the defender when the draft contract was adjusted shows that the question was under consideration of the Bank at the time the feu was granted; and that, while in the original draft of the feu-contract it was proposed to charge the defender with a share of the expense of constructing the common sewer, that was objected to on the part of the defender as not being covered by the agreement, and that the clause was altered so as to limit the obligation to the expense of maintaining the sewer. This evidence was objected to as contradicting the written contract, but as it appeared to the Lord Ordinary to be explanatory of a matter not made clear by the terms of the contract, rather than contradictory of those terms, he did not consider that he would be warranted in rejecting it."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—My Lords, the sum in dispute in this case is a small one, but the question which it raises is not unimportant, and the judgment which we pronounce will be widely applicable in building cases of this description. If I had any doubt what that judgment should be I would have advised your Lordships to take some time for consideration, but I entirely agree in the view taken by the Lord Ordinary. It appears to me to be quite plain that the ordinary practice in Glasgow—and I suppose in many other towns,—is that when the owner of building ground is giving it off for that purpose he prepares the ground himself and provides each street with a sewer. The expediency of such a course is obvious, and there cannot be a doubt that substantially that is what was done here; but the expense of making the sewer would be useless if the parties who occupy the building lots did not communicate with it, and it would be a great disadvantage if any one of the houses did not communicate with it, and the disadvantage would extend to the whole street to which the sewer is necessary in a sanitary point of view. It is also quite reasonable that an arrangement should be made by which each feuar should contribute towards the expense of making the sewer, and that arrangement is part of a well established practice, and the only question is, how that burden should be laid on the purchaser. It ought to be settled at the time when the contract is entered into, for that is a payment which is to be made once for all, and is not an annual payment. Sometimes it is taken into consideration in fixing the amount of feu duty, in other cases, when ground is sold off it can be done at the same time, and it might be arranged that, independently of the feu contract, feuars should be made to pay down their share at the time the contract was entered into. The thing might be done in any of these ways. But if the right is once given without demand for present payment, and without any burden laid upon the subject, I do not know how it can be done afterwards. Now that appears to me to be the position of the present case.

In the contract of ground annual the defender stipulates to pay a certain amount and he gets a title, and he is also bound to maintain the sewer along with the other feuars, but not a word is said about paying for its original construction, nor was any such demand made upon the defender when he got his title. It appears to me, putting out of view the peculiarity of the Bank's position in reference to the obligation to reconvey to the pursuer, that when the owner of building ground sells, giving to the purchaser the right to connect with a sewer, and fails at the time to make any claim for payment of its cost, it is impossible to make such a demand afterwards. Now let us see what was the position of the party from whom the defender acquired his right. The Bank was in no other position than any other owner. They had a title *ex facie* absolute. It is true they had a latent obligation to the pursuer, but so far as third parties could tell they were absolute owners; they dealt with the defender as such, and so they must be considered as ordinary owners. There is a peculiarity beyond that, which is that the sewer was made while the Bank were *ex facie* owners, at the pursuer's expense. Now the construction of the sewer just made the Bank proprietors of it as they had been of the ground before its construction, and, being so, they were entitled to give it off to the defender, which they did by plain implication on the face of the title. I quite agree with the Lord Ordinary. I may just add that I do not rest on the evidence of the agent nor on the draft, both of which I consider quite incompetent.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard Counsel on the reclaiming-note for the pursuer against Lord Mure's interlocutor, dated 16th September 1873, Adhere to the said interlocutor, and refuse the reclaiming-note; find the defender entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer — Rhind. Agent — W. Officer, S.S.C.

Counsel for Defenders—W. Watson, and Goudy. Agents—Fraser, Stodart & Mackenzie, W.S.

Wednesday, January 28.

SECOND DIVISION.

[Lord Gifford, Ordinary.

GILLESPIE *v.* MILLER & CO.

Contract—Sale — Conditions — Insurance—Profit — Vendor and Purchaser.

A certain mineral, stored in heaps, was sold under an agreement whereby the purchasers and the vendor were to divide any profits from a resale at a price above a fixed amount per ton. The purchasers insured, and, a fire having consumed one heap, entered into an arrangement with the Insurance Company to take over the whole of the mineral, consumed and unconsumed, for a certain sum.—*Held*, in a question with the vendor, that the purchasers were liable to him in one-half of the sum so obtained from the Insurance Company in so far as it exceeded the amount per ton agreed on between them.

This case came up by reclaiming-note against an interlocutor of Lord Gifford, of date 21st November 1873. Mr Gillespie of Torbanehill, the pursuer, in the course of the year 1871 entered into an agreement with the defenders, Miller & Co., by which he sold them 35,000 tons of Torbanehill

mineral, then lying upon the surface of his lands, for a price, immediately payable, of 40s. per ton, as at the pit mouth, and at a further price, contingently payable, of one-half of the difference between 50s. per ton f.o.b. at Bo'ness and any sum for which Miller & Co. might resell the mineral. It was assumed in the transaction that the cost of transporting the mineral to Bo'ness would be 5s. 6d. per ton. Miller & Co. insured the whole of the mineral for a sum of £100,000, and one of the heaps of stored mineral then at Torbanehill was destroyed by fire in June 1872. After some negotiations the insurance company and the defenders came to an arrangement, whereby the former were to take over 9975 tons of the mineral, some of which was uninjured or only partially damaged, at a price of £29,402, 4s. 7d.—which was equal to £2, 18s. 11⅔d. per ton, as at the pit mouth, and this arrangement was carried out.

As no expense was incurred by defenders in transporting this mineral from the ground, the pursuer added 5s. 6d. per ton to the above sum, which made the money realised by the defenders on this quantity of mineral 14s. 5⅔d. in excess of 50s. f.o.b. at Bo'ness; and of this excess he claimed under the contract of sale one-half, amounting in all to £3604, 1s. 3d. The question which arose in the case, therefore, was whether Mr Gillespie was entitled now to come upon the defenders in respect that they had realised more than 50s. per ton f.o.b. at Bo'ness in terms of the contract. The defenders maintained, in answer, that this contract of insurance was effected at their own expense, and solely for their own behoof, they being under no obligation to insure the mineral.

The pursuer pleaded—"(1) The pursuer, by the contract, according to a sound and just construction of it, and as it has been acted on by the parties, is entitled to payment from the defenders of one-half of the sum by which the amount realised by the defenders for the said 9975 tons exceeds 50s. as free on board at Borrowstounness. (2) In respect of the facts above condescended on, and the provisions of the contract of sale founded on, and the circumstances in and by which it was entered into and followed up, the pursuer is justly entitled to the sum sued for, and to decreet therefor, with expenses."

The defenders pleaded—"(1) The statements of the pursuer are not relevant or sufficient to support the conclusions of the action. (2) The defenders having been all along ready and willing to pay the pursuer all sums due to him under the said contract, the present action is unnecessary, and ought to be dismissed. (3) The pursuer is not entitled to claim from the defenders any part of the sum received by them from the Insurance Companies for the portion of the said minerals consumed by the fire, in respect the defenders were under no obligations to insure the said minerals, and the insurance thereon was effected by them at their own expense, solely for their own behoof. (4) The defenders not being indebted or resting-owing to the pursuer in the sums sued for, they are entitled to absolvitor, with expenses."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 21st November* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, and both parties having declined to adduce any further evidence, Finds that, according to a sound construction of the contract between the pursuer and defenders, as applicable to the circumstances proved in evidence, the pursuer is entitled to one-half of the surplus price received by the defenders as for 4915 tons of Torbanehill mineral abandoned to the insurance company, and for which the defenders realized from the insurance company £2, 18s. 11d 3-7ths of a penny per ton: Finds that, adding 3s. 6d. per ton as the estimated expense of transit to Bo'ness, and shipment there, the one-half of the surplus price to which the pursuer is entitled amounts to 6s. 2d. 5-7ths of a penny per ton, which, taking the said 4915 tons, amounts to £1530, 1s. 8d. sterling; therefore decerns and ordains the defenders to make payment to the pursuer of the said sum of £1530, 1s. 8d. sterling, and that in full of the conclusions of the present action; *quoad ultra*, assoilzies the defenders from the further or other conclusions of the action, and decerns: Finds, in the circumstances, no expenses due to or by either party, and decerns.

"*Note.*—The interesting and difficult questions which are raised in the present action have arisen out of the disastrous fire which occurred on 3d June 1872 to a large and exceedingly valuable bing of the Torbanehill mineral which was lying stored on the lands of Torbanehill. The fire raged for several days; it entirely consumed and destroyed a large portion of the mineral stored in the bing: a further portion of the mineral—a very considerable portion—was seriously injured and deteriorated by the fire, being charred and mixed with oil, ashes and refuse; while a third portion was saved uninjured, or nearly so, the fire having been extinguished before it penetrated to the inner or lower portions of the bing.

"The whole bing, at the time of the fire, had been sold by the pursuer, Mr Gillespie of Torbanehill, to the present defenders, along with certain other bings, at a price of £70,000, with a contingent advance or additional price, estimated at from £10,000 to £20,000 more, dependent upon the price which the defender should realise from the re-sale of the mineral, as 'free on board at Borrowstounness.'

"The contract of sale, which is in very peculiar terms, was concluded by, and is embodied in, a formal deed of contract, dated 27th and 28th December 1871, No. 8 of process, and, in the Lord Ordinary's view, it is mainly upon the terms of this contract that the questions between the parties turn. The contract itself must be specially referred to for its peculiar terms and provisions, but the substance of the bargain may be shortly stated as follows:—The whole mineral belonging to Mr Gillespie and stored on the surface, estimated at 35,000 tons, more or less, as might turn out, was sold for a price certain, £70,000, being 40s. per ton, with an additional price, to be fixed as follows, viz., if the mineral or any part of it was re-sold by the defenders at a greater price than 50s. per ton f.o.b. at Borrowstounness, then one-half of the excess was to be paid by the defenders to Mr Gillespie, as additional price to be paid from time to time as the re-sales were effected. There are detailed provisions regulating terms of payment and the carrying out of the agreement.

"The whole mineral sold was delivered, so far as delivery was possible. It was placed at the absolute disposal of the defenders, and was taken and dealt with by the defenders at pleasure as their property,

and partly removed and partly disposed of by them. The price certain, £70,000, was paid partly in cash and partly in bills, and means were taken to ascertain and account for the surplus or additional price as reseales were effected. It was while the defenders were in the course of removing the Torbanehill bing to another place of deposit at Boghead that the fire occurred.

"It so happened that the defenders had effected policies of fire insurance to a very large amount on the mineral purchased from Mr Gillespie, as well as on certain other large quantities of the same mineral previously belonging to themselves, or held by them for behoof of third parties, and after the fire the defenders claimed from the insurance companies indemnity under the policies for the losses occasioned by the fire. The claim under the policies was ultimately adjusted thus, the principle being to allocate a proportional part of the whole sums assured to the burnt bing, in proportion to the whole quantity of the mineral assured. A difficulty arose as to ascertaining how much of the burnt bing had been destroyed, how much injured, and how much remained uninjured under the debris and incrustation of the burnt mineral. This difficulty was settled by the defenders abondoning the whole bing to the insurance companies as on a total loss. The insurance companies took the salvage as it lay, and paid the defenders just as if the whole bing had been entirely consumed. The result was that the total quantity estimated to have been in the burnt bing was 9975 tons, of which, however, the Lord Ordinary holds it established, by the fair reading of the minute of admissions, that 145 tons were not part of the minerals sold to the defenders, but a separate parcel sold to Miller, Son, & Co., leaving 9830 tons embraced in the pursuer's sale to the defenders. For this total quantity, partly destroyed, partly injured, and partly saved, the defenders recovered from the insurance companies at the rate of £2, 18s. 11½d per ton, as at the pit mouth. The greater part of the mineral not destroyed by the fire, partly injured, and partly uninjured, is still on the ground.

"In the circumstances now shortly stated, the pursuer brings the present action. He claims the benefit of the fire insurance effected by the defenders. He maintains that the sums recovered from the insurance company are to be regarded as a price realised by the defenders for the whole mineral remaining in the bing at the date of the fire, destroyed, partly destroyed, or saved uninjured. He maintains that this price, being £2, 18s. 11½d. at the pit mouth is equal to £3, 4s. 5½d. as f. o. b. at Borrowstounness, and as this is 14s. 5½d. in excess of 50s. per ton f. o. b. at Bo'ness he demands 7s 2⅝d. per ton on the whole estimated quantity of 9975 tons, or alternatively, if the Court shall hold that 145 tons was James Miller, Son, & Co.'s, then on 9830 tons.

"Instead of considering in detail the various views and arguments presented by the parties, the Lord Ordinary thinks that he will best explain his judgment by stating *seriatim*, but very shortly, the various conclusions to which he has come, both in point of fact and in point of law. He will content himself with merely indicating the grounds of his opinion, referring to the deeds, proofs, and documents for the details.

"(1.) The Lord Ordinary is of opinion that under the contract of sale of December 1871 the whole mineral sold passed to and became vested in the defenders, as the full and absolute proprietors thereof. There was nothing remaining to be done by the seller under the contract of sale. There was no suspensive condition of any kind remaining to be purified. There was nothing to prevent the defenders from using or disposing of the minerals at pleasure, and they might have been attached or carried off by the defenders' creditors or assignees, and no right of property of any kind remained in the pursuer as the seller.

"The pursuer did not seriously contend that the property had not passed, but he maintained that the pursuer still retained an inherent right in the subject, to the effect of making good the extra or contingent additional price; and, without attempting to define what this right was, he endeavoured to use it as a means of getting at the insurance money. The pursuer did not claim to be proprietor. He refused to say that he had any right of lien, but he claimed something, which he called reserved interest, and yet which was not of the nature of security.

"The Lord Ordinary thinks that the pursuer's reserved interest was merely a personal claim under the contract of sale against the purchasers, affording undoubtedly personal actions of various kinds against the defenders, but not involving any inherent right in the subject sold. In short, the pursuer would have a direct action for the price, a direct action for the extra price when the condition was purified, and direct actions to compel the defenders to give fair play to the condition, and to implement their obligations under the contract, but nothing more.

"(2) The Lord Ordinary is of opinion that the whole *periculum* or risk of the mineral sold was, at the date of the fire, with the defenders, the purchasers. This would have been the case even had there been no delivery,—assuming the Lord Ordinary to be right in holding that there was nothing remaining to be done and no suspensive condition requiring purification. *Periculum rei venditæ nondum traditæ est emptoris.* If any part of the price certain had not been paid, it must have been paid by the defenders just as if no fire had happened. The bills for the price current at the date of the fire must be paid by the defenders. The fire would afford no defence; and if the case is otherwise with the extra or contingent price, it will not be because the defenders had not the whole risk of the subject, but because the contingent condition (on which alone extra price becomes due) cannot now be purified, and that without any fault being imputable to the defenders.

"(3) The Lord Ordinary thinks that the defenders were under no obligation to insure, and could not have been compelled by the pursuer to do so.

"The written contract contains no obligation to insure, and such obligation, as between opposite and contracting parties, is rarely or never to be inferred. Sometimes an obligation to insure may be inferred from circumstances—against an agent or factor, or against a consignee, or against the managing owner of a vessel or ship's husband; but the Lord Ordinary knows of no case in which an obligation to insure was *inferred* in a contract between vender and purchaser, and while there is no obligation to insure in the deed of contract. So neither is there any obligation to insure, either express or implied, contained in the correspondence either prior or subsequent to the deed of contract. The produc-

tion in evidence of the correspondence which passed before the contract was objected to; and the Lord Ordinary with some difficulty allowed it to be put in, because it was said to show the surrounding circumstances in which the contract was made, and the meaning of the words the parties used. But he would not allow the correspondence to be put in, and he will not look at it, for the purpose of controlling or adding to in the slightest the contract itself. Whenever the question is, What is the contract? the formal deed must be held to supersede and alter all previous letters or communings. In point of fact, however, it is impossible to spell from the correspondence even the semblance of an obligation to insure. On the contrary, Mr Gillespie himself did not insure, and repudiated insurance as unnecessary. No doubt he said that if the mineral was watched then insurance was unnecessary; and he raises now a separate point about watching, which will be adverted to immediately; but it is out of the question to maintain that he took the defenders bound to insure.

"(4) It follows, that if there was no obligation to insure, then each contracting party, vender and purchaser, might insure each for his own interest only. Each party had undoubtedly an insurable interest, which he might cover by policy. The defenders, as proprietors, might insure the subject purchased which was liable to be burned. The pursuer, having a contingent interest in enhanced price, which was liable to be defeated *interritu rei*, might insure that interest so as to secure his *own share* of the enhanced price, if the subject should perish by fire. Insurance is a contract of indemnity, and nothing more. Neither party had a right to insure more than his own interest, and if a fire happens, neither party is entitled to demand the benefit of the prudence or forethought of the other party. He should have insured for himself, *sibi imputet*, if he chose to be his own insurer. This point will be adverted to again under a subsequent head.

"(5) The Lord Ordinary is of opinion that it has not been shown in point of fact, and that it cannot be held that the defenders were in any way to blame for the fire. He thinks it clear that, *quoad* the defenders, the fire must be held as a *damnum fatale*, without any fault imputable to them.

"The pursuer's case is, that the fire was not an accidental fire, but the work of an incendiary, and that the defenders must be held to blame for it, because they had not sufficient watchmen. The Lord Ordinary does not think that incendiarism is proved or accident excluded. There were fires on the grounds and locomotives on neighbouring service railways. Split coals or lighted fuel, wind-carried, might cause the conflagration; and, probably, there were carters and labourers, some of whom smoked and carried lucifers. Carelessness occurs everywhere, and it would not be surprising that accidental light should reach dry herbage in June, which unobserved might kindle the bing. The unlikelihood of the occurrence often produces the carelessness which brings it about. But even though the work of an incendiary were to be assumed, the case is the same for the defenders, and quite as favourable for them. *Quoad* them, incendiarism is a pure accident, for it is not pretended that the defenders, or any one for whom they are responsible, intentionally fired the bing. A determined incendiary is far more dangerous and more difficult to guard against than mere accident. In either view, the defenders are not to blame.

"But the pursuer strenuously maintained that the defenders had failed duly to watch the bing. They had only one night watchman, and he was careless that night, and was employed to get up fires in locomotives in the morning, and it was during his absence that the fire on the bing broke out. There is a good deal of evidence as to the question of sufficient watching, and perhaps the evidence is somewhat conflicting. It seems the defenders just continued the very same watchman whom the pursuer himself had employed, and whom the pursuer thought quite adequate for the duty. No doubt the man had a little more to do, but it is not shown that the additional work laid on the watchman made the watching insufficient, if it was efficient before. It would require very strong evidence of *culpa* to make the defenders liable for insufficient watching. But really the Lord Ordinary thinks the defenders were under no obligation to watch at all. They might watch or not for their own behoof, just as they pleased, and if they choose to run the risk with little watching, or with no watching at all, that was their own concern, with which the pursuer had nothing to do. If the pursuer thought that watching was insufficient, he might watch for himself at his own expense and for his own interest, just as the defenders might do for theirs. Here, again, the contract is silent, and, just as in the case of the insurance, it is impossible to spell out an obligation to watch which the contract does not contain. It seems clear that the pursuers could not have compelled the defenders by an action *ad factum prestandum* to put on a watchman, or any number of watchmen, if the defenders themselves did not choose to do so; and this seems a very good test, both of the alleged obligation to watch and of the alleged obligation to insure. The Lord Ordinary holds, therefore, that the fire was a *damnum fatale*, for which no one is to be held answerable.

"(6) The next point relates to the immediate consequences of the fire, and it will be convenient to look as these consequences as if there had been no insurance. The effect of the insurance will be considered afterwards.

"Now, first, a portion of the mineral, a considerable portion, was absolutely consumed, dissipated by heat into gases and other products of combustion, which escaped for ever, any oil produced being only partially saved, and the ashes, coke and refuse being comparatively worthless. The Lord Ordinary thinks it clear that, as to the mineral absolutely destroyed, the conditional extra price could not be exacted, because, without the fault of the defenders that destroyed mineral had not been, and could never be, sold for more than 50s. a ton as f.o.b. at Bo'ness. It perished. It perished to the defenders for their interest, and it perished to the pursuer for his interest. Each party lost *interritu rei* their interests under the contract. The defenders would have to pay the price certain all the same, but in regard to the conditional surplus price above 50s. per ton, as by the accident it could never be realised, the defenders lost their half of that surplus price, and the pursuer lost his half. This much seems clear, supposing there to have been no insurance by any party.

"Next, as to the injured mineral partially saved, but partially charred and destroyed, this (apart from insurance) would remain the defenders' property under the contract. If they ultimately disposed of it for less than £50s. f.o.b. at Bo'ness, they

would have no surplus price to pay, whatever price the uninjured mineral might bring. If the damaged mineral brought more than 50s., the half of the surplus price would be divisible under the bargain.

"And lastly, the mineral saved from the fire wholly uninjured would of course be treated just as if no fire had taken place. It would remain under the contract just like other portions of mineral removed before the fire, and as to which no question has arisen.

"Such would have been the law applicable to the case if no insurance had been effected, and if the Lord Ordinary be right in his propositions of fact and law above announced.

"(7) But here arises the great question, What is the effect of the insurance? Does the benefit of it accrue to the pursuer, and is he entitled to take the sum recovered under the policy as if it had been a price realised as on a sale of the whole bing?

"The Lord Ordinary is of opinion, in point of law, that the pursuer is not entitled, as matter of right, to claim any benefit whatever from the insurance effected by the defenders. That insurance was not effected for his behoof, or by his orders, or, so far as appears, with his knowledge or consent. He paid no part of the premium of insurance, and had nothing to do therewith. As already mentioned, the pursuer chose to be his own insurer, and it is difficult to see upon what principle the pursuer can claim the benefit of an insurance effected by the defenders at their own expense, and for their own interest alone. It is vain to refer to the terms of the policies, for although these are carefully expressed so as to cover mineral held by the defenders in trust for others, this was only designed for the benefit of the defenders themselves, of their customers, and of the different individual members of their firms, who had certain separate interests in the mineral. It had no reference to the pursuer, and in no sense could the defenders be said to hold the mineral in trust for him.

"It is quite fixed that when there are independent interests in a subject, and when the subject perishes by fire or other accident, the maxim *Resperit domino suo* applies to the respective interest which each party has therein. The leading case on the subject is *Bayne* v. *Walker*, as ultimately decided in the House of Lords—Court of Session, 30th May 1811, 15 F.C. 265; H.L., 3d July 1815, 3 Dow, 233—which related to the destruction of a farm house, in which both landlord and tenant were interested each for their respective rights. In all cases where there are separate insurable interests each party is held to insure only for himself, and in the absence of special stipulation neither party is bound to insure for the benefit of the others. There are many cases illustrating this principle, as between landlord and tenant, seller and purchaser, mortgager and mortgagee. One of the last and most important decisions is that of *Lees* v. *Whitely*, 1866, Law Reports, 2 Equity, 143. In this case certain machinery was assigned by bill of sale in security of a sum lent. The assignment contained an express covenant to insure in an insurance office, to be approved of by the creditor, but no provision for the application of the insurance money in case of fire. The machinery was burned, and the debtor became bankrupt. It was held that the creditor who held the assignment to the machinery had no claim to the insurance money, as in competition with the general assignees in bankruptcy. This is an exceedingly strong case, for the express covenant to insure might very naturally be held to be, by implication, for the benefit and behoof of the bondholder, but as this had not been said the Court held that they could not make a contract which the parties had not made for themselves. There are numerous cases referred to in the report. See, *inter alia*, *Leeds* v. *Cheetham*, 1 Simon, 146, and see in contrast *Garden* v. *Ingram*, 23 L. J. Chancy. 478. It is fixed that a bondholder cannot without express contract debit a postponed bondholder with premiums of insurance. Each must insure for himself; *Pollock* v. *Marnock*, July 12, 1859, 21 D. 1210. See also *Duke of Hamilton's Trustees* v. *Fleming*, Dec. 23, 1870, 9 Macph. 329; *Poole* v. *Adams*, 33 L. J. Chancy, 639. There are illustrative cases about sailors' wages, payable in kind from the oil procured in a whaling voyage, where the oil happened to be burned; *The Lady Durham*, 3 Hagart's Admiralty Reports, 196; *Wilkinson* v. *Trazier*, 4 Espinasse, 182. There is an instructive case, having a direct bearing on the present, that of *Dalglish* v. *Buchanan*, Jan. 16, 1852, 16 D. 332, where a coachbuilder having effected an insurance in a general policy, including both his own and his customer's carriages, was held entitled to apply the insurance money first and primarily to his own loss until he himself was completely indemnified, and that a customer was not entitled to more than a share of the surplus, if there was any, and it was even doubted if he could claim that except *ex gratia*, but this question was not raised.

"The Lord Ordinary holds, both on principle and on authority, that the pursuer in the present case is not entitled, as a matter of right, to claim any part of the insurance money recovered for the mineral that was totally destroyed. At all events—and this would be sufficient for the present case—he is not entitled to anything until after the defenders have been totally indemnified. The proceeds of the policies must be first applied in recouping the defenders not only the price certain they paid, but in their own half (not the pursuer's half) of the surplus price, and all their prospective profit. At the date of the fire the mineral was selling f.o.b. at Bo'ness, at from 70s. to 74s., so that in no view have the defenders been more than recouped by the insurance.

"So much for that portion of the mineral completely destroyed.

"(8) But there arises an important question as to the effect of the contract of abandonment, whereby the injured mineral and the mineral entirely saved was given up to the insurance company as upon a total loss. The Lord Ordinary calls it contract of abandonment, because it was under express agreement, and it would rather appear that in the fire insurance there can be no abandonment as matter of right or at common law.

"Now, here the Lord Ordinary is of opinion that the pursuer cannot, by reason of the insurance and of the abandonment under the policy, be placed in a worse position than he would have been in had there been no insurance at all, in which case the saved mineral, whether injured or uninjured, would have remained the property of the defenders.

"He is further of opinion that the defenders having, in perfect fairness and *bona fide*, abandoned the salvage to the Insurance Company as upon a

total loss, and having received for the whole at the rate of £2, 18s. 11¾d. per ton, this must be held to be the price which the defenders received for the salvage, and it does not seem to be necessary, in this view, to make any distinction between the injured and uninjured portions saved.

"The result, therefore, which the Lord Ordinary has reached is this, that *quoad* the saved portion. if the defenders have got more than 50s. per ton for it as f.o.b. at Bo'ness, the pursuer must get one-half of the surplus. He will get nothing for the portion totally consumed, but as the portion saved has been substantially sold to the Insurance Company as it lies at the pit head, if the price affords a surplus, as under the contract with the pursuer, the pursuer is entitled to one-half of such surplus.

"(9) To ascertain what the surplus price truly was, it is necessary to add to the £2. 18s, 11¾d. per ton, at which the salvage was abandoned, the expense of carrying the mineral to Bo'ness and shiping it there. The abandonment money was the price at the pithead, but the surplus was to be calculated as on the price f.o.b. at Bo'ness. Here also the parties are at issue, and a good deal of conflicting evidence has been led. The Lord Ordinary is of opinion, on the whole, that 3s. 6d. per ton would be a fair allowance for the expense of carrying the mineral from Torbanehill to Bo'ness, and putting it on board there. The best evidence on the subject is that given by Mr Henry Aitken, the manager for Russel & Sons, who long worked the pursuer's pits, and who is perhaps of all possible witnesses best qualified to judge. The pursuer himself, when he himself shipped at Bo'ness, used to charge 4s. 6d. per ton, but that included 1s. for other expenses, such as watching, &c.; and indeed the question between the parties came to be whether watching, insurance, &c., should be added to the mere expense of transit and shipping. The Lord Ordinary thinks they should not. Watching, insurance, and incidental expenses were necessarily incurred so long as the mineral lay on the ground, and whether it was shipped or not, or although it never was shipped at all. The contrast is, as the Lord Ordinary reads the contract, between a sale at the pit head and a sale at the same time and in the same circumstances f.o.b. at Bo'ness The difference is the mere transit and loading, which does not exceed 3s. 6d. per ton.

"(10) If the Lord Ordinary is right in the preceding steps which he has taken, the only remaining question will be, How much of the mineral was burned absolutely, or totally destroyed, and how much saved, making no distinction between what was saved injured and what was saved untouched? In other words, How much was abandoned to the Insurance Company under the contract of abandonment?

"On this point the Lord Ordinary felt that there was not sufficient evidence, and after making avizandum, and fully considering the whole case, he put it to the roll before deciding, that the parties might have an opportunity, if they wished, of clearing up this point. Both parties, however, stated that they did not wish to lead any additional evidence. Indeed, they were not in a position to do so. The bing is not now the property of either of the parties, or within their control. Both parties concurred in asking the Lord Ordinary to decide the case as it stands.

"In these circumstances, the Lord Ordinary, on the evidence before him, holds that one-half of the bing or thereby was destroyed, and one-half saved. The witness Vernor (Mr Gillespie's steward), says that nearly one-half of the whole mineral may turn out to be not much injured, and Mr Stewart, the secretary to the Insurance Company, estimates that a half of the bing had been saved. This half included the partially injured as well as the uninjured portion. The witness Mr Wallace, who analysed specimens, thinks there is not much difference between the injured and uninjured portions. The other witnesses can give no estimate whatever.

"Taking one-half of the bing, therefore, as destroyed, and one-half as saved, and applying the principles already explained, the result is, that after deducting the 145 tons, one-half of the remainder must be held to have been sold to the insurance company under the contract of abandonment at the price of £2, 18s, 11¾d. per ton. Adding 3s. 6d. per ton, the total price, as f. o. b. Bo'ness, is £3, 2s. 5¾d., being 12s. 5¾d. above the 50s. To one-half of this surplus the pursuer is entitled on 4915 tons.

"In the whole circumstances, looking to the divided success, and the peculiar nature of the questions, the Lord Ordinary thinks it equitable that each party should bear their own expenses."

Against this judgment the pursuer reclaimed.

In the course of the argument before the Division, a plea was stated to the effect that, assuming the Lord Ordinary to be right in holding that the defenders were under no obligation to the pursuer in respect of the mineral totally destroyed, the settlement with the Insurance Company as to the still saleable portion was beyond the defenders' powers, inasmuch as they were taken bound under the contract to resell at the highest price they could obtain, and that the price given by the Insurance Company was not the market price of the day; and, accordingly, an amendment was lodged in process, and met by a counter-statement on the other side.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—My Lords, the question we have raised in this action is, whether Mr Gillespie is entitled, as the seller of this mineral, to claim under his contract a share of the profit realised ultimately by the defenders, in as far as that profit exceeds 50s. per ton f.o.b. at Bo'ness.

To this claim Messrs Miller & Co. answer that the seller had nothing to do with this insurance; he had paid no share of the premium; they had in no way been bound to effect it. Accordingly, it has been urged that the contingency under which Mr Gillespie's interest was to arise has not emerged, and under existing circumstances could not do so. A plea was advanced in the course of that argument, that, even assuming the view of the Lord Ordinary to be correct, a settlement such as that made by the defenders with the Insurance Company was beyond their powers, and an amendment with counter-statement was made on the record. This cannot be adopted as the basis of our judgment; the summons does not embrace the question of the market price of the commodity thus raised.

I think that even if the seller, Mr Gillespie, had been by the contract of sale divested of all property in the mineral, and no insurable interest at all in the proper sense had remained in him, there was created by the agreement between the parties a tacit trust in the pur-

chasers (the defenders) to administer and sell or dispose of this mineral, the subject of their contract, for their joint behoof. The only question is, whether in the course of that administration this insurance was or was not effected for such joint behoof. I think it was, and further am of opinion that it had been effected by the defenders, not indeed under any obligation, but in the honest and faithful discharge of the administration for the joint benefit. In the negotiations preceding the agreement, and fixing the terms subsequently entered into, a margin was left for the expense of insurance; it would seem that this expense was kept in view by both parties. Insurance was a necessity. I do not say there was an obligation to insure, but when effected it was understood to be for the benefit of both parties. This was the clear understanding of the parties at the time, and I do not think the defenders are entitled now to plead that it was not. Independent of all that, although it is quite true that an insurance is a contract of indemnity in good faith, the contract of sale comes to this, that if the defenders, in consequence of their obtaining the property in the mineral, have realised a price amounting to more than 50s. a ton f.o.b. at Bo'ness (and it does not matter how that value was obtained), then the pursuer is entitled to share the benefit.

Lord Benholme—My Lords, we have here a *bona fide* contract under which a certain amount of this Torbanehill mineral was sold by Mr Gillespie to the defenders, on the footing that 40s. per ton was to be the price down, and secondly, as to the profit made by the purchasers, that the seller was to share equally in it when it exceeded 10s. per ton or 50s. of realised price. The expenses of carriage to a port were also considered and calculated in the transaction at a fixed rate. The fair and *bona fide* nature of the contract and the liberal interpretation I think we must give to it, relieve me from the necessity of entering into the nice questions as to insurance which otherwise might arise. Upon this fair and *bona fide* interpretation of the contract the case chiefly depends. Under the contract the one party was bound to account to the other for the share of profit realised. The seller's right depended for its existence upon the contract: had he then any interest in the insurance? Again, how did the purchasers deal with the mineral, and what did they make of it? No doubt the insurance was effected under no obligation, and of their own accord, but by that insurance they made a profit, and I am of opinion that in fulfilment of their agreement to share the profits *this* profit must be shared with the pursuer.

Suppose that, in place of half, the whole of this mineral had been destroyed, and that consequently nothing at all had been left to come to the pursuers—then, upon the principle laid down by the Lord Ordinary, the pursuer would have received not a farthing beyond his original 40s. per ton, that is the necessary result from an adoption of this view, and accordingly his Lordship only gives to Mr Gillespie a share in the profit proportioned to the amount of the mineral saved from the fire. Such a view appears to me to be quite contrary to a *bona fide* contract. No doubt the sale is a contract made upon certain conditions, but as I look upon it, the profits alluded to under that contract must be held to cover profits such as these from the Insurance Company: it is a jesuitical interpretation of the contract to say that if the profits have been made in another way from that expressly contemplated, the pursuer here is to have no share in them—it is contrary to the justice of the case.

Further, the Lord Ordinary seems to think that the only portion in the profits on which the pursuer is entitled to share is that part of the mineral which was not burned. If, however, we look for some *modus* in the sale, the pursuer was entitled to share in the highest price the commodity would fetch, whereas this sale to the Insurance Company was not at the highest price.

The Court would be right, I think, in holding that the amendment made upon the record cannot be adopted as the foundation of our judgment, and with these remarks I concur in the views your Lordship has stated.

Lord Neaves—I am clearly of opinion that the interlocutor of the Lord Ordinary is wrong. I am sorry that I do not agree with many of the principles which have been stated by your Lordships, but I nevertheless arrive at the same result, although upon different grounds.

According to the view which I take of this case, the pursuer, Mr Gillespie, had no concern with the insurance at all—he had nothing to do with it, and he cannot, on the footing of the insurance, claim to get any of the benefit derived therefrom, for he was not under any restraint as to the insurance—there was nothing binding Miller & Co. to insure. What was the contract which was entered into? It was that the defenders should pay for the mineral to Mr Gillespie a sum of 40s. per ton down, and an equal share of any price above 50s. which might upon a second sale be realised by the defenders. Among the conditions we have upon record the following statements:—"It is understood that in the case where the mineral, or any part of it, shall be sold at a price above 50s. per ton, free on board, Bo'ness, such price, so far as in advance of the 50s. per ton, shall be equally divided between you, the first party, and the second party, namely, ourselves and our two friends, Mr Simpson and Mr Poynter. It is understood that you shall have no control in any way over the sales to the public. You shall be entitled to a statement of sales, accompanied, if required, by an affidavit as to their accuracy, and the division of sums drawn from the excess above the 50s per ton f.o.b. Bo'ness shall be accepted by you as final."

Now suppose that there had been a total destruction by this fire without any insurance whatever—What would have been the position of matters then? There would have been no blame on the part of the defenders, and Mr Gillespie, standing on his bargain, would only have got his 40s. per ton, while the defenders must have borne the loss. Messrs Miller & Co. say now—We have insured certainly, but we did it of our own accord, without any action or interest on your part, and you cannot have an interest in it.—On these grounds I am decidedly of opinion that the pursuer in this action had nothing whatever to do with the insurance. The only event contemplated by the contract was the sale of this mineral by Messrs Miller, and if that sale took place, *then* the pursuer's right to claim a proportion of the accruing profits was to arise.

There is, however, here an element by which I am induced to adopt the view that the pursuer's claim is well founded, and to arrive, although on different grounds, at the same result as your Lordships have done. That element is to be found in the fact that this Torbanehill mineral was not en-

tirely destroyed, a large quantity of it was left uninjured by the fire, and stored in heaps separate from that which was destroyed. Now this portion of the mineral thus left it was the duty of the defenders under the contract to sell—they were not entitled to do as they have done, and enter into a special arrangement with the insurance company as to it, an arrangement by which the whole of the mineral saleable and unsaleable was thrown together and in the slump handed over to the insurance company. Had the saleable and unsaleable portions been kept entirely separate, the remedy of the pursuer would have been clear—for the mineral destroyed he would have had no claim whatever, while for that portion left uninjured the terms of the contract would still have held good. But the defenders have not adhered to the contract. They handed over this perfectly saleable part of the mineral to the insurance company, and by so doing have caused an obscurity in the whole transaction; have rendered it inextricable, and have, I think, entitled the pursuer to claim on the price realised. He may fairly say, I wish to have the profit on the uninjured portion, but am unable, owing to the complicated nature of your arrangement with the Insurance Company, to ascertain what that is, and therefore I will take the price as realised by your arrangement. We are on this ground, I think, entitled to give the pursuer the sum he asks, and accordingly I concur in the result at which your Lordships have arrived.

The Court's interlocutor was as follows:—

"Alter the interlocutor of the Lord Ordinary; find that the pursuer is not entitled to have the proposed amendment added to the Record; find that the pursuer is entitled, under his contract with the defenders, to one-half the amount received from the Insurance Company, in so far as the same exceeded the amount of 50s. per ton; find that the said sum amounts to £3060, 3s. 4d., for which sum of £3060, 3s. 4d. decern in terms of the libel, and for interest thereon at the rate of 5 per cent. from the 31st day of December 1872 until payment; find the pursuer entitled to expenses, except the expenses caused by the proposed amendment, and remit to the Auditor to tax and report.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Young), Q.C., Pattison, and Harper. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders (Respondents)—Solicitor-General (Clark), Q.C., Asher, and Guthrie Smith. Agents—Hill, Reid, & Drummond, W.S.

Friday, January 30.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

M'KERNAN *v.* UNITED OPERATIVE MASONS' ASSOCIATION OF SCOTLAND.

(*Ante*, vol. x., p. 361.)

Trade Union—Benefit to Members—Restraint of Trade—"Trade Union Act 1871," §§ 3 *and* 4.

In an action by a member of a trade union for payment of a sum of money due under the benefit provisions of the Association—*Held*, in terms of Act 34 and 35 Vict. c. 31, that although the purposes of the Association were no longer unlawful, the Court could not entertain an action for enforcing the said benefit provisions.

The summons in this case was raised at the instance of Patrick M'Kernan or M'Kerna or M'Kernon, mason, residing in Greenock, against the United Operative Masons Association of Scotland, and certain individuals, all members of the said Association, and forming for the time being the Central Committee of the said Association, or a majority and quorum thereof, and concluded for the sum of £80, which M'Kerna alleged was due to him by the laws of the Association in consequence of an injury which had caused the loss of his right eye whilst engaged in his occupation as a mason, he being a member of the said Association.

From the condescendence it appeared that the pursuer "is a member of the Greenock Lodge or Branch of the United Operative Masons Association of Scotland. The said Association comprises eighty-three lodges in all, and its affairs are made known through the medium of fortnightly returns published by the Central Committee, who are the executive council of the Association, and are in possession of the funds thereof. These returns are not accessible to the individual members of the various lodges, but only to the trustees of the working and sinking fund of the Association, and to the members of the Central Committee, the office-bearers of the Association, and the secretaries of the various lodges. The defenders are the members of the said Central Committee. The pursuer, on or about 24th January 1862, was following his trade as a mason in the employment of Messrs Currie & Guthrie, builders and joiners in Greenock, and, while engaged in dressing a stone at Messrs M'Nab & Company's, now Messrs Steele & Company's, boiler-shed, Greenock, a spark or blow from his chisel struck the pursuer in the right eye, permanently deprived him of its use, and rendered him unfit for life to follow his trade as a mason. When the pursuer was thus injured he was a member of said Greenock Lodge or Branch of the said United Masons Association of Scotland, and had been a member of said lodge for more than twelve months prior to the date of the accident, and fully entitled to the benefit of the accident provision after-mentioned." The provision referred to is as follows:—"Members disabled for life by any real accident received while following their employment as a mason (and also those specified in law 7, class i., may lay an application before the Society, according to law 7 of this class, and if a majority of those voting on the application consider him entitled he shall receive the sum of eighty pounds sterling." The pursuer further stated that he had made application for payment of this sum of £80 in accordance with the rules of the Association, which nevertheless illegally refused to pay it.

The defenders denied liability. They stated that the pursuer's application had been considered by the Association and refused in accordance with the rules applicable to such cases. They further maintained that the Association, not being incorporated, had no *persona standi in judicio*.

This case came before the Lord Ordinary (ORMIDALE) in October 1873, when his Lordship pronounced the following interlocutor:—

"*Edinburgh, 29th October* 1873.—The Lord Ordinary having heard counsel for the parties on the competency of the action as laid, finds the same to be incompetent, and therefore dismisses the action, and decerns: Finds the defenders entitled to expenses, allows an account thereof to be lodged,