attend the proper performance of his duty, and I think it would be much too narrow a view to take of a case like this to say, "We shall allow the expenses which arise within your own parish, which is in the town of Stranraer, but we shall not allow you the expenses which you incur in the performance of your duties several miles, it may be, beyond the parish, in attendance upon persons who go regularly to your church, such attendance having reference to marriages, cases of sickness, funerals, and the like. I think that is too narrow a view to take of this matter. I think that such expenses should be allowed as are really incurred in connection with visiting which the minister is either expected or enjoined by his ecclesiastical superiors to do. As to the part of the dwelling-house used as an office, it is quite clear that neither in this case nor in any case almost that one could figure, does the clergyman take a bigger house for the purpose of having one room in which he may discharge his parochial duties. In the case of a manse that is not so, and no one can suppose that this is not just the case of an ordinary manse with a study which is used for parochial duties. Therefore I do not think that is an expense which should be allowed. As to the expense of attending mission board meetings and presbyterial commissions, I would apply the same rule as in regard to the expense of visiting the congregation. If the duty is one which the minister may be fairly expected to do, or may be enjoined to do by his ecclesiastical superiors, then I think the expense is one which may fairly be deducted from his income before the balance of income is made chargeable with income tax. With these observations I agree with your Lordship that of course we do not expect ever to see this case again. The parties have got the principles settled, and they will settle the details for themselves. I have nothing to add.

LORD ADAM and LORD M'LAREN concurred.

The Court remitted to the Commissioners to amend the case.

Counsel and Agent for Appellant—Party.

Counsel for Inland Revenue—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Tuesday, May 27.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

RICHARDSON *v.* COUNTY ROAD TRUSTEES OF DUMFRIESSHIRE.

Contract—Locatio operarum—Completion of Contract—Payment.

A contractor entered into an engagement with a body of road trustees to execute repairs upon certain bridges belonging to the trustees. He had completed the work upon all the bridges but one, and the work on that one was nearly done, when a surfaceman in the employment of the trustees, without the knowledge or leave of the contractor, removed the wooden supports from the uncompleted bridge, with the result that the bridge fell down and the work bestowed upon it was lost.

In an action by the contractor against the road trustees, *held* that the pursuer was entitled to payment for the work expended by him upon the unfinished bridge, the accident not having been caused by any fault on his part. *M'Intyre* v. *Clow*, January 8, 1875, 2 R. 278, *considered*.

In March 1889 the County Road Trustees of the county of Dumfries advertised for offers for repairs to be executed upon three small bridges in the Moffat Water District in that county. The contractor was to provide all materials, cartage, &c., with the exception of wooden centres, for support of the bridge during the operations, which were to be provided by the Trustees. Upon 4th April Peter Richardson, contractor, Moffat, put in an offer to build and repair the bridges for the sum of £88, 10s.; secondly, to do all the concrete work at 5s. 6d. per yard; and thirdly, to build all parapet walls at 5s. 6d. per yard. By letter of 6th April the Road Trustees accepted this offer.

The contractor finished his work on two of the bridges, but a difficulty arose as to the third bridge, which was over the Tail Burn. The work upon this bridge had been finished except the building of the parapet walls, but the wooden centres supplied by the Road Trustees, for holding the bridge in proper position until it was set, were still supporting the mason work of the bridge. Upon 29th May 1889, James Quigley, a surfaceman in the employment of the Road Trustees, with the permission of one of the contractor's workmen, removed the centres, and the next day the mason-work of the bridge fell down and the bridge was destroyed. The Road Commissioners entered into a new contract for rebuilding the bridge, and declined to pay Richardson anything for the work expended upon the former bridge under his contract.

The present action was raised by Richardson in the Sheriff Court at Dumfries, against the Trustees, for payment of the

price agreed on under the contract for the three bridges. After the action had been raised, the Trustees settled the pursuer's claim for the work done on the two bridges which had been completed, and by minute of restriction the pursuer restricted the conclusions of his petition to £39, 0s. 11d., the amount fixed by a valuator, in terms of a remit by the parties, as the price of the work performed by the pursuer on the Tail Burn bridge.

The defenders pleaded—"(2) The defenders are not responsible for the unauthorised acts of their surfaceman outwith the special line of his employment. (3) The pursuer is responsible for the want of skill and negligence of his superintendent and workmen in sanctioning or allowing the removal of the supports of the Tail Burn bridge while the same was in his hands for repair."

The Sheriff-Substitute allowed a proof.

John Richardson, mason and slater, son of the pursuer, aged twenty-eight, deponed—"I work for my father as a mason. I am not a foreman, just an ordinary workman. . . . In the end of May, Quigley, the surfaceman, came to me when I was at the Moffat Water bridge. He asked if it would do any harm to take out the centres of the Tail Burn bridge, and I said I did not think so. That was all that passed. He did not mention any reason to me why they should come out."

James Quigley, surfaceman, Moffat, deponed—"I had no instructions from the surveyor specially about the Tail Burn bridge. He said, with regard to all the bridges, that I should look and see they were doing nothing wrong. I was at the putting up of the wooden supports of the Tail Burn bridge. The cement was laid on the Monday, the supports were taken out on the Wednesday, and the bridge fell next day. I took out the supports. I went and asked pursuer's son for liberty, and he said I was quite at liberty to do so. I went to ask his leave because there was no one else. I thought he would be the person to give leave. The reason why I wanted to take them away was that there was a rising flood in the burn, and I thought that the whole thing would be carried away. James Boyes and John Gibson assisted me. There were cross wedges on the tops of the standards below the wooden arch, and we took these out in succession. Gibson was in the employment of the pursuer. John Richardson sent him to assist us."

Upon 23rd December the Sheriff-Substitute (BOYLE HOPE) pronounced this interlocutor—"Finds in fact (1) That the pursuer contracted to rebuild a portion of a stone bridge over the Tail Burn near Moffat for the defenders, conform to specification 10/1 of process; (2) That he also contracted to do the other work referred to in the petition, but that since the raising of the action, his claim therefor has been settled, and the prayer of the petition restricted accordingly; (3) That when the arch was completed, but before the parapets were built, or the haunching, backing, or pointing were done, James Quigley, a surfaceman in the employment of the defenders, took out the wooden supports and centres which were under the arch; (4) That in consequence of this being done before the mortar had sufficiently dried and the building had settled down, part of the new-built portion of the arch, and also part of the old portion, fell down, whereby the pursuer's work was rendered useless; (5) That the supports were taken down by Quigley without the leave or knowledge of the pursuer, and that he had no instructions from the defenders to do so; and (6) That the defenders have refused to pay the pursuer for the work done by him to the bridge: Finds in law (1) That the act of Quigley, which caused the fall of the bridge, was not within the scope of his duties as a surfaceman; and (2) That the defenders are not liable to the pursuer for the loss which he has thereby sustained, in respect that the act of Quigley was neither directly authorised by them, nor impliedly within the line of his duties: Therefore sustains the second plea for the defenders, and repels the third and fourth: Refuses the prayer of the petition, as restricted, and decerns, &c.

"*Note.*—I am sorry to be obliged to decide against the pursuer, especially as the defenders have failed in several points of their defence. It was maintained in the record that the bridge fell in consequence of bad workmanship, and of the work not being done in terms of the specification. This was stoutly maintained throughout the proof, but at the debate the defenders' procurator stated that he would not, in view of the terms of the evidence as a whole, insist in this ground of defence. I think he was well advised not to do so. It is not now necessary to advert to the evidence on this part of the case. I shall only say that if it had required a decision, I should without hesitation have found the defenders' allegations unfounded. The defenders' own witnesses were obliged to admit that the supports of the arch were taken out much too soon, and I am of opinion that this was the cause of the fall of the arch. It was also attempted to be proved that Quigley was authorised to do what he did by some one acting on behalf of the pursuer. This also has signally failed. The only question therefore for decision is, whether Quigley was acting within his instructions or his duty. I am of opinion that it was not part of his general duty as a surfaceman to interfere as he did. The pursuer has led no evidence to show that it was. His argument was simply founded on the fact of his being a surfaceman in the employment of the defenders. Nor did the pursuer lead any evidence to show that Quigley was ordered or specially authorised to do what he did. All that he can found on is a statement by Quigley himself, who says, 'I had no instructions from the surveyor specially about the Tail Burn bridge. He said with regard to all the bridges that I should look and see they were doing nothing wrong.' That does not mean that he was to do anything himself, but watch the pursuer's workmen.

Mr Paterson, the surveyor, says—'James Quigley is a surfaceman, and had no special duties in connection with this bridge. He had no instructions from me to remove the centres.' He also says—'I would not have authorised the centres to be taken out at the time they were without pursuer's permission.' It does not appear that the taking out of the centres was a duty falling on the defenders. Whether it was or not, the pursuer says that he intended to do it, but not until the bridge was entirely finished. It is a significant circumstance that Quigley says he was afraid that a coming spate in the burn might wash the wooden erection away, and that he admits that he was to get the wood after it was done with. While the facts in the main are in favour of the pursuer, I am sorry to say that the law is against him. It is so clearly fixed that a master is not liable for the wrongful act of his servant, unless it was done within the sphere of his employment, that I do not think it necessary to discuss the question. I have carefully examined all the cases and other authorities quoted on both sides, and I cannot find any exception which applies to circumstances such as present themselves in this case.

"It is a very hard case for the pursuer, and I am sure that no ratepayer would have found fault with the defenders if they had made good his loss. It would have been more graceful, and more fair, if they had stood purely on the law, if they were going to dispute the claim, rather than throw reflections on the pursuer's skill and honesty as a contractor. I have only awarded partial expenses to the defenders in consequence of their being partly unsuccessful."

The pursuer appealed, and argued—In this case the pursuer was entitled to recover the sum sued for, which was the amount due for work expended upon the bridge before it fell down. The reason that it fell down was because the centres were removed before the stonework had time to settle down. These centres were removed by Quigley, a servant of and acting in the interests of the Road Trustees. They were therefore liable for any damage that might result from his actings. Further, the bridge was the property of the defenders, and as its fall was not due to any fault on the part of the pursuer, they were liable to pay for the labour expended on it—*M'Intyre* v. *Clow*, January 8, 1875, 2 R. 278.

The defenders argued—It had to be kept in mind that the case for the pursuer was founded upon the contract which he had concluded with the Road Trustees to put certain bridges on their property in good repair, and as a necessary step to the winning of this action it was necessary for the pursuer to show that he had completed his contract, which he could not do, as one of the bridges had fallen in and was destroyed. If the pursuer alleged that he was entitled to be paid for work which had been rendered useless, and before he had executed the contract, he was bound to show that the fault which prevented him so executing the contract lay upon the defenders. Now, looking at the facts here that Quigley had asked permission from one of the pursuer's workmen—who was also his son—but was even given the assistance of one of the pursuer's workmen to remove the centres of the bridge, it must be held that he was in the employment of the pursuer and not of the Road Trustees, and upon the whole evidence it was plain that the pursuer's servants and not the defenders' were in fault. In English law it was settled that if a contractor undertook to do a certain piece of work and did not conclude it, he was not entitled to be paid for any portion of the work which he had done. No doubt in the case of *M'Intyre* v. *Clow* it had been held that if the work had been destroyed by *vis major* the contractor would have a claim, but it was laid down in that case that the rule was applicable only where the works had been destroyed by *vis major*. Here there was nothing of that kind, but the bridge was destroyed by the fault of the pursuer's workmen in allowing Quigley to remove the centres, and the pursuer was responsible, at least in a question with the defenders, for their fault—Bell's Comm. (5th ed.) 456; Addison on Contracts.

At advising—

LORD YOUNG—This is a very special case, and its facts are generally these—The pursuer had a contract with the defenders to repair a certain bridge. These repairs, which were not of a very extensive nature, were on the eve of completion—the parapets on the sides of the bridge not having been put up—and we are to assume that they were well executed and according to the contract.

It occurred to Quigley that there was some apprehension of a flood, and that unless the wooden props, which were then standing to support the bridge, were removed, the safety of the bridge would be imperilled, and that the proper course in the interests of the Road Trustees was to have them removed at once. But before acting upon his own opinion he applied to John Richardson, who was the pursuer's son, but was acting as one of his workmen, and he asked him if the proposed removal would do any harm. John Richardson replied in the negative, and also agreed to ask a man to go and help Quigley to remove the props. In all this Quigley may have been, and probably was, wrong, but he was acting in a matter in which his employers the defenders were interested, and in which the pursuers were not. The consequence of the removal, according to the evidence, was that this work, well executed under the contract, was destroyed, the bridge coming down as soon as the props were removed. Now, the question that arises upon these facts is, whether the calamity that destroyed the bridge is an answer to the pursuer's claim for payment for the work already done?

It was said in the course of the argument that by the law of England if a man makes a contract to perform certain work, he has no claim to be paid for any portion of the work unless he completes his contract. I

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

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

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

LORD LEE and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

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

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

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

Tuesday, May 27.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BENNETT AND OTHERS *v.* MACLELLAN.

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

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