erected for a piggery. For the damage thus sustained she seeks by this action to make her landlord liable. The Sheriff-Substitute decided in favour of the pursuer and assessed the damage at £25, but on appeal the Sheriff recalled that judgment and assoilzied the defender. I am clearly of opinion that the Sheriff was right.

The pursuer can only succeed in her action on showing that she has suffered damage through breach of contract on the part of the defender, or through wrong done by him. Now, the only contract between the parties was the contract of lease. Under that contract the landlord's obligation was to maintain the subjects let wind and water tight, and to repair whatever in the fabric of the building became defective through actual decay. But the landlord was under no obligation to restore or rebuild the subjects if they were destroyed by *damnum fatale* or by the fault of others for whom he was not responsible. That, however, is what happened. The workings of the Legbrannock Company, who were not the tenants of Roberton, destroyed the pursuer's house, and the lease thus came to an end *rei interitu*, not through any fault of the landlord. It appears clear enough, therefore, that no claim arises against Mr Roberton (or his representatives, who are now the defenders) on the ground of breach of contract. It is not alleged that Roberton failed to fulfil any of the obligations incumbent on him before the destruction of the pursuer's house. Nor has she a claim against the defender on the ground of wrong. The wrong from which she suffered was done, not by the defender, but by third parties whose conduct was not in any way under the defender's control. If the pursuer has a claim in respect of the damage she has sustained (and it appears more than probable she has), it is a claim against the wrongdoer, but not against the defender.

The pursuer maintained that she was entitled to damages against the defender on the ground that after the destruction of her house he had agreed to rebuild or repair the same so as to make it suitable for her occupation, and that he had failed to do so. I think this part of the pursuer's case is not proved.

The other Judges concurred.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—Black. Agent—A. S. Gray, W.S.

Counsel for Defenders and Respondents—Salvesen. Agent—H. B. & F. J. Dewar, W.S.

Tuesday, June 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BENNET AND OTHERS *v.* MACLELLAN.

(*Ante*, vol. xxvii., p. 653.)

Ship—Liabilities of Owners inter se—Power of Majority of Owners to Bind Minority—Action Compromised without Consent of One Owner—Liability for Share of Law Expenses.

A ship having been lost, an action was raised in England, by the cargo-owners against the shipowners 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* (1) 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; and (2) that he was also bound to bear his share of the costs of the proceedings in the English Courts.

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

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

Tuesday, June 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE MIDDLE WARD OF LANARKSHIRE ROAD TRUSTEES *v.* JAMIESON (LORD BELHAVEN'S TRUSTEE).

Road—Private Railway—Level-Crossing—Removal and Regulation of such Crossings—Rights of Road Trustees.

Authority to carry a private railway across a public road to certain coal-pits was granted by Statute Labour Road

Trustees to the proprietor of the pits in 1841. In 1890 the County Road Trustees, without being able to prove any danger to the public or material change of circumstances, brought an action against the proprietor of the pits to have him ordained to remove the level-crossing, or alternatively to make certain alterations, and to grant a bond making himself liable for any loss or damage that might arise to the pursuers from the existence and use of the crossing.

Held (1) that the road trustees were not entitled to have the level-crossing removed, and (2) that an offer by the defender to execute the alterations desired upon the crossing, and to grant a bond making himself liable for loss or damage arising from its existence, and to obtain bonds from his tenants making them severally liable for loss or damage arising from their use of it, was reasonable and sufficient.

An application having been made by Lord Belhaven to the Statute Labour Road Trustees of the parish of Cambusnethan on behalf of a railway company to carry a branch of the railway over the parish road to Lord Belhaven's coal work near the foot of Wishawtown, the trustees by minute of 11th September 1841 granted the same, and directed the surveyor to see that the work was properly done.

The railway crossing was duly made and used without complaint until 1889—horses being employed up to about 1866, when locomotives were introduced.

In 1889, however, the County Road Trustees of the County of the Middle Ward of Lanark, being in place and right of the Statute Labour Road Trustees of 1841, served a notice upon George Auldjo Jamieson, C.A., Edinburgh, as sole trustee under a trust-disposition granted by the late Lord Belhaven in 1859, requiring him to remove the crossing, and upon his refusing to do so they brought an action against him to have their order enforced, or alternatively, to have him decerned and ordained to grant a bond in favour of the pursuers in terms of a draft bond produced by which he should be bound and obliged to implement, "observe, and fulfil certain obligations, conditions, and regulations therein contained regarding the maintenance of the said level-crossing and the working of the traffic thereon, and the relief or indemnification of the pursuers against any loss or damage that may arise through the existence of the said level-crossing or from the traffic thereon, or in any manner of way in connection therewith."

The pursuers averred that since the formation of the level-crossing, the volume of railway traffic over the same, as well as the volume of traffic passing along the public road which it traversed, had very largely increased, so that the safety of the public, for which the pursuers were responsible, was much endangered; that the population of the burgh of Wishaw, within which the level-crossing was situated, had increased from under 5000 in the year 1851 to over 13,000 in the year 1881, and that it had been the custom of the pursuers in the discharge of their duty as a public body, in all cases where a level railway crossing had been formed on any of the roads under their charge, to take from those interested in said crossings a bond similar to the draft bond produced.

They did not aver that any accident had actually occurred, or that the public had suffered any special inconvenience from the existence of the crossing.

They pleaded—"(1) The said level-crossing having been made in virtue of leave given by the pursuers' predecessors without onerous cause, and with no provision for its continuance during a fixed period, the pursuers are entitled to have the same removed after reasonable notice. (2) *Separatim*, the pursuers are entitled to have the crossing removed, as being in their opinion dangerous to the public safety. (3) The said level-crossing having been formed for the use and benefit of the defender upon a road under the control and management of the pursuers, and for the safety of which the pursuers are responsible, the pursuers are entitled to impose such regulations and conditions on the continued use thereof as they may deem reasonable and proper in the discharge of their duty."

The defender pleaded, *inter alia*—"(5) The pursuers are barred from demanding the removal of the crossing, in respect of the minute dated 11th September 1841, and *rei interventus* following thereon . . . (6) The said crossing being necessary for the proper working of the defender's minerals and management of his lands, and not being dangerous to the public, ought not to be removed."

A proof was led, the import of which sufficiently appears from the Lord Ordinary's note. Thereafter by minute the defender agreed to erect suitable gates at the level-crossing, to remove certain levers and points, to grant a bond undertaking to relieve the pursuers of all responsibility for or claims in regard to damage caused by the existence of the crossing as distinguished from its use, and that his tenants using the crossing should grant bonds binding them severally to relieve the pursuers of all responsibility for or claims in regard to damage caused by the working of traffic upon the crossing, the owner of the engine of any train causing such damage being liable therefor, and that future tenants should be taken bound to grant similar bonds. The pursuers refused to accept this offer as it would not make the defender liable for all loss and damage connected with the level-crossing, whether arising from its existence or its use.

The Lord Ordinary (KYLLACHY) dismissed the action.

"*Opinion.*—The pursuers here seek to enforce the removal by the defender of a certain railway crossing formed upon a road known as 'The Manse Road,' in the outskirts of Wishaw; or, alternatively, they seek to have the defender ordained to grant a certain bond, the terms of which are recited in the condescendence. The parties not being at one as to the history

of the crossing and the circumstances which have led up to the dispute, I some time ago allowed a proof before answer; and that proof having now been taken, and the pursuers having declined to accept the terms offered by the defender in the course of the proof, and now embodied in the minute No. 93 of process, I have to decide the question at issue—a question which, as it seems to me, should never have arisen, and which is now at least reduced to a point so fine that (apart from the question of expenses) I can scarcely conceive how, as between two such parties, it comes to be litigated.

"The crossing in dispute was sanctioned, by minute of the road trustees of the day, on the application of the defender's author in the year 1841; and it has been in use ever since by the defender's tenants, forming part of a private line of railway which is the usual means of communication between various important works and the Caledonian Railway. This private railway, up to 1866 or 1867, was a horse railway. Since then the traction has been by locomotives. The road is not a main thoroughfare and is not much used; and I think that as regards the amount of the road traffic passing along it, and as regards the amount of the railway traffic passing across it, the result of the evidence is that while there has been a considerable increase as compared with 1841, there has been no material increase or other material change of circumstances for at least the last twenty or thirty years. The crossing is watched in the usual way by a watchman, who lives on the spot. It is admitted that there has never been any accident upon or in connection with it. There are numerous similar level-crossings all over the district and county, some of them upon roads more important and more largely used.

"In these circumstances it is, I think, clearly impossible to entertain the pursuer's demand for the removal of the crossing. It is not necessary to affirm that when a crossing of the kind has been once sanctioned the owner acquires a permanent right which the road authority can in no circumstances recal. But where the construction of such a crossing has been authorised, and the crossing has thereafter been used for a period of fifty years, it is at least safe to say that the road authority seeking its removal must make out a strong case of public danger or public inconvenience, and will, moreover, scarcely succeed in making out such a case if the alleged danger or inconvenience turns out to be nothing new, and is no greater and no worse than is common to other level-crossings in the district. Now, as already indicated, it does not seem to be possible to make out such a case here, and therefore I rather gathered that the pursuers did not seriously press the first conclusion of their summons, their contention rather being that they are entitled to impose reasonable conditions, and that if these are not accepted the crossing must be removed.

"Now, I am disposed to the opinion that it is always an implied condition of a grant or licence of this description that the grantee shall submit to such reasonable conditions as the road authority may from time to time find it necessary to impose; and therefore I think the question really is, whether the difference between the bond which the pursuers require as a condition of the continuance of this crossing, and the bond which the defender tenders in his minute, is a difference sufficiently material to justify the pursuers in requiring that the crossing shall be removed.

"In my opinion, the difference between the parties in this matter is no difference at all. The defender offers to comply with all the structural requirements of the pursuers, and he also offers to become responsible for all accidents which may occur in consequence of the condition of the crossing. He also tenders the obligation of his tenants using the crossing to be responsible each for his own use of the crossing—the proprietorship of the engine drawing the traffic determining the responsibility in any case of mixed use. The pursuers, however, insist that the defender shall become liable, or that his tenants shall become conjunctly and severally liable for all accidents occurring through the negligent use of the crossing, whoever may be the party to blame; and it is upon this point that the parties have differed.

"In my opinion, the pursuers are here asking what is unreasonable; or rather, the defender's offer meets, in my opinion, the full substance of the pursuers' demand. In the first place, I as yet fail to see how in any circumstances the pursuers could be sued (I mean successfully) for the fault of a person lawfully using the crossing, any more than for the fault of a person lawfully using the road. I do not therefore see the pursuers' interest to demand the special indemnity which they seek. But, in the next place (and assuming the contrary), the pursuers have failed to suggest any reasonable or practical ground for rejecting the obligation of the actual users of the crossing expressed in such manner that each shall be responsible for his own engine. The whole argument in the procedure roll went on the difficulty of ascertaining who was to blame in the case of mixed or rather combined trains, and the offer latterly made of making the ownership of the engine the test appears to me quite to meet that difficulty. I shall therefore, in respect of the defender's minute, dismiss the action; but as the defender's offer on record did not come up to the offer in the minute, and was not in my opinion altogether satisfactory, I shall (although with hesitation) find no expenses due to or by either party."

The pursuers reclaimed, and argued—(1) They had an absolute right to have the level-crossing removed upon notice without assigning any reason—*Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, October 19, 1883, 11 R. 18. The trustees' right here was stronger because there was here no ish whatever. Road trustees had absolute authority as to granting or refusing such leave, and as to restrictions where leave was granted — *Watson* v. *North*

British Railway Company, November 9, 1877, 5 R. 87, and July 5, 1878, 5 R. (H. of L.) 211. (2) The pursuers' demand as to a bond was reasonable. The crossing was entirely for the defenders' benefit and he should be made liable to the pursuers for any loss or damage. He could get bonds of relief from his tenants. The pursuers were not to be put to the necessity of finding out what person was in fault. (3) The defenders' offer was insufficient, *e.g.*, the proprietorship of the engine would not be a conclusive test in the case of mixed trains.

Argued for the respondents—(1) Life in manufacturing districts could not go on unless road trustees could give manufacturers power to lay such railways. The leave given here was unlimited, and the road trustees were barred by acquiescence from now disputing the defender's right—*Moir* v. *Alloa Coal Company*, November 15, 1849, 12 D. 77. The pursuers had not proved either danger to the public or material change of circumstances which might have justified their demand. The *Cowdenbeath* case depended on the special terms of the contract. (2) The pursuers were entitled to regulate the traffic, but the bond offered to them was sufficient and gave them all they were reasonably entitled to demand.

At advising—

LORD PRESIDENT—I think the interlocutor of the Lord Ordinary here is right. The condition of this district is such that it is occupied almost entirely by works of a large description which require a great deal of access both by road and rail, and it is not surprising that arrangements should have been come to for supplying such access. It appears that in 1841 application was made by Lord Belhaven to the Road Trustees to be allowed to carry rails across a certain road. That application was granted, and occupation of the level-crossing then formed has gone on ever since. In these circumstances the present action was raised to have the level-crossing removed—not to have its use limited, but to have it removed and so to shut up an important access to public works. It would require a very cogent reason to persuade me that such an order should be given, and I have not heard any such. As I have said, it was not asked that the use of this level-crossing should be regulated, but that the crossing itself should be removed. I think that the Lord Ordinary has very properly refused the decree asked, and that it is not necessary to go into the circumstances further.

LORD ADAM—I am of the same opinion. So long ago as September 1841 Lord Belhaven obtained leave to carry a branch of a colliery railway over a parish road to certain coal workings. That railway was originally a horse railway, but in 1866 steam was introduced. If anything had been said in that year showing that under the altered circumstances some change was necessary, I could have understood it, but since 1866 until the present date—that is, for twenty-five years—it has been used as a steam railway, and the proposal is now made that Lord Belhaven should be ordained to remove it. I agree with what was said in the case of *Moir*, that there is nothing disabling road trustees from granting leave to lead a railway across a public road. In many cases it may be very advisable and convenient for the public that such leave should be given, and it may be that because of the granting of such lease large undertakings have grown up. It will not do to say that upon the mere *ipse dixit* of the road trustees such a railway can be closed. It must be matter of arrangement if any change is to take place. I am quite of opinion that the Road Trustees cannot divest themselves of the power of regulating such a crossing, but they are not to say it must be removed just because they choose.

As to the matter of regulation and use, it has been suggested that the want of gates here and the presence of certain levers are sources of danger to the public. Well, the defender has undertaken to erect gates and to remove the levers, and therefore all objection to the crossing on the ground of danger to the public has been removed by this promise. As to the convenience of the public,—it has not been said that the public have ever been put to any inconvenience because of this level-crossing all these years. The only question, as I understood Mr Dykes, is that the defender is ready to give an undertaking, and has done so by minute, that he will be responsible for any accident arising from the physical condition of the crossing, but declines to be responsible for accidents arising from the use of the railway at the level-crossing, that is to say, he is ready to give an undertaking to be responsible for his own acts, such as keeping up the plant, &c., but declines to make himself liable for the actings of others over whom he has no control. That is the real question between the parties, and that is not a question of danger or of safety to the public, but a matter of regulation, and I agree with your Lordship and with the Lord Ordinary in thinking the defender's offer is fair and reasonable.

LORD M'LAREN—Road trustees are not entitled to enter into agreements as to roads inconsistent with their duty to the public. On the other hand, it may be the best way of carrying out their duty to the public to give rights to mine owners and others to cross roads with rail under restrictions for protecting the public safety. During the last generation a vast number of such railways have been laid down. Among other things they save the wear and tear to which the roads would otherwise be subjected. In some cases it would be impossible to carry on the business of the neighbourhood without such crossings, and powers would have to be got from Parliament. We must recognise the advisability of road trustees voluntarily conceding such powers without putting the

party asking them at the expense of going to Parliament for them. It is a reasonable practice and ought to be supported. Such powers are of course liable to be taken away if the use of the crossing is inconsistent with the primary uses of the road—if, for example, the road traffic has materially increased. No such case is raised here, and the question for our consideration is, whether or not the Road Trustees, having in the fair exercise of their powers given the right to use this crossing, are entitled to take away that right without assigning any reason, or to impose arbitrary and unreasonable conditions upon its use—although I have no doubt they do not think them either arbitrary or unreasonable. The right cannot, in my opinion, be taken away without having regard to the convenience to the public. The defender is willing to be responsible for any damage that may be caused by the state of the crossing, and he is willing to take his tenants bound for the proper use of the crossing, and I am not satisfied that it would be reasonable to make the defender responsible for all accidents. Such a demand I think unreasonable, and therefore I think the Lord Ordinary is right.

LORD KINNEAR—I am of the same opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Guthrie—Dykes. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Defender and Respondent—Dickson—Dundas. Agents—Dundas & Wilson, C.S.

Friday, June 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WHITE *v.* DOUGHERTY.

Sale — Auction — Conditions of Sale — Sample—Sale of Goods in Bulk.

A public roup of fruit was conducted under certain conditions which were not read, but which were, in accordance with the custom of trade, hung up in front of the auctioneer's rostrum. Article 3 provided—"Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

The fruit in bulk was stored in a cellar under the auction hall; six cases selected from the bulk were opened and placed on a dais in front of intending purchasers, and were referred to by the auctioneer as specimens of the fruit. The purchaser of a number of cases discovered, when they were delivered at his place of business on the following morning, that a large quantity of the fruit was in an advanced state of decay.

In an action for the price—*held* that the sale was not by sample but of goods in bulk, and that the 3rd article of the conditions of sale imposed on the purchaser the duty of satisfying himself both as to the quantity and quality of the fruit.

W. N. White & Company, Limited, fruit brokers, Covent Garden, London, and John Morton Threshie, writer, Glasgow, their mandatory, sued in the Sheriff Court at Glasgow, under the Debts Recovery Act 1867, James Dougherty for £39, 5s., the price of certain cases of apples which the defender purchased from the pursuers at public market in London.

The defender denied liability upon the ground that the sale was by sample, and that the goods delivered were not conform thereto.

The facts as established by the proof are set forth in the following passage of the Sheriff-Substitute's interlocutor—"A public sale of apples was held in Covent Garden Market on 11th June, and a large quantity of apples was sold on that occasion. Among the sales were two quantities of apples to the defender, being sixty cases of a brand know as the 'Eagle' brand and sixty cases of another brand known as the 'Kangaroo.' The apples had arrived from Tasmania, and they were brought to this country in steamers, which had refrigerators on board, so as to keep the apples fresh. According to the custom of trade in Covent Garden Market, the sales of apples, 'to arrive' by certain ships are publicly announced and on the arrival of the vessels the apples are taken to the market and sold by public auction. The apples in bulk are placed in the cellar underneath the market, and a certain number of cases is placed on a dais in front of the intending purchasers. These cases are selected from the bulk by the auctioneer or his deputy, and they are open, and the apples are visible to the offerers. The auctioneer refers to them as being specimens of the apples to be sold. The sale is conducted under certain conditions, which are not read out, but are hung up in front of the auctioneer's rostrum, and it appears to be in accordance with the custom of trade that the conditions are not read, but that they are known to be there and to regulate the sale. At the auction on 11th June the sales to the defender were made in accordance with these customs. The steamer by which the apples are said to have arrived had discharged its cargo the day before the sale, and the bulk of the apples was placed in the cellar, and six open cases were placed on the dais as specimens of the apples in the cellar. These cases contained good sound hard apples. The conditions of the sale were not read, but the defender was bound to know of them. After the sale the defender received a delivery-order for the apples and handed it to a carrier, and the carrier had them conveyed to Glasgow. They arrived in