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

executed by the deceased James Aytoun, advocate, and others, against The Lochore and Capledrae Cannel Coal Company, Limited, incorporated under the Companies Acts, 1862 and 1867, craving the Court to "interdict, prohibit, and discharge the respondents from removing from the mineral workings in the lands and estate of Capledrae, of which they are tenants under the complainers, the machinery and plant belonging to them presently upon the said lands or in the said workings, or any part thereof, and in particular from removing from the said workings the engines and boilers, drums, wheels, ropes, and other winding gear, the rails, sleepers, plates, switches, brakes, and other fittings of the railways, tramways, and drawing rods, the steam-pipes, water-pipes, rods, cranks, pumps, and other pumping gear, aye and until the termination of a lease entered into between the authors of the complainers and the respondents, dated 11th, 14th, 16th, and 17th October 1872, without the complainers exercising their option to take the said machinery and plant at a valuation, in terms of the said lease; and further, during the subsistence of the said lease, from allowing the water to rise in the said workings above the level at which it stood at 20th August 1888, or the water levels, drawing roads, wall-faces, and air-courses to become obstructed, or the said workings, or any part thereof, to become disordered or insecure; or to do otherwise in the premises as to your Lordships shall seem proper."

The respondents were the lessees of coal and minerals in the lands and estate of Capledrae and others of which the complainers were proprietors under a lease for 31 years from 13th July 1872, which contained a declaration "that the company (the respondents) shall be entitled to give up this lease at the end of the fourth year hereof, and at the end of every second year thereafter during the currency hereof, on giving six months' notice in writing to the proprietors or their known agents of their intention to avail themselves of the breaks in the lease at any of the periods above specified." Power was given to the respondents by the said lease to search for, dig, work, win, store, and carry away the coal and others thereby let, to erect machines or engines for drawing the water and coal, to calcine ironstone and coke coals, and to make roads, railways, reservoirs, watercourses, ponds, and drains for the purposes of the colliery, within any part of the coalfield thereby let; and in general to do everything necessary for carrying on the operations of the colliery and the working of the minerals, under certain conditions and restrictions therein specified. The rent payable by the respondents under the said lease was a fixed rent of £1000 per annum, payable half-yearly at 13th January and 13th July of each year, beginning with 13th January 1873 for the half-year from the commencement of the lease to that date, "and that whether the company work the minerals or not;" or, in the option of the lessors, and in lieu of the said fixed rent, certain lordships. The respondents further bound themselves to fill up or close up such pits as might no longer be of use to the colliery, under the declaration "that it shall be in the option of the proprietors to require the tenants to leave open any pits they may have ceased to use, so that they may, by themselves or others, enter into and continue the working of the minerals immediately on the termination hereof, or to order them to be left fenced with a substantial stone and lime wall not less than six feet in height from the surface of the ground." The respondents further bound themselves "to fit, win, and work the said coals in a regular and systematic manner, and that all pit levels shall be properly conducted, and all water-levels, drawing roads, wall-faces, and air-courses of the going workings shall be kept clear, readily accessible, and well ventilated, and the whole workings shall be conducted in a fair, orderly, and regular manner, having always the dip levels, wall-faces, and roads from the wall-faces to the pit bottoms from which the minerals are raised, clear and patent;" and the respondents further obliged themselves "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 this lease, so that the proprietors may immediately enter upon and carry on the workings of the said minerals, either by themselves or their tenants;" and the respondents obliged themselves "to leave the whole coal workings, houses, buildings, and machinery connected with the colliery at the termination hereof in good habitable condition and state of repair." It was also by the said lease provided and declared "That at the termination of the lease, either at the natural ish thereof or in any of the events above stated the proprietors shall, upon giving three months' previous notice to the Company (the respondents), have right and option to take the whole or any part of the engines, machinery, utensils, railways and tramways, and apparatus on the lands connected with the works of this lease either above or below ground at a valuation to be made by arbiters or their oversman as aforesaid, but in the event of their taking a part only they shall be bound to take the whole at any one pit or mine, and shall not take a part which would render the remainder useless or greatly deteriorated in value, but in the event of the proprietors not declaring their option to take the whole or any part of the said machinery, plant, and others the Company (the respondents) shall have liberty to remove the same, and shall be allowed three months after the termination of this lease for disposing of and carrying away the same, or for disposing of any stock of coal that may then be on the ground, and they shall have all reasonable facilities for such removal or disposal that do not unduly interfere with the carrying on of the colliery works."

The respondents entered upon possession of the subjects let at 13th July 1872, and they

shortly thereafter commenced working the cannel or gas coal therein and continued to do so down at any rate to the date of the correspondence mentioned below. No alteration took place on the terms and conditions of the lease except a reduction in the rate of lordship, and none of the breaks, including that which occurred at 13th July 1888, were taken advantage of by the respondents. Upon 20th August 1888 the respondents' secretary wrote to the agent of the complainers intimating that the respondents intended "shortly to stop work, draw the rails and pipes, and allow the water to rise." And he further wrote to the agent of the complainers on 6th September 1888—"The mine at Capledrae on which the machinery is planted will immediately, in the ordinary management of the colliery, cease to be a going mine, and the machinery on it will not then be further required for it. The Company has every wish to meet the fair desires of the proprietors, and if the latter think the machinery is of any use to them to acquire this Company are prepared to give them the option of acquiring it now in the same way as if the lease had come to its natural expiry by lapse of time. But if the landlords do not avail themselves of this offer the Company will not continue to keep up machinery which in the ordinary and fair management of the colliery they do not further require to keep up, and they hold themselves at liberty at once to remove all the machinery, including pumps, on the mine. They will refrain from doing so for a period of fourteen days to enable your clients either to accept the offer above made or, if they think their rights in any way infringed, they may take steps to vindicate these supposed rights. Failing the above the Company will remove the machinery as soon as it has finally ceased to be required, which, as I have said, will be at a very early date. The subject of the lease will then be exhausted, except that the coal on the hill will remain for disposal."

The complainers averred that "Were the respondents, as they propose, to remove the engines and machinery and draw the rails, &c. in the mines, levels, and drawing roads, and the pipes, &c. in the pumping mine, they would not merely be dismantling an exhausted and abandoned portion of the workings, but would be dismantling the whole workings, and were they to allow the water to rise in the mine, as indicated in their letter of intimation of 20th August 1888, they would not merely drown out an exhausted and abandoned portion of the workings but the presently going workings, and would prevent them being prosecuted in the due order and course until the mine was again pumped clear. In either case the respondents would render it impossible that the complainers should, either by themselves or others, enter into and continue the working of the minerals immediately on the termination of the lease either at its expiry or sooner in the event of the respondents taking advantage of the breaks provided. The minerals which are the subject of the said lease are not exhausted. Notwithstanding the terms of the intimations referred to in statement 11, the respondents' output from the mine has been larger since August 1888 than during the corresponding period of the previous year. The complainers are entitled on the termination of the lease to enter upon and continue the working, and they will either do so by themselves or by new tenants. Whether the respondents work the said minerals or not they are bound in terms of the said lease to keep the 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 of the lease. The respondents are not entitled to remove the machinery without which the water cannot be kept down nor the workings kept in good order and ready for use at the termination of the lease, except on failure of the complainers at the termination of the lease to exercise the option conferred upon them thereby, and they are not entitled now to require the complainers to declare their said option. As the respondents intimate that they intend at once to allow the water to rise, and to remove the plant and machinery of the mine, the complainers are entitled to interdict as craved."

The respondent in a separate statement of facts averred—"The only seam of commercial value or workable to profit in the lands embraced in the lease is the seam known as the Capledrae Cannel Seam, let to respondents by the said lease and worked by them by the mines and workings in question. The workings were formerly carried on by what is now termed the old mine. After the date of the said lease the respondents opened what is called the new mine, about half a mile to the west of the old mine, the workings from the new mine being connected with those from the old mine. The new mine was equipped with machinery by the respondents. The coal in question is to a large extent broken up and destroyed by the eruption of whinstone or igneous rock, and at present nearly the whole of the coal let to the respondents or workable by said mines is exhausted."

The complainers pleaded—"(1) The respondents being bound, in terms of the said lease, to keep the whole going workings in the mineral field thereby let, upred, and secure, and in good working order at all times, and to leave the same in like order and condition at the expiry or sooner termination of the said lease, so that the complainers may enter upon and continue the said workings, and the said lease being still current, the respondents are not entitled to remove the machinery and plant in the said workings, and to allow the water to rise. (2) The said lease being still current, the complainers are not now bound to exercise their option to take the said machinery and plant at a valuation. (3) Generally, the course which the respondents have notified the complainers of their intention to pursue being in contravention of the said lease, the complainers are entitled to interdict as craved."

The respondents pleaded—"(1) The complainers' averments are irrelevant. (2) The complainers' material averments being unfounded in fact, the note should be refused. (3) The whole actings and proposals of the respondents being warranted by the lease, the note should be refused."

On 31st January 1890 the Lord Ordinary (TRAYNER) refused the prayer of the note and decerned.

"*Opinion.*—The respondents are the tenants of the minerals in Capledrae under a lease granted in their favour by the complainers. The lease is for the period of thirty-one years from July 1872, with a power to the respondents to terminate it at the end of the fourth year, or any second year thereafter, under which power the lease cannot now be terminated before July 1890. Full power is conferred on the respondents to work and win the minerals either by pits or mines in the lands forming the subject of the lease, or by pits or mines in the adjoining lands; and the respondents are taken bound to pay a fixed yearly rent of £1000, 'whether they work the minerals or not,' the complainers having an option to exact a lordship (instead of the fixed rent) on the minerals wrought.

"On 20th August last the respondents intimated to the complainers that they intended 'shortly to stop work, draw the rails and pipes, and allow the water to rise.' On 6th September they further intimated that 'the mine in which the machinery is planted will immediately, in the ordinary management of the colliery, cease to be a going mine, and the machinery on it will not then be further required for it,' and that they would hold themselves 'at liberty at once to remove all the machinery, including pumps,' if the complainers did not acquire the same. In these circumstances the complainers seek interdict against the respondents (1) from removing the machinery, and (2) from allowing the water to rise in the workings above the level at which it stood on 20th August last, and the water levels, drawing roads, &c., to become obstructed, or the workings to become disordered or insecure.

"1. The only stipulation in the lease regarding machinery is one which entitles the complainers at the termination of the lease to take the whole machinery on the lands connected with the works at a valuation. It is plain that the right thus conferred is one which the complainers cannot enforce at present, because the lease has not come to a termination, and is not terminable until July 1890. But the complainers seem to maintain that if machinery is once put upon the grounds in connection with the workings, the respondents are bound to leave it there until the termination of the lease. I can see nothing in the lease to warrant such a contention. There is nothing in the lease which binds the respondents to put any machinery whatever upon the grounds, or binds them to keep machinery there if once placed. They may therefore put down machinery or remove it as best suits themselves, provided that if any machinery happens to be on the ground connected with the works at the termination of the lease it is given to the complainers should they desire to acquire it at a valuation.

"2. The second branch of the interdict sought is the most important, because, if the complainers are entitled to it, the result may involve the necessity of leaving the machinery already referred to, and using it as the only means of keeping down the water in the workings, and keeping them in such a condition as that they may be handed over in working order to the complainers at the termination of the lease. Several clauses in the lease have been referred to as bearing upon this part of the case, but the clause chiefly relied on, and apparently the one most directly applicable, is that under which the respondents bind themselves '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 workings of the said minerals, either by themselves or their tenants.' There are two obligations here (1) to keep the 'going workings' in working order at all times, and (2) to leave them in like order at the termination of the lease. I think the primary purpose of this clause was to provide for the second of the two obligations; it was to secure to the proprietors a state of workings on which they might immediately enter and continue. This, however, would not apply to workings which the respondents had for years ceased to occupy as workings—workings which they had abandoned, either because they could not work there longer to advantage, or because they could work elsewhere in the field with more advantage, or for any other reason. They are to maintain 'going workings' only. The respondents contend that the workings which they wrote about on 20th August and 6th September (and in reference directly to which this interdict has been brought) are no longer going workings, that they have ceased to be so 'in the ordinary management of the colliery,' and that therefore they are not bound to keep such workings 'upred, secure, and in working order.' The complainers maintain in answer to this that the respondents are not entitled, at their own hand, and whenever they please, to alter 'going workings' to which the stipulation in the lease applies into non-going workings, and that a working once a 'going working' must be so maintained. In this contention I think the respondents are right. There is no obligation imposed by the lease upon the respondents to work the minerals at all. There is equally no obligation to continue working after they have commenced to do so for any period longer than suits their own interest or convenience. They may therefore (provided they are not acting *in mala fide*, contrary to the good faith of the contract, which is not suggested here) stop any 'going working' at their pleasure, and when

they stop such a working it is no longer a 'going working' in the sense of the lease. To give effect to the complainers' argument would be to add a condition to the contract which the parties had not made for themselves.

"I am of opinion that the interdict prayed for should be refused."

Counsel for the Complainers—H. Johnston. Agent—Hugh Patten, W.S.

Counsel for the Respondents—C. S. Dickson. Agents—Drummond & Reid, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, March 20.

(Before the Lord Justice-Clerk, Lord Adam, and Lord M'Laren.)

SINCLAIR *v.* H.M. ADVOCATE AND ANOTHER.

Justiciary Cases—Suspension and Liberation—Apprehension — Where Prisoner Apprehended brought Illegally into Jurisdiction of Court Granting Warrant.

The Sheriff-Substitute of Lanarkshire on the petition of the Procurator-Fiscal granted warrant to apprehend a person charged with breach of trust and embezzlement. The accused was brought before the Sheriff-Substitute on this warrant, and committed to prison to await his trial. He brought a suspension and liberation, in which he alleged that he had been arrested in Portugal in an illegal manner by the Portuguese authorities; that he had been put by the Portuguese authorities on board an English ship in the Tagus, and there taken into custody by a Glasgow detective officer; that during the voyage to London the vessel had been in a Spanish port; that the officer had no other warrant than that of the Sheriff-Substitute of Lanarkshire; and that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, where he was committed to prison.

Held that the allegation of illegal proceedings on the part of the Portuguese authorities and the detective officer in bringing the accused within the jurisdiction did not affect the validity of the commitment by the Sheriff-Substitute.

This was a bill of suspension and liberation brought by Matthew Sinclair, a prisoner in the prison of Glasgow, against the Right Hon. James Patrick Bannerman Robertson, Her Majesty's Advocate, and James Neil Hart, writer, Glasgow, Procurator of Court for the public interest, praying for suspension of the warrants under which he was apprehended and detained in prison, and for liberation.

He averred that in the month of January 1890 he was residing in Lisbon in Portugal; that he was there arrested by the Portuguese authorities, and taken to the prefecture or police office, where William Warnock, a detective from Glasgow, identified him, and undertook to pay for his keep. He was then, without any charge being made against him, or any inquiry instituted, or warrant produced, locked up in the police office for some days, and thereafter detained in prison twenty-seven days. He was then taken by two Portuguese officers to the docks, and thence in a boat to the English ship ss. "Malaga," of London, then in the roads at the mouth of the Tagus, and in Portuguese waters, and put on board thereof. William Warnock accompanied the complainer and the officers, and assumed the custody of the complainer on board. Immediately thereafter the vessel sailed, viz., about 3rd February 1890. No warrant was then produced, nor did such exist. There is no Extradition Treaty between the United Kingdom and Portugal. The ss. "Malaga," on its voyage to London, went into the port of Vigo in Spain, and anchored in Vigo Bay, in Spanish waters, for nearly ten hours. The complainer demanded to be allowed to land, but was refused by Warnock. The vessel sailed from Vigo to London, where it arrived on 10th February 1890, and the complainer was at once taken in custody of Warnock straight from the docks to Euston Station, and thence, after waiting an hour, by train to Glasgow. The complainer was not taken in London before any magistrate or official, nor was any warrant procured or produced there to justify the complainer being kept in custody, and he was brought to Glasgow and lodged in the prison there without any warrant whatever being produced or exhibited. The petitions on which the warrants of commitment were afterwards granted only contain warrants to search for and apprehend and bring the complainer up for examination, but the said warrants only run in Scotland, and are not endorsed or visé-ed in any way by any authority out of Scotland, and there was thus no authority for William Warnock taking or detaining the complainer in custody and lodging him in prison in Glasgow, nor is there any authority in the warrant of commitment for detaining him in prison. William Warnock acted throughout upon orders received from the respondents, but without any judicial or other warrant or authority whatever. The officials who apprehended him, and those who subsequently set him on board said vessel, had no authority or judicial or other warrant to do so, and of this William Warnock was at the time well aware.

The suspender pleaded—"1. The complainer is entitled to suspension and liberation, in respect (1) his arrest and imprisonment, without judicial inquiry in Lisbon at the instance of the respondents, were unwarranted, illegal, and oppressive; (2) his custody and detention on board the 'Malaga,' an English ship, by a Glasgow criminal officer, were without warrant, illegal, and oppressive; (3) the refusal of the said criminal officer to allow the complainer to