we have to deal with are proper and ordinary charges if Mr Landless is entitled to be paid at all. But it is said he undertook to do the work gratuitously. I think there is no proof of that, and it is a very incredible thing in itself. No doubt it is said that Mr Gordon also furnished plans, and that both sets of plans were given in on the footing of a competition, the architect only to be paid for his plans if they were accepted and acted on. But to this theory I think a fatal answer is that the sets of plans were in no sense competing. The one set was complete, with elevations and accurate scale measurements. But the things called plans by Mr Gordon were not of that description at all—they were mere sketches, and no builder could have set to work to build by them in that state. A mere sketching out of the basement is no plan at all. Mr Gordon's sketches are said to have been at one time in process, but they have unfortunately disappeared. If they had been here they could have been seen, but they certainly do not appear in the proof under the name of plans, and they have now disappeared. If Mr Gordon's agent had taken the trouble to recover them by diligence, he could have done so, and there might have been some sense in that.

Mr Wilson at first intended, as I said, to build and sell houses on his land. But he did not do so; but sold the ground to Mr Carrick. He bought it originally for £13,000, and sold it to Mr Carrick for £16,000. How can anyone doubt that he got this price mainly by exhibiting the pursuer's plans. I think the use made of Mr Landless' plans is most important, and may be said to have contributed very largely to the defender having got a sum of £3000. It is therefore out of the question that he should not be paid anything for them; and without going further into detail I may say that I think these facts are conclusive against the defence maintained by Mr Wilson, and that the pursuer is entitled to his decree.

Lord Mure—I think the Sheriff is quite right. This is an action to recover professional charges for work done by the pursuer; the charges are admittedly not above the ordinary and proper rates, and he is therefore entitled to recover, unless it can be shown that he agreed to do the work on some other terms. The *onus* of proving such agreement lies clearly on the defender, and the evidence as to it being contradictory, I am not able to arrive at the conclusion that this defence has been proved. The pursuer and the defender and his agent are not at one in regard to it, and I think it a great pity that the terms of the original undertaking or agreement were not shortly put in writing at the time. The pursuer certainly did not understand that he was to furnish these plans gratuitously; and they are complete plans—quite different from the sketches by Mr Gordon, who admits that he undertook to do his work without the ordinary remuneration. And after the pursuer's plans were done, a special application was made to him in December for an elevation plan, to use for showing to the buyer. This Mr Gordon says is not usual in cases of ordinary competition. On the whole case I agree with your Lordships, and I think that even if the evidence had been in favour of there having been a competition, the taking and using of the pursuer's plans to the extent the defender did would form a good ground for Mr Landless' present claim.

Lord Shand—There is a conflict of evidence here as to the terms of the contract between the parties, but the *onus* of proof being clearly with the defender, who alleges an extraordinary and peculiar agreement, I agree in thinking that he has failed entirely to discharge it. The pursuer is quite distinct that he never heard anything of a competition, and that his work was done on the ordinary footing, and the plans themselves go strongly to support that view. On the other hand we have the defender and his agent Buchan; but I cannot reckon them as two witnesses, for an agent who comes into the witness-box in circumstances like these must not be surprised if he is identified to this extent with his client. On that state of the evidence I agree in thinking that the defender is bound to prove the special agreement he founds on; and that even if the original footing was really a competition of plans between the two architects, and the defender afterwards thought fit to change his mind, it would be impossible to hold that he was entitled to say to each of them, "For all your plans and your labour you shall have nothing." But I am very clearly of opinion that when these plans had been prepared (say, on the footing of a competition which was afterwards frustrated by the defender's change of mind), and the defender had made use of them to obtain an advantageous bargain with a purchaser, he was bound to pay for the services which were thus beneficial to him. It does not seem to make any difference that the plans should be used for the purpose of enhancing the value of the ground in the eyes of a purchaser, and not, as originally intended, for the erection of Mr Wilson's buildings upon it. I am not nice to inquire whether the legal principle underlying this case is that of recompense or implied contract or obligation; but I hold that the services were rendered, and must be paid for by a fair and adequate return. On any view of the case I think the pursuer is entitled to succeed.

Their Lordships dismissed the appeal, and found the appellant liable in additional expenses.

Counsel for Pursuer and Respondent—Asher—Geo. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender and Appellant—Kinnear—Rhind. Agent—R. P. Stevenson, S.S.C.

Friday, December 17.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

KIRKPATRICK *v.* THE ALLANSHAW COAL COMPANY.

Lease—Verbal Agreement Modifying Clause of Lease—Acquiescence—Rei interventus—*Proof—Competency.*

Averments of *rei interventus* and acquiescence will not warrant the admission of proof *prout de jure* as to an alleged verbal agreement to alter the terms of a written lease,

unless the circumstances and actings averred are plainly referable to such an agreement and inconsistent with the terms of the lease.

Averments of *rei interventus* and acquiescence which *held* (*rev.* Lord Rutherfurd-Clark — *diss.* Lord Shand) insufficient to warrant parole proof of an alleged verbal agreement to modify the rent clause of an existing lease.

Observations per curiam on the case of *Wark* v. *The Bargaddie Coal Company*, March 6, 1856, 18 D. 772, *rev.* 1859, 3 Macq. 467, and subsequent decisions.

By mineral lease dated 24th December 1873 Alexander Kirkpatrick of Allanshaw let to the now deceased John Sneddon, coalmaster, his heirs and assignees, the coal and fireclay lying in and under the estate and lands of Allanshaw and others, in the parish of Hamilton and county of Lanark. By subsequent assignation the tenancy passed to the Allanshaw Coal Company. The lease was for a term of thirty years from Martinmas 1873, but with right to the tenant to break and renounce it at each three yearly intervals during its currency on a six months' notice in writing. The tenant was taken bound to pay a fixed yearly rent of £3000 for the said coal and fireclay, whether he should work them or not, and the lease then proceeded as follows:—"Or, in the option of the first party, and in lieu of the said fixed rent, to pay to the first party the following lordships upon the minerals hereby let, which may be raised and carried away from the said lands, free of all cost, expense, and deduction, viz., For each quantity weighing 20 cwt. of unscreened coal, or coal and dross, the sum of ninepence, and for each quantity weighing 20 cwt. of fireclay the sum of threepence; declaring that every particle and portion of the foresaid minerals raised and carried away from the said lands shall be chargeable with lordship at the rates foresaid, without any reservations whatever, it being clearly understood that the whole of the said minerals taken from the said lands are liable in lordship, subject only to the special exceptions hereinafter particularly mentioned; and which fixed rent or lordships shall be payable to the first party (subject to the declarations after mentioned) at two terms in the year, Whitsunday and Martinmas, and by equal portions in the case of the fixed rent, beginning the first term's payment at the term of Whitsunday 1874 for the half year preceding, and the next term's payment at the term of Martinmas 1874, and so forth half-yearly and proportionally thereafter during the currency of this lease, with a fifth part more of each term's payment of penalty in case of failure, and interest at the rate of 5 per centum per annum from the respective terms of payment during the not-payment; but declaring that no fixed rent shall be exigible for the first three years of this lease ending at Martinmas 1876, for which period the foresaid lordships only shall be payable upon such minerals as shall be raised and carried away out of the said lands: Declaring further that the payment to be made at each term of Whitsunday during the lease after the said term of Martinmas 1876 shall be the one-half of the amount of the said fixed rent, and that such payment shall be considered as a payment to account of the fixed rent or lordships for the year in which it is made; and it shall be optional to the first party, at the term of Martinmas at the end of each such year, or within one month thereafter, either to accept of the foresaid fixed rent or the said lordships in lieu thereof; and at each such term of Martinmas, or within one month thereafter, the first party shall declare his option either to take the fixed rent or the lordships for the whole preceding year, and the balance shall then be paid; with power, however, to the second party, in the event of the fixed rent paid for any one of the years of the lease exceeding the lordships at the rates foresaid upon the output raised and carried away during that year, to make up and retain the short or deficiency from the excess of the lordships over the fixed rent of the three years immediately succeeding the year or years in which any such short or deficiency may have occurred, but of those three years only and to the extent of such excess."

The present action was raised by Mr Kirkpatrick against the Allanshaw Coal Company, and Alexander Simpson and Ralph Moore, the partners thereof, for payment of £1500, being the half-year's rent due by them under the lease at Whitsunday 1880. The defence was an allegation of a verbal agreement on the part of the pursuer to reduce the yearly rent from £3000 to £2000; and the defenders had accordingly offered £1000 in full of the half-year's rent, which was rejected by the pursuer.

The averments in support of this defence were as follows:—"(Stat. 1) The working of the coalfield in question has, since the opening of the pit a few years ago, been carried on with great expedition, and during the three years ending Martinmas 1879 the lordships have exceeded in amount the stipulated fixed rent. The defenders, however, found themselves at a considerable disadvantage in dealing with the men in their employment in consequence of the fixed rent being so high. At various times prior to the month of October 1879 suggestions have been made and discussed by the pursuer and the defenders as to a reduction of the fixed rent, but no final agreement was come to. In the months of September and October 1879 the miners in the Hamilton district, in which the coalfield in question is situated, maintained an agitation for an increase of wages. The defenders experienced great difficulty in dealing with this agitation, in consequence of being compelled to keep up a large output in order to meet the fixed rent, and were in fact prevented from taking up a firm position with the men in consequence of this necessity. (Stat. 2) On a day about the end of October or beginning of November 1879 the pursuer called at the colliery and had a conversation with the defender Simpson on the subject of the disputes between the masters and the miners. The pursuer expressed wonder that the masters did not take up a stronger ground, to which the defender Simpson replied that he was surprised that the pursuer should so express himself, as he had done nothing towards reducing the fixed rent, and so had left it impossible to stop working. The pursuer then said that the defenders should not allow that to stand in the way, that he did not require the money, and had never intended taking more than the lordship on the coal actually put out. He added that he would lose nothing by such an arrangement, as the coal would still be there. At the pursuer's request a meeting

was then arranged to take place in the office of Mr Robertson, C.E., Glasgow, at which the matter might be discussed and settled. (Stat. 3) On 3d November 1879 the pursuer, in terms of the above arrangement, met the defender Simpson in Mr Robertson's office, there being also present at the meeting Mr Robertson and the Rev. T. M. B. Paterson, a son-in-law of the pursuer. After an arrangement had been come to as to the rate at which small dross was to be charged, the pursuer brought up the subject of the fixed rent, and asked the defender Simpson if a reduction of £1000 per annum would satisfy him. The defender replied that it would, and asked the pursuer to give him a letter to that effect, so as to put the matter beyond dispute. The pursuer said that his word was quite sufficient, and that there was no need for any writing, but on the suggestion of the Rev. Mr Paterson he undertook to endorse the agreement on the back of the lease. (Stat. 4) On 15th November 1870 Mr Mitchell, salesman to the defenders, called on the pursuer at Allanshaw with reference to the receipt for the lordships due at the term of Martinmas which had been sent him, and in course of their conversation the proposed indorsation of the agreement on the lease was mentioned. The pursuer then said that the arrangement was concluded, and there was no need to put it in writing, as the defenders had his word, and that he had also entered it in his private note-book and mentioned it to his trustees, and especially to his son-in-law Mr Paterson, so that there could be no dispute about it even in the event of his (the pursuer's) death. The defenders thereupon, having then full confidence in the pursuer's honour and integrity, considered the matter finally settled. On 5th December 1879 the defenders received from Messrs William Robertson & Smith, C.E., Glasgow, the engineers acting on behalf of the pursuer, a letter annexing a report sent by them to the pursuer. In the said report Messrs Robertson & Smith, while dealing with the question of lordship, say—'You' (the pursuer), 'however, agreed to reduce the fixed yearly rent from £3000 to £2000 sterling.' This report embodied the defenders' view of the transaction, and until the occurrence of the dispute out of which the present action has arisen the defenders had no reason to doubt that it was also the pursuer's view. (Stat. 5) Immediately after the conclusion of this agreement, and in reliance thereon, the defenders took up a decided position with their men, who were in consequence out on strike from the beginning of December 1879 till the end of January 1880. In acting in this manner the defenders had full reliance in the binding nature of the agreement come to with the pursuer. But for this reliance they would not have thought of entering upon the struggle with the men to the extent they did, there would have been no strike, and the output from the colliery would have been kept up to an amount sufficient to cover the fixed rent. In order to cover the original fixed rent of £3000, the annual output of coal from the colliery requires to be 80,000 tons; and since the opening of the colliery the defenders have been able to turn out very little more than that quantity. About five-eighths of the total output is turned out during the winter months, or from Martinmas to Whitsunday, in consequence of the demand for coal being much greater in winter than in summer. The stoppage of work during the winter months thus seriously affected the defenders' ability to turn out such a quantity of coal as would suffice to cover the fixed rent. The pursuer was well aware of the nature of the defenders' controversy with their workmen, and also knew that in refusing to accede to the terms demanded by their workmen, which resulted in the strike by them as above mentioned, they were acting in reliance on the said agreement come to with him. The pursuer's residence is situated within 400 or 500 yards of the defenders' colliery, and in sight thereof. During the time the strike lasted, and for some weeks before it began, the pursuer was in the habit of visiting the colliery almost daily, and was fully aware of the whole negotiations between the defenders and their men. The pursuer knew quite well that but for the said agreement with him the defenders would not have allowed their men to go out on strike, and he never suggested that they were in error in so acting, or that the agreement which had been made would not be fulfilled."

The pursuer pleaded—"(2) The defences are irrelevant, or at least can only be established by the pursuer's writ or oath."

The defender pleaded—"(1) The pursuer is barred by the said agreement from insisting in payment of the full fixed rent stipulated in the said lease. (2) The said agreement having been finally concluded and acted on by the parties, cannot now be resiled from by the pursuer."

The Lord Ordinary (Rutherfurd Clark) before answer allowed to both parties a proof of their averments.

The pursuer reclaimed, and argued—The defence was irrelevant. The averments were not such as could competently be admitted to parole proof. The actings set forth were not of a kind to support the alleged verbal agreement; they were not "unequivocally referable" to it, nor inconsistent with the terms of the written lease. The case of *Wark* was one of acquiescence, and not upon contract. The House of Lords' judgment did not trench on the reasoning of the Judges in the Court of Session as to verbal agreements. Acquiescence was a plea in bar founded on presumed consent. There was here no case of acquiescence on the part of the landlord. Nor was there *rei interventus* in the true sense. *Rei interventus* could not by itself establish a contract; it was a mode of perfecting an imperfect contract. The defenders' actings here would have been quite natural on the footing that no such agreement as they averred had taken place.

The respondents argued—The Lord Ordinary was right in ordering a proof. The defenders were entitled to get into an investigation as to the alleged agreement. Their actings, though not inconsistent with the existing lease, were just the sort of actings which would naturally follow, and were intended by the parties to follow, on the agreement to reduce the rent, and the question whether or not they were "unequivocally referable" to it was a matter which could only be cleared up by proof. The case of *Wark* decided that though the terms of a written contract could not be waived or altered by words only,

yet a verbal agreement followed by *rei interventus*, consisting of actings in direct pursuance thereof, would be effectual to alter the original contract, and such verbal agreement and *rei interventus* might be proved by parole. The defenders here averred that they had entered on a certain course of acting in reliance on a verbal agreement, and they were willing to undertake the responsibility of proving both actings and agreements. If the actings had followed, not on a verbal agreement, but on an improbative writing, proof would have been allowed. To refuse proof in this case would be to tend towards introducing undue restriction into our law on this subject.

Authorities—Bell's Prin., secs. 26, 945, 946; *Wark* v. *Bargaddie Coal Company*, March 6, 1856, 18 D. 772, *rev.* H. of L. 1859, 3 Macq. 467; *Sutherland* v. *Montrose Shipbuilding Company*, Feb. 3, 1860, 22 D. 665; *Gowan's Trustees* v. *Carstairs*, July 18, 1862, 24 D. 1382: *Walker* v. *Flint*, Feb. 20, 1863, 1 Macph. 417; *Elmsley* v. *Duff*, June 2, 1865, 3 Macph. 854; *Fowlis* v. *M'Lean*, Jan. 18, 1868, 6 Macph. 254; *Philip* v. *Gordon* (*Cumming's Executor*), June 3, 1869, 7 Macph. 859; *Bathie* v. *Lord Wharncliffe*, March 6, 1873, 11 Macph. 490; *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749; *Johnston* v. *Grant*, Feb. 28, 1844, 6 D. 875.

At advising—

Lord President—This is an action for payment of £1500, being the amount of a half-year's rent due at Whitsunday last under a mineral lease entered into between the pursuer as landlord and the defenders as tenants. The fixed rent under the lease is £3000 per annum, and the half-year's payment is accordingly £1500. The defence is an averment that the pursuer consented to reduce the fixed rent from £3000 to £2000. The lease is dated 24th December 1873, and its currency is for thirty years from Martinmas of that year, so that it would come to an end in the year 1903. The subject let is certain coal and fireclay, and the provisions as to the rent and lordships are precise and determined. [*His Lordship read over the clauses of the lease as quoted above*]. Now, I cannot read this without seeing that it has been the subject of very deliberate negotiation and contract. A great many events are foreseen and provided for, and it is needless to say that in a subject of such extent and value the amount of the fixed rent is very important to the landlord. If the minerals are not worked the rent is still payable, though the tenant may end the lease after three years, and if the fixed rent exceeds the amount of the lordships the landlord is to have the benefit. On the other hand, the tenant is to have power in such an event to retain the deficiency from the excess of the lordships over the fixed rent of the three years immediately succeeding the year or years in which the deficiency may have occurred, but of these three years only, and to the extent of such excess. Altogether, a better considered and more impartial lease I never read.

But the defenders' averment is that this fixed rent of £3000 has been reduced to £2000, and this is said to have been done by a verbal agreement. It is necessary to attend to the precise averments of the defenders. They are as follows —[*reads statements* 1, 2, 3, *and* 4, *quoted above*]. Now, it is not quite clear to what the defenders say that the pursuer agreed. They do not say that the reduction was to operate during the whole period of the currency of the lease, but I understand from the defenders' argument that they intend to say that, and do extend their claim to the whole of the period. Now, that is certainly a strange subject of a verbal agreement, and the defenders seem conscious of that, for they say they wanted to have it in writing; and if it really passed, I think nothing could be more foolish or absurd than to allow such an agreement to stand on mere words. It is to be observed that this is not the constitution of an original and independent agreement by parole, but the alteration of a written contract by a parole agreement; and these two things stand in a different position as regards their legal aspect and effect. The rule as to a parole agreement in the case of heritage is, that it is not of any avail unless it be proved by the writ or oath of the parties; but as to the variation of a formal written contract by words alone, the only rule is that it cannot be done, and that is the rule which we must apply here. That being so, I have no doubt that the averments which I have hitherto read fall clearly under the rule, and cannot warrant any proof *prout de jure*.

But the defenders further aver acquiescence or *rei interventus* sufficient to entitle them to get into an investigation of the whole proceedings as to this alleged reduction of rent. Before reading these further averments, let us see what this variation is which is said to have been made. It is a reduction of the rent by one-third—an alteration of the rent clause of the lease operating in the future during a period of twenty-four years, and so involving an interest of £24,000. The sort of acquiescence or *rei interventus* which we should expect to follow would be payment of the short rent by the tenants, and acceptance of it by the landlord, in such circumstances as would be plainly referable to an agreement to a reduction of rent during the remaining years of the lease. Anything short of that would not, I think, be that sort of acquiescence or *rei interventus* which is inconsistent with the rent clause. I could easily understand that a landlord might accept short rent once, or even several times, and that might be referable to an agreement of a very different kind—in consideration of losses sustained by the tenant owing to temporary bad times; and if the alteration were referable to that it would not be acquiescence or *rei interventus* of such a kind as to vary or alter the rent clause of the lease. Therefore it seems to me that this kind of parole agreement is difficult to fortify by acquiescence or *rei interventus* unless it be shown that what was done or permitted to be done was plainly referable to an agreement of this continuing character. Now, what are the averments here?—[*reads stat.* 5, *quoted above*]. What does this amount to? It is an averment that, relying on a parole agreement on which they were not entitled to rely, the defenders did something they would not have done if they had not believed the parole agreement would be fulfilled. They say they dealt with their workmen, and took up a firm position, which they would not have done if they had thought they would be required to put out 80,000 tons from the mines so as to pay £3000 of fixed rent. That may be so, and we must assume that it was so; and if a separate and independent agreement or stipulation had been executed, that the defenders should insist on

their men working at such rates or going on strike, and the tenants had stipulated on the other hand for a reduction of rent—the one stipulation being in consideration of the other,—and that had been contained in a separate original agreement, I think there might have been great force in the contention. The tenant having fulfilled his part, the landlord would be bound to fulfil his, and that would have been *rei interventus* on a parole and informal agreement. But the case here is different. We have an alleged variation of a clause of a written agreement, and the acquiescence or *rei interventus* which is necessary to fortify that must be something done or permitted to be done which is inconsistent with the written contract.

This is a question of the greatest importance, and I should have thought there could be no great doubt about it but for the very ingenious argument which was presented to us upon the case of *The Bargaddie Coal Co.* v. *Wark* in the House of Lords. It is very important there should be no misunderstanding on the matter, for if the defenders' contention in that case be right it would introduce a very serious and startling innovation into the law of Scotland. But I think it is not so, and that that case only affirms a principle perfectly consistent with the law of Scotland as hitherto understood and interpreted in practice. There are, no doubt—and I say it with the greatest respect—some loose expressions in the judgment of the Lord Chancellor which are capable of being twisted and misunderstood, but the principle of the case is to be found in a single sentence of Lord Cranworth's opinion, and is not inconsistent with the preceding judgment of the Lord Chancellor. His Lordship says—"With regard to the general principle, I should be very sorry to think there was any doctrine in the Scotch law which rendered it at all possible, uniting law and equity together, that if a person having what we should call here a legal right under a lease authorises something to be done by his tenant in contravention of that lease, and it is done accordingly, I say I should be very sorry to think that according to the law of Scotland the tenant is still liable as for a breach of contract, having done that which his landlord authorised him to do." Now, there is in a very few words what was really decided by this case of *Wark*. The tenant was prohibited by his lease from working within a certain distance of a natural barrier, but he did work nearer. This was in contravention of his lease, and he justified it by alleging that his landlord consented verbally to his doing so, and afterwards saw him working and did not object—in short, that the contravention was with the landlord's knowledge and assent. Taking that view of the case, I think Lord Cranworth's doctrine must commend itself to the mind of every lawyer. If the landlord assents there is no breach of contract, and that appears to me to be all the length of this case. The doctrine of *Wark's* case was brought under this Court's notice within one year after the date of the House of Lords' decision, in the case of *Sutherland* v. *Montrose Shipbuilding Company* before the Second Division. That was a case of contract for the building of a ship, where the time when she was to be finished was an important element. This time was exceeded, and the shipbuilder averred that there had been an agreement to prolong the time, and that he had consequently delayed. It is hard to distinguish the averments there from those of the present case. The defence in that case was repelled, and the terms of the contract given effect to; and in commenting on the case of *Wark* Lord Cowan said—"The recent judgment in the House of Lords in *Bargaddie Coal Co.* v. *Wark* recognises no more than this, that acts of acquiescence at variance with the terms of a written agreement may be the subject of parole proof." In that opinion Lords Wood and Benholme concurred. I was then Lord Justice-Clerk, and I am reported to have said—"The rule of law, as standing on that judgment, I take to be, that where there are averments of acquiescence in operations inconsistent with the terms of the written contract, they may be admitted to proof." Now, after that I think it would be a strong thing to say that anything short of acquiescence in or consent to operations inconsistent with the terms of the written contract would be sufficient under the principle laid down by the House of Lords to justify a tenant in refusing to fulfil the stipulations of the written contract. The same view has been taken in subsequent cases. The expressions of opinion have been mainly *obiter dicta*, but they are evidence, and important evidence, of the understanding of the meaning and effect of the judgment in the case of *Wark* by various members of this Court. I think it is the only true construction; and it appears to me that the general rule stated by the Lord Chancellor that a clause of a written contract cannot be varied or altered by words only means also that it can be varied by acts acquiesced in by the landlord, and by nothing else—acts, that is, which are sufficient to vary it—a variation inconsistent with the written obligation. Now we have nothing of that kind here. There is merely an averment that because the defenders got a verbal agreement they did so and so, but nothing inconsistent with the rent clause of the lease. The defenders' quarrel with the workmen, and so on, has nothing to do with the rent clause of the lease; there is no inconsistency between the two; the one is not referable on the face of it to the other; and there is therefore not that inconsistency with the written obligation which is indispensable to entitle a party to proof. I am therefore for recalling the Lord Ordinary's interlocutor.

Lord Deas and Lord Mure concurred with the Lord President.

Lord Shand—The Lord Ordinary by the interlocutor brought under review has before answer allowed the parties a proof of their respective averments, his Lordship being of opinion either that proof of the facts alleged is competent, or that it is undesirable in a case of this kind to determine *ab ante* the abstract question of competency of proof of all the matters alleged, and that in any view the Court would be in a better position for determining the whole questions involved, including the admissibility of parole evidence, to the full effect contended for by the defenders, when they have the best means of knowing the truth on all the material facts. It appears to me, with all deference to your Lordships, that the Lord Ordinary was right, and that it would have been better to have reserved the decision of the whole case until the result of the proof was seen, the order for proof being in terms which show

expressly that all questions as to the competency of evidence on particular matters was left open for consideration and determination.

In the view which your Lordships have taken, however, it has been necessary to form an opinion now as to the legal right of the defenders to the inquiry they ask; and my opinion on that question differs from that entertained by your Lordships. The case is of importance to the parties, but its chief interest arises from the important consequences of the principle or rule on which the judgment proceeds—a rule which must apply to many future cases; and I confess I am apprehensive of these consequences. In the state of the law of evidence as now settled, by which through the examination of the parties themselves, and all others connected with them, the means of getting at the truth on disputed questions of fact are now so ample, I regret any decision which appears rather to narrow than extend and relax existing rules; and apart from the merits of the dispute in this particular case, I fear the decision to be pronounced will seriously diminish the salutary effect of the principles laid down by the House of Lords in the case of *Wark* v. *The Bargaddie Coal Company* in 1859, reversing the decision of this Court.

It humbly appears to me that the law as laid down in that case substantially comes to this, that although the terms or stipulations of a written agreement cannot be waived or varied by words only—that is, by proof of a verbal agreement to that effect not reduced to writing or proved by the writ of party—yet if the verbal agreement be followed by *rei interventus* consisting of acts of sufficient importance in pursuance of the verbal agreement or in reliance on it, an alteration or waiver of the original agreement will be effectual, and the verbal agreement and *rei interventus* may be proved by parole.

The case of *Wark* v. *The Bargaddie Coal Company* was one in which it was alleged the landlord verbally consented to waive a stipulation that a barrier of fifteen feet should be left unwrought all round the boundaries of the mineral field, and that the barrier was thereafter at various points broken through with his knowledge and acquiescence. The agreement and the acts of the tenant following on it were alike inconsistent with the stipulation of the original lease. Your Lordships, as I understand, are of opinion that the rule or principle of the decision is to be applied only when substantially the particular state of the facts averred is the same as occurred in that case—that is, where not only the parole agreement is inconsistent with or opposed to some stipulation of the lease, but the acts following on it are obviously also of the same nature. It seems to me that this is too narrow a view of the principles or rules established by the case, that it is not warranted by the terms of the opinions of the noble and learned Lords who decided it, and that if given effect to, the benefit of the decision in declaring and defining the law will in a great measure be lost or restricted.

It would not serve any good purpose to go over in detail the expressions used in the opinions of the Lord Chancellor, Lord Chelmsford, and Lord Cranworth in delivering their judgments. Conceding that the case was one of the nature I have mentioned, it nevertheless appears to me that the decision was fully explained to rest on general principles, not limited to the special circumstances then before the Court, but of application generally to the case of a waiver or variation of a written contract followed by acts of sufficient importance consequent on the parole agreement, that is, in pursuance or part performance, or on the faith of it. The Lord Chancellor, after referring to the two leading passages from Bell's Principles (secs. 26 and 945-6) on the important effects of actings proceeding on the faith of a verbal agreement or consent, observed (3 Macq. 480)—"Now, as I understand this passage, the acquiescence which will support and give validity to a previous parole agreement is something less than the facts and circumstances which will be required to enable you to presume an agreement. It is clear that with regard to the facts and circumstances from which the agreement is to be presumed, there must be great cost incurred by the operations—something allowed to be done which manifestly cannot be undone—and under those circumstances the law will presume an agreement or conventional presumption."

There is no suggestion in this or any other part of his Lordship's opinion that I can discover in which the limited view of the decision maintained in the defenders' argument is either expressed or indicated. It is nowhere said that the acts following on the parole agreement must be of a nature inconsistent with the original contract, or that the cost incurred or the act done, which manifestly cannot be undone, all proceeding on the faith of the verbal agreement, must be of this character. The same observation seems to me to apply with force to the observations of Lord Cranworth. The general case with which his Lordship deals, in the passage following that read by your Lordship, is that of a consent or previous consent given, which his Lordship says "taken by itself is nothing," unless as ancillary to some acting "which is to follow that consent." This expression "some acting which is to follow that consent" in terms covers actings by way of part performance of the parole agreement or on the faith of it, and is not limited to actings in themselves contradictory of a term of the agreement. Indeed, his Lordship's reference to the practice of the Court of Chancery in directing an issue to be tried where the question was whether there had been verbal consent followed by part performance, with the effect of setting up even a new and independent agreement, appears to me to exclude the limited view of the judgment contended for by the defender, and to show that his Lordship was referring to the verbal waiver or alteration of some term in a written contract followed by acts of sufficient importance on the faith of it. His Lordship seems to have had in view such a case as that of *Nunn* v. *Fabian*, which he afterwards decided on appeal in the Court of Chancery, L.R., 1 Chan. App. 35.

In regard to the cases which have occurred in this Court since the case of *Wark* v. *The Bargaddie Coal Company*, it is sufficient to say that the question here raised has not been decided in any one of them. In two of the cases, viz., *Gowans* v. *Carstairs* and *Walker* v. *Flint*, the question was not one as to the waiver or alteration of an existing agreement; the point in dispute was entirely whether a new and independent agreement affecting heritage was well constituted or not; and I find that throughout

the opinions in both of these cases a distinction is expressly drawn between such a case and one like the present. The Judges are careful to say that a different principle applies in the cases where the evidence offered is to be used to set up a new agreement from that which holds in the case of an alteration of an existing written agreement. The observations which fell from the Judges in these cases in regard to the case of *Wark* were clearly *obiter*. The case of *Sutherland* v. *The Montrose Shipbuilding Company* is one no doubt of a different character, but it appears to me that the true ground of judgment in that case was that the proof led on the issue that the agreement had been waived or altered had entirely failed, and that although there are observations by the Judges on the question whether proof was admissible in the case at all, these do not contain the grounds of judgment. I do not think that a reference to the various opinions which have been delivered (in which the case of *Wark* has been referred to) in this Court leads to the conclusion that the Judges have taken at all the same view of the judgment in that case. I may illustrate what I mean by referring to the opinion of Lord Curriehill in the case of *Gowans* v. *Carstairs*, in which his Lordship's view of *Wark* v. *The Bargaddie Company* is thus expressed (p. 1387)—"The case of *Bargaddie* was referred to as an authority, but in reality it is none, because the ground of decision there was in effect that the piece of ground upon which the operations complained of took place was not included in the lease at all. I am aware that there were *dicta* of the noble and learned Lords who addressed the House in that case which taken abstractly may appear to countenance the doctrine for which the case was cited to us, but when the nature of the case is fully attended to it will be found that they have no bearing on the question before us." And in the same case my learned brother Lord Deas seems to attach considerable importance to the circumstance that the alternative of referring the question to the oath of the landlord was not suggested. His Lordship says—"The House of Lords held that if the restriction against working through the barrier had been dispensed with by the landlord's consent, the landlord could not require the tenant to restore the barrier and claim damages for what has been done, and that the mode of proof of the alleged consent was not limited to the landlord's writ. The alternative of the landlord's oath, so far as we can see from the reports, was not suggested by the parties, either in this Court or in the House of Lords, probably because the landlord was not prepared to deny the fact upon oath, and stood only on the legal necessity of writ." And on a reference to the opinions in that case of *Gowans* it will also be seen that there is considerable difference in the views taken by the Judges.

Taking the view that I do of the principles settled by the case of *Wark*, the next question is, What are the averments in the present case? The pursuer and defenders were respectively landlord and tenants of a mineral property. It is obviously for the interest of both parties, in order to the advantageous and successful working of the field, and in order that as large an output as possible may be got from it, that the tenant should not be compelled, owing to the effect of any stipulation in his lease, to yield, it may be, to most unreasonable demands on the part of his workmen. A large fixed rent compels the tenant in a mineral lease to put out a large quantity of minerals upon the very barest profits—indeed it may be without profit, if he can cover working expenses and pay the rent. But if the tenant is in a position to resist demands by his workmen when they become unreasonable by stopping the work for a time, he may thus in the end benefit both the landlord and himself. Keeping that in view, and that the landlord has always this security, that no mineral can be removed without payment of the stipulated royalties, it is not an improbable or unnatural arrangement that a fixed rent should be relaxed in the interest of both parties if it be found to fetter the tenant in his dealings with his workmen. It is notorious that throughout Scotland there were many cases in which, during recent struggles which ended in prolonged strikes, fixed rents were relaxed—I do not say for the whole period of the lease, but for such periods as to enable the tenants to offer resistance to the demands of their men, which it was said could not possibly be acceded to without great loss in carrying on the business of mining. The statement made in the present case is, that from the position of the tenants they were unable to resist the demands of the men, and on that being represented to the landlord he agreed, in order to enable the tenants to resist the demands made on them for increased wages, to restrict the rent from £3000 to £2000 during, as I understand, the whole term of the lease. Then it is stated, that immediately upon that having been arranged—it being agreed that the fixed rent should be reduced from £3000 to £2000, the landlord having of course his lordships if they exceeded the reduced rent—the tenants with his knowledge and assent resisted the demands of their men, with the result that the men were either locked out or refused to work during two of the most profitable months of the year, and the output and sales for that period were thus entirely lost. These are the facts stated, and if the truth of the case be as alleged—if it be true that there was such an agreement as this, and that the tenants in the landlord's knowledge acted on the faith of it, in the very direction which the agreement pointed at, and in the way in which it was expected and intended they would do, with the result of disabling themselves from turning out so much coal as would enable them to pay their rent—justice would seem to require that they should be allowed a proof of their averments and obtain relief if the facts alleged be proved. It is said that even if the agreement was made and acted on as alleged, the defenders cannot be allowed a proof or obtain any remedy. I confess I feel the force of what your Lordship in the chair has pointed out as to the special nature of the averments in the case. I see difficulties in the way of the tenants making out their case upon a proof. The cause assigned for so important a change as an alteration of the fixed rent throughout the whole period of the lease is, as your Lordship has said, apparently inadequate, although it might be otherwise with reference to the rent of a particular year, or of any year in which strikes might occur; and, again, the acts which followed are not on the mere statement of the case to be traced to such an agreement, but may have resulted from other reasons altogether. These are very important difficulties in the de-

fenders' way in this proof. It would require in such circumstances very clear evidence to affect and vary a written agreement. The *prima facie* improbabilities of the defenders' case make it one of great difficulty in the proof. But though it may be difficult, that is no good reason for not allowing a proof if a relevant case be averred; and, upon the grounds I have stated, it does appear to me that the case is irrelevant, and that the proof asked is competent.

Your Lordships are of opinion that if the agreement alleged is inconsistent with the provisions of the lease, and the actings on the agreement are also inconsistent with the lease, the proof ought to be allowed. The agreement here undoubtedly is inconsistent with the lease. The actings which are alleged to have followed are not so. But the agreement, according to the pursuer's statement, was followed by actings of the very kind which it was intended by both parties to lead to, and this to the serious prejudice of the defenders, who acted on the faith of it. That being so, I ask why should they not be allowed a proof? The reason of the rule to which effect was given in the case of *Wark* v. *The Bargaddie Coal Company* I take to be this, that where a verbal agreement to waive or alter a term of a written contract has been followed by acts to which it has naturally given rise on the part of one of the parties, and these acts must be to his serious prejudice if the other party should be permitted to repudiate the agreement because it was not communicated in writing, justice requires that parole evidence of the agreement and actings should be admitted. It is not because the acts are inconsistent with the lease that the proof is admitted, but because the acts are the direct consequence of the parole agreement—that is, because the alleged variation does not rest on words only, but on an agreement constituted by words and made binding by important acts which cannot be undone, and which took place on the faith of it. With reference to the passage in Bell's Principles in which the doctrine of *rei interventus* is mentioned—I mean section 26, in which it is thus described—"*Rei interventus* raises a personal question. . . . It is to be inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obliger to take place on the faith of the contract as if it were perfect, provided they are unequivocally referable to the agreement and protective of an alteration of circumstances, loss, or inconvenience, though not irretrievably." The pursuer maintained that the alleged actings are not unequivocally referable to the agreement. It appears to me that that is a matter not to be determined by shutting out proof which will show whether they are unequivocally referable to that agreement, or not, but by admitting the proof, which alone will throw light on that subject. I do not understand Professor Bell in this passage of his Principles to lay down this, that the actings must be of such a kind as, apart from any evidence, to be clearly and unequivocally referable to the parole agreement or parole variation of a written agreement, and accordingly it appears to me that a proof here should be allowed for the purpose of showing whether these actings were or were not unequivocally referable to the agreement alleged.

It was very fairly put by Mr Asher in the argument, that if it be supposed that this agreement, instead of standing upon entirely verbal communications, had for its basis an informal improbative writing which would have been of no effect, but would simply be a record of what took place, the acts alleged might surely have been proved to have taken place on the faith of it. If an improbative writing passing between the parties had contained a statement that both the landlord and tenant were satisfied that in order to enable the tenant to resist the unreasonable demands of the men it was proper to reduce the rent, and accordingly it had been agreed to do so, would the writing have been of no value unless acted on, and unless the acts founded on were distinctly referable to the parole agreement. But suppose the tenant to have proceeded to act in the very way in which it was contemplated he should do, by immediately afterwards refusing to accede to the demands of his men—shutting them out and shutting up his colliery for a few months—could it be said that that was not an acting referable to the agreement. It could not be shown without evidence. The fact of his having shut out his men a week or two afterwards might have been caused by other reasons not connected with the agreement; and, on the other hand, evidence might show that his actings had reference to and were a direct consequence of the agreement, so that the case would come under the rule of *rei interventus*. A proof alone could clear up this question of fact. I think that is substantially the state of matters in this case, although there is no writing to which you can refer. If the parole agreement is proved, then the action of the defender would be a proper subject for proof, for he undertakes to show that he resisted the demands of his men and shut up his colliery on the faith of it. We have an illustration of the same class of questions in the ordinary case that occurs of advances made by bankers and others on improbative documents. A person undertakes by a writing, which is of no value until it is acted upon in some way, because it is not tested or is wanting in some of the solemnities required by law, to repay any advances that may be made on the faith of his undertaking. The banker proceeds, weeks or months, it may be, afterwards, to advance the money. The banker then brings an action for repayment, and says, "I advanced the money on the faith of that document." Would it be an answer to say that these advances were not unequivocally referable to the agreement—that they in fact have been made on the credit of some other guarantee or without a guarantee at all—and therefore a proof should not be allowed to clear up the question of fact? The answer would be—"I undertake to prove that my actings in making the advances had reference solely to the agreement or undertaking;" and that answer is conclusive. Accordingly, proof in this class of cases has been allowed frequently. A direct authority on that point is to be found in the case of *Johnston* v. *Grant*, 6 D. 895, in which I think the general principle is correctly laid down, that if a man by an improbative writing undertakes an obligation of guarantee, and actings of the kind which he contemplated follow upon it, then the actings will validate the obligation or agreement. The principle of that case applies to the present

to this extent, that it is a question to be determined on evidence whether acts are or are not distinctly referable to a previous parole agreement.

This case is one in which the agreement suggested by defender wants the feature of probability in its favour. But the rule now announced will, it appears to me, apply to cases where this is not so, and may result in great hardship and injustice. I can very well suppose a case in which a landlord residing close to the mineral field worked by his tenant, observing and knowing that his tenant is working at a disadvantage in not being able to resist the demands of his men for higher wages because he has to get a large output from the field to enable him to meet his fixed rent, agrees with his tenant that he shall be placed in a position to resist the men's demands, and that a reduction shall be made from the fixed rent for the year, or for each year in which a strike occurs. This agreement is not reduced to writing, but the tenant thereupon proceeds on the first occasion of a demand for an increase of wages to resist it, and shuts up his works. Thereafter the landlord, ignoring his agreement and the acts following on it, demands his fixed rent. He is met with the answer—"You varied the settled terms of the lease, and with your knowledge I acted on the faith of this." Is proof in such a case to be disallowed and all remedy refused because the acts are not in contradiction of the lease? I apprehend not; and in one view even of this case it might turn out that an agreement to this limited effect was made and acted on. Again, suppose that a landlord agrees with his tenant that he will make a reduction from his rent under a lease of several years' duration if the tenant will make a large outlay in the way of building, draining, planting, or other permanent improvements. The tenant goes on to make the expenditure. The acts are not inconsistent with the lease though the agreement alters one of its terms. According to the present decision it seems to me the tenant would be at the mercy of his landlord. If the view I take of the case of *Wark* be sound, a proof would be competent and justice would be done. Take, again, such a case as that of *Sutherland*. A person undertakes to perform a contract of furnishing machinery or other articles by a date fixed. While in course of carrying out the work the other contracting party finds he cannot take delivery, and requests that the work be delayed, and in consequence the contractor dismisses his workmen and delays the work. It seems to follow from the decision to be now given that the variation by parole, followed by acts however important, cannot be proved, because they are not directly inconsistent with the contract. The result would be to deprive the Court of the power to do justice by allowing proof in circumstances in which it appears to me that proof is admissible. These are illustrations of the result of the view which your Lordships take of this case, and I feel for these reasons constrained to differ from a judgment which would lead to such results.

The only other observation I have to make has reference to a point referred to by two of your Lordships in this particular case—the power of renunciation or break at the end of every three years of the lease, in the tenant's option, and a clause which is generally spoken of in this way, that it is a right "to make up shorts,"—that when the fixed rent in any year exceeds the lordships the tenant is entitled to make up the shortcoming in future years. I do not understand your Lordships' judgment to proceed to any extent on these clauses. For my own part, I think they have little, if any, bearing on the case, and the judgment would obviously be the same if they were both awanting. Upon the whole, I think the case is one in which we should have everything by proof before proceeding to deal with the merits of the case, and that parole evidence of the facts alleged is competent.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and decerned in terms of the conclusions of the summons.

Counsel for Pursuer (Reclaimer)—Kinnear—Lorimer. Agents—MacBrair & Keith, S.S.C.

Counsel for Defenders (Respondents)—Asher—Lang. Agent—Thomas Carmichael, S.S.C.

Friday, December 17.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DAVIE *v.* BUCHANAN.

Partnership—Joint-Adventure.

Held that where one of the partners in a joint-adventure extends the joint-adventure in its natural lines, and acquires for that purpose property with funds raised partly on the credit of the copartners and partly by a mortgage over part of the copartnery assets, it will be presumed that the property was acquired for the joint-adventure, and that the purchaser is bound to account to the copartner suing him therefor.

In the beginning of the year 1864 the pursuer and defender and John Cook entered into a joint-adventure or partnership for the building and working of a river steamer called the "Eagle," which is still plying between Glasgow and Rothesay on the Clyde. The vessel was registered in the name of the defender as managing owner and master, and he duly accounted to the pursuer for the profits of the joint-adventure during the seasons of 1864 and 1865, since which date no accounting took place between them. Three other steamers were subsequently purchased by the defender, as the pursuer alleged, with the funds and on behalf of the joint-adventure, and the present action was therefore raised by the pursuer in the Sheriff Court of Lanarkshire at Glasgow for the purpose of compelling the defender to account to him for his share in the profits or earnings of these vessels. The defender maintained that by an advance made to the pursuer in 1866, by depreciation in the value of the vessel, and by sundry disbursements and advances, the pursuer's interest in the "Eagle" was really exhausted, and he ceased to be a partner, at least on and after 3d December 1868, and that as he had never till August 1879 made any claim upon the defender with regard to the profits of said vessel, his claim was barred by *mora*. A proof was allowed, from which it appeared that in 1867 the steamer