cused, since they bore that he had complied with the statutory requirement. These certificates were produced and spoken to by the sanitary inspector at the trial, but they were most improperly and illegally suppressed or omitted from the record."

He pleaded—"(1) The said sentence is illegal and unwarrantable, and ought to be suspended with expenses as craved, in respect: The certificates sent by the complainer to the medical officer of the burgh, and produced by the witness Dunne, the sanitary inspector, were omitted from the record."

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 16, provides:—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth, in the form of the Schedule (I) to this Act annexed, the respondent's plea if any, the names of the witnesses if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

Counsel for the complainer referred to *Oliphant* v. *Wilson*, December 12, 1889, 2 White 403.

The Court, in respect the record failed to set forth the documentary evidence put in, suspended the conviction and sentence.

Counsel for the Complainer—J. C. Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

COURT OF SESSION.

Saturday, June 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ALLAN *v.* ROBERTON'S TRUSTEES.

Reparation—Lease—Uninhabitable House—Rents Caused by Mineral Workings Underneath—Fault of Third Party.

A let house became uninhabitable during the course of the lease through rents caused by mineral workings not belonging to the landlord. *Held* that the landlord was not liable in damages to the tenant for loss of the subject let.

On 17th May 1886 James Roberton, Lawhope, Holytown, let a house or houses at Parkneuk near Holytown to Mrs Hannah Allan for a term of five years at an annual rent of £9. The proprietor agreed to keep the roof of the houses water-tight, but the interior was to be kept in repair by the tenant.

In January 1888 the houses were badly rent through subsidence of the ground, and in the September following Mrs Allan left them as being uninhabitable.

In October 1888 she brought an action in the Sheriff Court at Airdrie against her landlord for £50 for loss and damage sustained through having to remove, in which she pleaded—"(2) The pursuer having suffered damage by the failure of the defender to make and keep the house let by him to the pursuer wind and water tight though informed of its condition, the defender is bound to compensate her for the loss and injury thereby sustained."

The defender pleaded—"The damage to said house not being caused by the fault of the defender or his tenants, the defender is not responsible for any loss or damage to pursuer that may have arisen therefrom."

Mr Roberton having died, his trustees sisted themselves as defenders in the action. After a proof, the import of which appears fully from the opinion of the Sheriff affirmed by the Court of Session, the Sheriff-Substitute (MAIR) on 27th May 1890 found that the houses had become untenantable from causes for which the defenders were responsible, and awarded the pursuer £25 of damages.

The defenders appealed to the Sheriff (BERRY), who upon 21st November 1890 pronounced the following interlocutor:—Finds that in January 1888 the walls of the said house became seriously cracked and the house otherwise injured through a subsidence arising from mineral workings in the immediate neighbourhood; that the mineral workings which caused the said subsidence were those of persons for whom the original defender was not responsible: . . . Finds in law and under reference to note that the defenders are not liable in damages for the loss sustained by the pursuer through the injuries caused to the house, or through her having removed therefrom, or through failure on the part of the original defender to restore the house to a tenantable condition; Therefore recalls the interlocutor appealed against: Assoilzies the defender from the conclusions of the action.

"*Note.*— . . . The houses were in good condition at the pursuer's entry, and they continued to be so until the occasion, early in January 1888, referred to in the case, when serious damage was caused to the buildings by a subsidence arising from mineral workings. That mineral workings underneath or in the immediate neighbourhood of the house were the cause of the damage is placed beyond question by the proof. The damage occurred suddenly in the course of a single night, and was of a very serious nature. The pursuer was awakened in the night by a sound, and in the morning she found the house in the dilapidated condition which she describes. The walls were rent, there being (to take the description given by Mr Scotland, an architect, called as a witness for the pursuer) a crack in the front wall of the eastmost apartment 3 inches wide and 5 feet 6 inches in length, measuring from the top of the wall, and a corresponding crack in the back wall from 3 to 3½ inches wide, extending the full height of the wall. The cracks went right through the walls. The windows were out of place, and had fallen

inwards. There were also cracks in the back wall of the adjoining room of from 2 inches to 1 inch in width, extending from the wall head to the ground, and there were rents elsewhere of a minor character. In the evidence of other witnesses, including that of the pursuer herself, her son James Allan, and Mr M'Neill, the sanitary inspector of the parish, further details of the damage are given. The roof of the building, we are told, was rent; snow fell through; and at the end of the building the roof was severed from the gable. The pursuer's landlord, Mr Roberton, was proprietor of the minerals immediately underneath the house, and there had been some years previously mineral workings by himself or his tenants in the neighbourhood, the nearest of them to the pursuer's house being some 60 or 70 feet from it. These workings, however, were not towards the side of the house on which the damage occurred, but on its other side, and they had ceased some five or six years previously. Without going into details, it is enough to say that the workings of the proprietor or his tenants could not have been the cause of the damage, and indeed it has not been maintained before me on the part of the pursuer that they were. On the other hand, it appears from the evidence that the Legbrannock Collieries Company, the tenants of a neighbouring coalfield not the property of Mr Roberton, had encroached on his minerals, and had about the time of the accident been working these up to a point within about 30 feet from the east end of the house where the damage was done. The conclusion to which the evidence points is, that the workings in the course of this encroachment were the cause of the damage to the pursuer's house. It seems to me impossible to attribute it to mere ordinary deterioration. . . .

"In the end of August or beginning of September the landlord caused some repairs to be done to the house, but these consisted only of inside plastering, and were not sufficient to make the house tenantable. To make it so it would have been necessary, as Mr Thomson, one of the architects called for the pursuer, says, to take out the stones and rebuild the walls where they were rent. The property, he said, could be repaired, but there would be a good deal of work. The pursuer being dissatisfied with the repairs that were done, and understanding from the landlord that nothing of a more substantial nature could be expected, left the premises on 14th September 1888, and she now sues the landlord for damages through injury to furniture, inconvenience and discomfort, for the value of certain pig-houses which she had erected, for loss of the remainder of her lease, outlays in removal, &c., claiming in all a sum of £50. The ground of action is variously set forth in the pleas, but the second plea fairly states the gist of it in these terms—[*see supra*]. The case is not one in which the question of abatement or remission of rent is raised. It is purely one of a claim for damages.

"In determining whether the pursuer has a legal claim against the defender for the damage which she undoubtedly sustained, it is necessary to consider the extent of his obligation as landlord in reference to the maintenance of the house. The missive of lease provided that he should keep the roof water-tight, but it cannot be inferred from this express provision as to the roof that he had no obligation in regard to the walls. The case must, I think, be treated on the footing that he was bound to maintain the walls in good condition, and to repair them in so far as they might suffer from ordinary decay or deterioration. He was not, however, in my opinion bound to restore them in the event of extraordinary injury and dilapidation arising from some violent external cause which could not reasonably be anticipated, and for the occurrence of which he was not responsible. If the walls of the house had been rent and destroyed through *damnum fatale*—as by an earthquake—I do not think he could have been called on to rebuild, and where, as I take it to be the case here, the damage arose from the wrongful act of a third party causing the walls to be injured and cracked to the extent disclosed in the proof, he must be equally free from an obligation to restore. If the damage caused had been of a slight nature it might have been reasonable to hold the landlord liable to repair it. But the proof shows that the damage was very serious, and that without rebuilding the walls the house could not have been restored to a tenantable condition. I am of opinion that the landlord was not bound in law to incur the extraordinary expense which that implied, and that the tenant's claim, equally with that of the landlord, for the loss which he has suffered must be directed against the party by whose act the damage was caused.

"Taking this view, it is unnecessary for me to enter into an examination of the different heads of damage on which the pursuer founds her claim, or of the various other points which have been raised in the course of the case.

"As regards expenses, I am unable to see my way to depart from the usual rule that these must be given against the unsuccessful party."

The pursuer appealed to the Second Division of the Court of Session.

At advising—

LORD TRAYNER—The pursuer of this action was tenant of a house and ground at Parkneuk in the county of Lanark, under a lease granted by the late Mr Roberton of Lauchope. That lease was dated in May 1886, and was to endure for five years. In September 1888, however, the pursuer abandoned the premises let to her, in consequence of the same having been rendered uninhabitable through mining operations of the Legbrannock Coal Company in the vicinity thereof. These operations resulted, as the proof shows, in the practical destruction of the house, and in damage to the pursuer's furniture, as well as to a wooden shed which she had

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