliver the whole amount agreed upon, but a part had been delivered and had been consumed. I think that by the law of England the contractor would be entitled to claim and to get paid for the amount of the commodity that had been delivered and consumed although not upon the ground of fulfilment of the contract, and I think that we could find in the books many cases illustrating other departures from the rule, by way of exception, where the contractor had been allowed to recover payment for the work that he has done, even if the contract work has not been completed, where there had been no breach of contract. Of course if any breach of the contract was proved then the contractor could have no claim, but by the law of England where it is desired to bring into application the rule that a contractor cannot be paid for his work unless he has completed his contract. I think that the defender, who is refusing to pay for the work already done, must bring his case up to a breach of contract by the contractor. A pursuer cannot sue upon a contract which he has broken.

Here there is no question of breach of contract, the pursuer fulfilled his contract up to the eve of completion and then by this unfortunate accident his work was destroyed. I do not think that any breach of contract has been imputed to him or that it has been said he was suing upon a contract which he had broken. The question then remains, whether the fact that a workman in the employment of the contractor, and who in matter of fact was his son, having permitted Quigley—a servant of the Road Trustees acting in their interest—to remove the centres of the bridge so that the bridge was afterwards destroyed amounts to a fault for which the pursuer is responsible. My opinion is in the negative, that that fact does not imply any fault upon the part of the contractor. I have the more confidence in my opinion because it is in accordance with the view that the Sheriff-Substitute takes of the evidence. He thinks that the contractor's workman in giving consent to Quigley taking out the centre of the bridge did nothing towards compromising his employer, and I am of that opinion also. The pursuer has made and furnished work which was contracted to be done at a certain price. It perished, but through no fault of his, and no breach of the contract has been imputed to him. Upon these facts and circumstances, and upon the view of the law which I have explained, I am of opinion that the Sheriff-Substitute's judgment should be recalled, and that the pursuer should have decree.

LORD RUTHERFURD CLARK—I think that this case falls within the principle *res perit domino*, and that it is ruled by the case of *M'Intyre* v. *Clow*, January 8, 1875, 2 R. 278. In proceeding upon that view of the case, my judgment must rest upon the answer to the question whether the contractor was or was not in fault? I think he was not.

LORD LEE and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"Finds in fact (1) That the pursuer contracted to rebuild a portion of a stone bridge over the Tail Burn near Moffat for the defenders, conform to specification No. 10/1 of process; (2) That he also contracted to do the other work referred to in the petition, but that since the action was raised, his claim therefor has been settled, and the prayer of the petition restricted accordingly; (3) That when the arch was completed, but before the parapets were built, or the haunching, backing, or pointing were done, James Quigley, a surfaceman in the employment of the defenders, without the leave or knowledge of the pursuer, took out the wooden supports and centres which were under the arch; (4) That in consequence of this being done before the mortar had sufficiently dried and the building had settled down, part of the newly built portion of the arch, and also part of an old portion fell down, whereby the pursuer's work was rendered useless: Find in law that the defenders are liable to the pursuer for the loss thereby sustained by him, amounting to £39, 0s. 11d. sterling, conform to the minute No. 12 of process: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, ordain the defenders to make payment to the pursuer of the said sum of £39, 0s. 11d.," &c.

Counsel for the Appellant—Shaw—G. Stewart. Agent—G. Brown Tweedie, Solicitor.

Counsel for the Respondents—Younger. Agent—H. W. Cornillon, S.S.C.

Tuesday, May 27.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BENNETT AND OTHERS *v.* MACLELLAN.

Ship—Liabilities of Owners inter se—Power of Majority of Owners to Bind Minority—Action Compromised without Consent of One Owner.

A ship having been lost an action was raised in England by the cargo owners against the ship owners resident there. The dependence of the action was intimated to the owner of one share in the

ship, who was resident in Scotland, but he declined to join in the defence. The defendants were found liable in a large sum in name of damages, with the costs of the action. Having discharged the liability the English shipowners raised an action to recover the amount against an assurance association with which the ship had been insured. Judgment having been given against the shipowners, they appealed, and pending appeal a substantial sum was offered to them in full of all claims, which, on the advice of counsel, they accepted.

In an action by them against the Scotch shipowner, *held* that the latter was bound to bear his share of the liability incurred to the cargo owners, and had not been impliedly discharged by the action against the assurance association having been compromised without his consent.

On 16th October 1884 the steamship "Austria" was lost on the island of Ailsa Craig. An action was thereafter raised in the Queen's Bench Division of the High Court of Justice in England by Messrs Leduc & Company, to whom the bill of lading of a portion of the cargo had been assigned, against all the owners of the steamship except William W. Maclellan, indiarubber manufacturer in Glasgow, who was resident outwith the jurisdiction of the Court. The defendants intimated this action to Mr Maclellan, and invited him to join in the defence, but he declined to do so, or bear any share of the expense. On 27th June 1887 judgment was given for the plaintiffs in said action for £12,100, and costs, which amounted when taxed to £486, 5s. 11d., on the ground that the goods were lost while the steamship was, without sufficient cause or excuse, deviating from the voyage stipulated for in the bill of lading, and this judgment was confirmed on appeal.

The shipowners were further liable to claims at the instance of other owners of cargo, the total claims exceeding the statutory liability of £8 per ton upon the tonnage of the vessel, which, with interest from the date of the loss, amounted to £13,316, so that including the costs above mentioned the total liability of the shipowners reached the sum of £13,802, 5s. 11d. Certain of the defendants were unable to meet their proportion of this liability, which was discharged by Stephen Bennett and others, who held sixteen shares of the ship.

The present action was raised by Stephen Bennett and others in April 1888 against William W. Maclellan in the Sheriff Court of Lanarkshire for payment of £785, 1s. 6d., as his share of the liability incurred.

The defender at first resisted the action on various grounds, *inter alia*, denying that he was an owner at the time the bills of lading founded on in the action by Messrs Leduc & Co. were entered into. In the Court of Session only one plea was insisted in, which was based on the averment (added by way of amendment in the Sheriff Court after the record had been made up) that the pursuers had compromised an action against the United Kingdom Mutual Steamship Assurance Association for £7000 in full of all claims against the said Assurance Association, and that this had been done without the defender's knowledge or consent.

He pleaded—"The pursuers having discharged the said United Kingdom Mutual Steamship Assurance Association of a claim in which the defender was interested, without the defender's knowledge or consent, have thereby impliedly discharged the defender of the claims in the present action, and are barred from further insisting therein."

Proof was allowed, from which the following facts appeared:—The managing owners of the "Austria" were Messrs Ward & Holzapfel of Newcastle-on-Tyne. All the shares belonging to the copartnery were registered in Ward's name. Mr Holzapfel was not registered as an owner. The defender addressed to Messrs Ward & Holdzapfel on 8th November 1883 the following application for shares:—"Please reserve for me one sixty-fourth share in steamer 'Austria,' No. 5, 2320 tons d. w., at the price of £366, 8s. 2d. per share, and I authorise you to insure my interest for its estimated value against all risks in the usual manner." Messrs Ward & Holzapfel effected an insurance of the ship by becoming members of the United Kingdom Mutual Steamship Assurance Association, and entering the ship in the Protecting Club, Class III. of said association, by which members were protected *inter alia* against "loss or damage which, by the improper navigation of any steamer entered in this class . . . may be caused to any goods or merchandise." Mr Ward died insolvent in 1886. After the shipowners had been found liable to the cargo owners they along with Mr Holzapfel in August 1887, as co-plaintiff, raised an action in the High Court of Justice in England against the United Kingdom Steamship Mutual Assurance Association, Mr Holzapfel claiming, "on behalf of his co-plaintiffs and the other owners" of the steamship, the amount of the liabilities which they had incurred to the cargo owners. Mr Holzapfel appeared as a plaintiff, as he alone was a member of the association, and by the rules of the association only members could take proceedings against it. Judgment was given against the shipowners in the Court of first instance, and an appeal was taken. Pending the appeal the Assurance Association offered the plaintiffs £7000 in full of all claims. On the advice of counsel this offer was accepted early in 1889. The defender was not a party to that action. Mr Saunders, the pursuers' agent, deponed that he had asked the defender to join in recovering the insurance money, but he had declined.

Mr Mair, the defender's agent, deponed—"I have gone carefully over the correspondence within the last ten days, and am prepared to state now that there was no request made to the defender, or us, as his agents, to join in an action against the United Kingdom Insurance Club. I am

quite certain of that. I have gone carefully over all the correspondence on that point, and I am also certain that we were never consulted about the compromise. *Cross.*—I was aware of the action against the United Kingdom Company after it had been raised. We were not asked to join in it."

On 3rd July 1889 the Sheriff-Substitute (SPENS) pronounced this interlocutor:—"Finds the defender was the registered owner of 1/64th share in the s.s. 'Austria,' the bill of sale being dated 6th October 1884, but the defender for some time prior to 27th September 1884 had a beneficial interest in said share: Finds that on 27th September 1884 the bill of lading, No. 12 of process, was entered into between the captain of the s.s. 'Austria' and Moritz Weismann, with reference to a cargo of rape seed: Finds by negligent navigation the said steamship 'Austria' was on 14th October 1884 run against Ailsa Craig, and became a total wreck on or about 16th October 1884, the whole of her cargo being totally lost: Finds it admitted that Leduc & Company at the time of said shipwreck were in right of said cargo, the property therein having been transferred by the said Moritz Weismann to the said Leduc & Company: Finds that thereafter an action was raised by the said Leduc & Company against the owners of the said s.s. 'Austria' for the value of said cargo, all the owners being convened to said action with the exception of defender: Finds the judgment was given against the said shipowners by Denman, J., and his judgment was sustained on appeal—*Leduc & Company* v. *Ward and Others*, 20 Q.B.D. 475—the ground of judgment being that there had been a deviation from the contract in the bill of lading in respect the cargo should have been taken direct to Dunkirk: Finds that in said action, conform to No. 13 of process, decree was given: Finds that thereafter the said shipowners raised an action in the High Court of Justice on or about 12th August 1887, against the United Kingdom Mutual Steamship Assurance Company (Limited) in order to recover the amount decerned for in said action, and also to claim a right of relief for claims at the instance of other cargo owners: Finds, however, that the full amount of statutory liability of £8 per ton amounted to £12,920, which sum (apart from expenses) was paid into Court by the said shipowners, and claimed by them from the said Assurance Company: Finds the last named action was in the first instance decided against the shipowners, but an appeal was taken, and pending the hearing of the appeal was compromised by arrangement between the pursuers and the United Kingdom Mutual Steamship Assurance Company, the latter paying and the pursuers accepting £7000 as in full of all claims: Finds defender was no party to this action, was not convened to the Court for any interest he might have, and the case was settled without his knowledge or consent: Finds, under reference to note, this is a bar to the present claim, and sustains the additional plea-in-law stated by the defender, and assoilzies him from the cravings of the petition, &c.

"*Note.*—I was favoured with long, elaborate, and able arguments with regard to the many different points which seemed to invite discussion in this case. I have, for reasons which I will enter into fully hereafter, come to the conclusion that the compromise with the United Steamship Assurance Company is a bar to the present claim, but I think, as the case may go further, that it is probably desirable that I should express my views on at least the main points which were debated before me. . . .

"The point, however, on which I am against pursuers is, that without the knowledge or consent of the defender they compromised the action of relief which had been raised against the United Kingdom Mutual Steamship Association. Mr Mair's evidence on this matter must be accepted—'I have gone carefully over the correspondence within the last ten days, and am prepared to state now that there was no request made to the defender, or us as his agents, to join in an action against the United Kingom Insurance Club. I am quite certain of that. I have gone carefully over all the correspondence on that point, and I am also certain that we were not consulted about the compromise.' I have no doubt whatever that this is perfectly accurate. Now, what happened, and what is its effect? The action of relief was raised by the pursuers, but along with them as a pursuer was Mr Holzapfel. He sued as the surviving partner of the firm of Ward & Holzapfel, and the insurance, as appears from the statement of claim produced, was based on an insurance made by Ward & Holzapfel for behoof of the owners in their own name or names. Under that action a compromise of £7000 was effected. It seems to me clear that no possible claim would lie at the instance of defender against this insurance company, and it is clear therefore, I think, that the compromise which has been effected, rightly or wrongly, bars any any chance of the defender making good any claim against this association. The action, I take it, would require to be in name of Mr Holzapfel, and his name could not be given as he was a party to the compromise. Now, as in a question with this defender, the compromise being effected without his knowledge or consent, I think he is entitled to plead that the claim of relief against the Insurance Company is valid as in a question between him and those who effected the compromise. I am not aware of any Scotch case exactly in point, but it seems to me analagous to the trite law laid down in Bell's Prins. sec. 200, with reference to cautionary obligations—'By the creditor discharging the principal debtor, or compounding the debt without the cautioner's consent, the cautioner is freed.' Take the case of A and B being jointly and severally liable for £10,000. A is resident in England and B in Scotland. The money is paid by A, who thereafter raises an action against C, also resident in England, for the full £10,000. A and C agree to compromise that action for £5000,

B never being consulted about the matter. A settles that question in such a way that B is precluded from afterwards raising any claim against C. A raises an action against B, concluding for £2500. In such a case is he not barred by the compromise effected without B's knowledge or consent? Now, it seems to me that this is practically the same question here. The legal effect is in no way altered because the defender in this case happens to be one of many, and it does not rest with this Court to decide the question of whether the action of relief was or was not well founded. That was a matter for the determination of the English Court, and, as in a question between pursuers and defender, in my opinion must be regarded as a valid claim. . . .

"With regard to the expenses in the action of Leduc & Company, my view at the debate was, that as defender was no party to the action (where moreover it is clear he would have had certain pleas to urge which were not applicable to the other shipowners), he in no case should be held liable in the expenses incurred; but since the debate I have come across the case of *Straiton Estate Company* v. *Stephens* (8 R. 299), which, it may be argued, is in support of pursuers' contention. Still, in the whole circumstances, I would not be inclined to hold there was liability for a proportion of these expenses on the part of defender." . . .

The pursuers appealed to the Court of Session, and argued—The Sheriff-Substitute had been misled by a mistaken analogy between the present case and the liberation of a cautioner by the discharge of the principal debtor. After the loss of the ship the claim against the Association was simply an asset of the joint proprietary in the same way that the ship itself had been. The pursuers and Mr Holzapfel, the only surviving partner of the firm which had managed the ship, and which had been authorised by the defenders to insure his interest therein, were entitled to realise said asset in the best way they could for the joint benefit. They had done so, and even now the defender did not contend that they could have done better. They had also acted on the advice of counsel. The defender was barred from pleading that he was not consulted about the compromise. He had been informed of the action against the owners of the ship by the owners of the cargo, and requested to join in the defence and share the expense of same, but he had refused. In the present action he pleaded that he was not an owner at the time the goods were shipped, and was in no view liable to the cargo owners. It was therefore unnecessary to consult him about a compromise of the claim against the association. Although not consulted as to the compromise he was well aware that the action was being prosecuted, and never offered to join and assist the pursuers in it. The defender's plea was an equitable one, and in the circumstances of this case it would be inequitable to sustain it.

Argued for the respondent—The Sheriff's decision was sound. There was no doubt that the respondent had an interest in the action against the Assurance Association, and therefore the appellants had no right to compromise that action without consulting him. The pursuers had no authority to bind their co-owner, the defender, in a matter of this kind. They had by their action put it out of his power to claim against the Assurance Association, and had thus impliedly discharged him of any claim they might have against him.

At advising—

LORD PRESIDENT—It is to be taken for granted that the defender in this case was owner of one sixty-fourth part of the "Austria." He became so by accepting it in a letter dated 8th November 1883, answering a circular of the previous June from Messrs Ward & Holzapfel offering him an interest in the vessel to any extent he pleased. Mr Maclellan's letter was in these terms—"Please reserve for me one sixty-fourth share in the steamer 'Austria,' No. 5, 2320 tons d. w., at the price of £366, 8s. 2d. per share, and I authorise you to insure my interest for its estimated value against all risks in the usual manner." I assume—and the words of the letter bear out the construction—that the sort of insurance intended is such an insurance as was afterwards effected by the United Kingdom Mutual Steamship Assurance Association, *i.e.*, a contract by which the owners were relieved of all losses which they might in any way sustain. Mr Ward is now dead, and he is no longer therefore in a condition to act under such a mandate. In point of fact Mr Holzapfel was the person who acted in effecting the insurance, and afterwards throughout the proceedings. The vessel was lost in circumstances which made her owners liable for the whole losses thereby incurred by the owners of cargo. The amount of the loss was ascertained in the usual way, the statutory liability being at the rate of £8 per ton upon the tonnage of the vessel, and amounted to £12,920, 8s., with interest. That liability opened to the owners, through their agent Mr Holzapfel, a claim against the insurance company for payment of that sum.

An action was accordingly raised in the English Courts for recovery of that sum against the United Kingdom Assurance Association, and in that case Mr Holzapfel, as surviving partner of the firm of Ward & Holzapfel, claimed, "on behalf of his co-plaintiffs and the other owners" of the steamship, for that amount. He appeared as plaintiff, because he alone by the rules of the association had a right to sue, he being a member, and no one but a member being entitled to take proceedings against the association. In this action Mr Holzapfel and his co-plaintiffs were unsuccessful—we are not told upon what ground—but they were defeated, and their only remedy was an appeal. An appeal was accordingly marked, but after this had been done the association made an offer to compromise for payment of £7000. This appeared a very tempting offer—it amounted to something over fifty per cent. of the whole sum claimed—and after con-

sulting counsel the owners determined to accept it. The case was therefore compromised upon that footing. The solvent owners of the vessel discharged the debt due to owners of cargo, and this action has been raised by them to have the defender found liable to pay his share of the debt. The defences have all been abandoned by the defender except the additional plea which was added after the record was made up. That plea is—"The pursuers having discharged the said United Kingdom Mutual Steamship Assurance Association of a claim in which the defender was interested, without the defender's knowledge or consent, have thereby impliedly discharged the defender of the claims in the present action, and are barred from further insisting therein." It is true that if Mr Holzapfel and his co-plaintiffs had succeeded in their action in the English Courts against the United Kingdom Association no claim would have arisen against the present defender, because there would have been more than enough to meet the liabilities of the owners of the vessel to the owners of cargo. But it is said that the defender had a direct interest in the action which was tried in the English Courts, and no doubt he had to the extent of his interest in the vessel. He did not take any concern with the action; he did not become a co-plaintiff, but held aloof, and would not bear any portion of the costs.

In these circumstances is the defender entitled to say that he must be treated upon the same footing as if the action in the English Court had been successful instead of unsuccessful. If it had been resolved not to appeal, the defender could not have had anything to say, could not have complained. The pursuers were entitled to act upon the best advice they could get. If they had been told that they ought not to appeal, it could not now have been said that they had not acted rightly if they had not appealed, although in that event they would have exposed themselves to the whole statutory liability. They took a wiser course, and marked an appeal, with the view, perhaps, of inducing an offer from the other side. The offer came in a very substantial shape. Has the defender in the circumstances any right to say that because the action was compromised without his consent all claim against him was thereby impliedly discharged? I do not think that that is a question of strict law, or depending upon any fixed rules or principle. The question rather is, has the defender any solid ground of complaint in respect of what was done in effecting the compromise? On the contrary, I think he ought to be very pleased that his liability has been so much reduced. I am therefore quite unable to agree with the Sheriff-Substitute, and I think the pursuers' claim in this action of contribution must be sustained. What the amount for which he must be found liable is we cannot determine, and we cannot at present deal with it.

Lord Adam and Lord M'Laren concurred.

Lord Shand was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and in respect the defender had not in this Court maintained any of the pleas stated by him in his original defences, repelled the said defences, and also repelled the additional plea stated for the defender, and remitted to the Sheriff to ascertain the true amount of the pursuers' claim, and to proceed further as should be just.

Counsel for the Pursuers and Appellants —Murray — Aitken. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender and Respondent —Asher, Q.C.—C. S. Dickson. Agents— Macpherson & Mackay, W.S.

Friday, January 31.

OUTER HOUSE.

[Lord Trayner.

AYTOUN AND OTHERS *v.* THE LOCHORE AND CAPLEDRAE CANNEL COAL COMPANY, LIMITED.

Landlord and Tenant—Mineral Lease—Obligation to Maintain "Going Workings" in Good Order—Right to Stop Working.

A lease of minerals contained an obligation on the lessees "to keep the whole going workings upred, secure, and in working order at all times, and to leave the same in the like good regular course and condition at the expiration, or sooner termination as the case may be, of the lease, so that the proprietors may immediately enter upon and carry on the working of the said minerals, either by themselves or their tenants." The lessees during the currency of the lease, having intimated to the proprietors that they intended "to stop work, draw the rails and pipes, and allow the water to rise," and that the mine will immediately "in the ordinary management of the colliery cease to be a going mine," and that they would hold themselves at liberty to remove the machinery and pumps, the proprietors sought to have them interdicted from removing the machinery and allowing the water to rise. There was no obligation in the lease to work the minerals.

Held that the obligation in the lease referred to "going workings" only, and that the lessees, so long as they acted in *bona fide*, could stop any "going working" at their pleasure, and such working ceased thereafter to be a "going working" in the sense of the lease.

This was a note of suspension and interdict at the instance of Robert Aytoun, civil engineer; James Aytoun, 7 Polwarth Terrace, Edinburgh; and James Patten, advocate, surviving and accepting trustees acting under the trust-disposition and settlement