the power to do—at least no Court administering justice by means of trial by jury, for it makes the verdict the verdict of the Court, and not the verdict of the jury.

I consider, therefore, that this is an attempt on the part of the Court, originating in a very laudable desire, on their part, to save the parties the expense of unnecessary litigation, but still an attempt to do that which was altogether *ultra vires.*

Further, I entirely concur with my noble and learned friend, that even if it were not *ultra vires*, it does not put the case in one particle better position than it was in before; because, suppose the jury had returned the verdict in the very words in which it is now entered, it would still have been equally open to the charge of ambiguity, for they "say upon their oath, that they find the case for the pursuers is not proven, and, therefore, that upon the first issue they find it is not proven, that the pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan; and, upon the second issue, that they find it is not proven that the pursuer, James Morgan, is, along with Alexander Morgan, next of kin of John Morgan." That is, it is given as a logical corollary, from finding that the whole case is not proven—that each and every part of it is not proven. That is just open to the very same complaint to which the former finding was open. Therefore I do not think it would have helped the case, even if we had not come to the conclusion, that what the Court has attempted to do is *ultra vires.*

As to the other point, to which my noble and learned friend has referred, I confess, that I have no doubt, upon the construction of the act, that when this House says, that there ought to be a new trial, it is in the power of the House to direct it at once. I do not even think it necessary to recur to the reasoning of my noble and learned friend founded upon the consideration, that we might have directed an issue. I say at once, that this being an appeal to this House, the House is to do justice, which can only be done here by having this unfortunate case re-tried, unless, indeed, the parties have some grains of common sense remaining; and now, that I believe not only the oyster,[1] but the greatest part of the shells, are exhausted, they will take care not to put themselves to any further expenses.

Mr. Solicitor-General.—Before your Lordship puts the question as to costs, your Lordship will forgive my suggesting that the appellants would be entitled to the costs of the proceeding which they took in the Court below, and which your Lordships now have held to be right, to apply the judgment of your Lordships upon the former occasion. The Court below refused so to apply it, but your Lordships have now held that to be the proper mode of applying that judgment.

Mr. Anderson.—We ought to get the costs below. The Court below ought to have given the costs against the respondents.

Lord Advocate.—Your Lordships will bear in mind that no costs were given of this proceeding to either party in the Court below. They were allowed to abide the issue of the cause, and I apprehend they still ought to be allowed to abide the issue of the cause.

LORD BROUGHAM.—We say nothing about costs.

The *order* of the House was as follows:—"Ordered and adjudged, that the said interlocutors complained of in the said appeal be, and the same are hereby *reversed:* And it is further ordered and adjudged, that the cause be, and is hereby remitted back to the Court of Session in Scotland, with instructions to that Court to give the necessary directions for a new trial of the issues for the appellants in the pleadings mentioned."

John Shand, W.S., *Appellants' Agent.*—Webster and Renny, W.S., and Adam and Kirk, W.S., *Respondents' Agents.*

MARCH 15, 1859.

THE BARGADDIE or BARTONSHILL COAL COMPANY (Robert Paterson, J. B. Neilson, &c.), *Appellants*, *v.* ROBERT WARK, *Respondent.*

Proof—Evidence, Parole—Lease of Coal—Confidentiality—Varying Written Lease by Parole—Rei interventus—*A proprietor who had, by a written contract of lease, let the coal under his lands to lessees, who, in terms thereof, were restricted from working within* 15 *feet of the boundaries, on the allegation that this stipulation had been violated, brought an action to have the lessees compelled to erect a barrier or wall of equal thickness. The lessees, who were also tenants of the coal in the adjoining land, averred, that the lessor had consented to allow them to work*

---

[1] His Lordship no doubt here alludes to the result of the appeal, *Magistrates of Dundee* v. *Morris*, 3 Macq. Ap. 134; 30 Sc. Jur. 528; *ante*, p. 747.

through to the adjacent coal, and they specified on the record various matters which, they maintained, formed evidence of consent and acquiescence, which was denied by the lessor, who, however, admitted knowledge of what had occurred. Prior to bringing the action, the lessor had obtained a report and a plan of the workings from a mining engineer, with a view to his information and to the bringing of the action.

HELD (affirming judgment), *That the report and plan were confidential, and that the lessees were not entitled to recover them under a diligence.*

HELD FURTHER (reversing judgment), *That it was competent to prove by parole, against the provisions of the written lease, that the lessors had consented to abandon the restriction as to the working, and that the lessees were entitled to a proof of their averments as to consent to abandon, or to establish acquiescence.*[1]

A contract of lease was entered into between the pursuer, who is proprietor of the estate of Bargaddie, on the one part, and William M'Creath and others, carrying on business under the firm of the Bargaddie Coal Company, on the other part, whereby the pursuer let to them the whole seams of coal which might be found on the lands of Bargaddie, for the period of 25 years from and after Whitsunday 1839, and the lessees becoming bound to pay to the pursuer the sum of £500 sterling of fixed yearly rent, or, in his option, a lordship of 5½d. per cart of the gross output of coals, such cart weighing 13 cwt., and the coals being riddled through a riddle or screen of the customary size.

It was declared by the lease, that the said lessees should "be restricted from working the same (said coal) within the space of fifteen feet from the boundaries of the said lands (the coal of which is now let) with the neighbouring proprietors." And that they should pay surface damage, and they were bound to work the coal regularly and systematically by long wall workings, or any other approved mode, so as to take the whole out whenever practicable, and to go down and work out, regularly and progressively, the lower seams equally with the uppermost, (the lowest seam of coal being agreed on and declared to be the splint coal,) always keeping equal, or nearly equal, surface, unless when, on reference to two skilled persons, this should be found to be impracticable.

The pursuer averred in this action that the defenders had by themselves, or those for whom they were responsible, violated the conditions of the lease in the following ways:—(1) That they had, in several parts of the coalfield, worked out and removed the space of 15 feet of coal, which they were taken bound to leave as a barrier between Bargaddie coalfield and the coalfields of the neighbouring properties; and that they had done so in several parts of the coalfield next the Bredisholm coalfield, which was possessed by the lessees, or by some of them, as tenants; and also in a part or parts of the Bargaddie field next to the lands of Drumpellier, the coal in which last field is not let to them. (2) That they had used the openings in the barrier of 15 feet (which they were taken bound to leave untouched) for the purpose of removing the coal worked in the Bargaddie pit, belonging to the pursuer, to the Bredisholm pit, belonging to another proprietor, and that they had thereby prevented the pursuer from checking the output of coal from his field of Bargaddie. And (3) That they had used the openings in the barrier of 15 feet for the purpose of conveying water by artificial means from the Bredisholm pits to the Bargaddie field, in order to the removal of the water through the Bargaddie pits. These openings had caused a large increase to the natural drainage of water from the Bredisholm to the Bargaddie pit, which had the effect of impeding the proper working of the pursuer's coal mine, or, at all events, might have that effect at the end of the lease.

In these circumstances, the pursuer brought this action against the lessees, in which he sought to have them ordained, at the sight of some person or persons to be appointed by our said Lords, to restore or erect a barrier or wall of equal thickness and strength, wherever the said 15 feet of coal, or any part thereof, had been removed, or to make payment to the pursuer of such sum as may be necessary to restore or erect said barrier or barriers; and that they should be interdicted and prohibited from removing any part of the said barrier of 15 feet, in so far as the same at present exists: Further, that it should be found that the defenders had no title to take coal from the Bargaddie coalfield by the Bredisholm field or pits, or in any other way than by the Bargaddie coalpit; and that they were not entitled to use the Bargaddie coalfield or pit for the purpose of removing water from the Bredisholm field or pits, or to convey the said water into, or through, or along the Bargaddie field or pit; and that they should be prohibited and interdicted from carrying on their operations in future, in any manner in opposition to, or contravention of, the above conclusion: That they should further be decerned to concur with the pursuer in the nomination or appointment of proper persons for the purpose of ascertaining the amount of surface damage due to the pursuer; or, failing their doing so, should remit to persons to be named by the Court to ascertain the amount of the surface damage.

The defenders alleged that they could not work the Bargaddie coal without making a

[1] See previous reports 18 D. 526, 772; 27 Sc. Jur. 224; 28 Sc. Jur. 319. S. C. 3 Macq. Ap. 467; 31 Sc. Jur. 323.

communication between the Bargaddie workings and the adjoining Bredisholm workings, and the pursuer consented to this being done.

After the record was closed, a diligence had been granted to the defenders to recover, *inter alia*, all "plans, sections, and drawings of the defenders' workings of the Bargaddie Coalfield, made from time to time." Mr. Landale, mining engineer, having been examined as a haver under this diligence, stated that he had draft reports and correspondence, which apparently fell under this head of the specification. The pursuer objected to their production, on the ground of confidentiality, as having been written and prepared in terms of special instructions, with immediate reference to the present action. Some other documents in the possession of other witnesses were also objected to on the same ground.

The Second Division sustained the objections to the production of Landale's report; refused to allow proof of pursuers' alleged consent to waive the restriction in the lease as to leaving 15 feet thickness at the boundary, and authorized the pursuer to restore the barrier.

The *defenders* appealed, maintaining in their *printed case*, that the judgments of the Court of Session should be reversed:—"Because the verbal consent of a landlord to the abandonment and withdrawal or modification of the stipulations of a written lease, subsequently acted on by both landlord and tenant for a series of years, was binding on the landlord, and he could not afterwards insist on the stipulations so abandoned or modified. The acquiescence of a landlord in any such abandonment or modification of the stipulations of a lease would in like manner be binding, even if he had given no previous consent. It was sufficiently alleged that the respondent had consented to and acquiesced in, the course of proceeding adopted by the appellants in working the mines comprised in the lease; and (with full knowledge of the extent to which such course of proceeding was a departure from the lease) had accepted, for a series of years, considerable advantages resulting to himself therefrom, and allowed the appellants to incur considerable outlay exclusively in reference to the altered course of working so consented to and acquiesced in by him. "Looking at the express provisions of the lease, and the conduct of the respondent, he was, in any event, not entitled to relief in the way of interdict. "The restoration of a barrier equal in strength and thickness to that which had been broken, was averred on record by the appellants to be impracticable; and such relief, if any, as the respondent might be entitled to, ought not, upon the facts averred, to have been given either by decreeing the appellants to restore the same, or by authorizing the respondent to do so at the expense of the appellants. "Because the allegations recorded by the appellants in the Court below were relevant and sufficient in law to entitle them to a proof thereof in defence against the conclusions of the respondent's action, founded on alleged violation of the lease." Dickson on Evidence, p. 429, § 829; *Kincaid* v. *Stirling*, M. 8404; Bell's Principles, § 26 and §§ 945, 946; *Ayton* v. *Melville*, M. App. *voce* Property, No. 6; More's Notes to Stair, p. lxix.; Hunter on Leases, vol. i. pp. 352, 354; Macfarlane on Issues, p. 230.

In this case the respondents maintained no additional pleas, and merely referred to the following authorities against the competency of parole evidence to control or alter the provisions of the lease—Dickson on Evidence, p. 98.

Rolt Q.C., *R. Palmer* Q.C., and *Anderson* Q.C., for the appellants.—We allege a parole consent on the part of the landlord to forego one of the stipulations of the written lease, and that we acted on the faith of that consent with his knowledge and acquiescence. That is a sufficient defence to any action brought by the landlord on that stipulation in the written lease, and all we ask is to be allowed to prove the facts we allege. It is well settled, that *rei interventus*, following on a verbal contract, will be a bar to the party resiling from that contract, though, if the verbal contract had not been acted on, it would have been bad if inconsistent with writing—Bell's Prin. § 26; Hunter's L. & T. 362; *Kincaid* v. *Stirling*, M. 8404; *Ayton* v. *Melville*, M. App. Property, No. 6. Moreover, acquiescence of itself will often amount to an implied contract, or, at least, will be good evidence to go to a jury from which to infer a prior consent—Bell's Prin. § 945; More's Stair, Notes, 69; *Barr* v. *Stirling, &c., Railway Co.*, 17 D. 582 These propositions are good sense, and hold good also in English law. Lord Cottenham defines acquiescence to be, where A stands by and sees B dealing with A's property in a manner inconsistent with A's rights, and makes no objection while the act is in progress—*Duke of Leeds* v. *Amherst*, 2 Phill. 123; *Dann* v. *Spurrier*, 7 Ves. 231; *Jackson* v. *Cator*, 5 Ves. 688. So where a written license of the landlord was necessary by the lease, but the landlord only gave a verbal license with a fraudulent intent, the Court relieved—*Richardson* v. *Evans*, 3 Mad. 218. In like manner, the Court will refuse relief simply because the party applying acquiesced in the alleged wrong—*Rochdale Canal Co.* v. *King*, 2 Sim. N.S. 78; 16 Beav. 632.

As to the production of the reports of the engineer and letters in reference thereto, these were not privileged on the ground of confidentiality. In *Goodall* v. *Little*, 1 Sim. N.S. 158, it was held that letters, merely written by one party to another, or by a stranger to one of the parties, though with the view of being communicated to the party's solicitor, were not privileged. And that decision was approved of, in *Glyn* v. *Caulfield*, 3 Mac. & G. 463; and it was stated that the doctrine was not to be extended.

Sol.-Gen. (Cairns), and *Sir R. Bethell* Q.C., for the respondent.—There is no doubt the law is, as laid down on the opposite side—Ersk. 3, 2, 2. But on examining the pleadings, it will be found, there is no distinct allegation of consent or of acquiescence. As to the consent, what is alleged was merely limited to a special act; the landlord granted a limited privilege for a short time, and the tenants used the privilege for a different purpose and for a long time. Then as to the acquiescence, it is merely alleged that the landlord *might have seen* the workings going on in the pit, &c.; but it is not distinctly alleged that he did see them. The statements on that head are loose and crafty. There being no distinct allegations, therefore, the ordinary rule comes into play, that a contract in writing is not to be varied by a parole agreement inconsistent with it—*Gibb* v. *Winning*, 7 S. 677; *Scott* v. *Cairns*, 9 S. 246; *Law* v. *Gibsone*, 13 S. 396.

As to the production of documents, the Court rightly held these to be privileged. In *Reid* v. *Langlois*, 1 Mac. & G. 627, it was held, that communications, passing between a defendant and persons employed to collect information to be communicated to the defendant's solicitor, were privileged. So it was in *Steel* v. *Stewart*, 1 Phill. 471.

Rolt replied.

LORD CHANCELLOR CHELMSFORD.—My Lords, this was an appeal against several interlocutors of the Lord Ordinary and of the Second Division of the Court of Session. The case arises upon a lease dated the 25th of December 1839, made by the respondent to the appellants, who were carrying on business under the firm of the Bargaddie Coal Company, of "the whole seams of coal which might be found on the lands of Bargaddie for a period of 25 years," at a certain fixed rent or lordship at the option of the lessor. And in the lease there was a stipulation that the lessees should "be restricted from working the coal within the space of 15 feet from the boundaries of the said lands (the coal of which is now let) with the neighbouring proprietors."

The conclusion of the summons was in these terms,—that it be found and declared "that the defenders have violated the express prohibitions of the lease, in so far as they have removed from a part of the said coalfield the barrier of 15 feet of coal which the defenders obliged themselves to leave unworked along the whole boundaries of the said coalfield; and that it ought to be decerned and ordained that the defenders should restore or erect a barrier or wall of equal thickness and strength wherever the said 15 feet of coal, or any part thereof, have been removed, or to make payment to the pursuer of such sum as may be necessary to restore or erect said barrier or barriers; and the defenders ought and should be interdicted and prohibited from removing any part of the said barrier of 15 feet, in so far as the same at present exists;" and that it should be found and declared "that the defenders are not entitled to take coal from the Bargaddie coalfield by the Bredisholm field or pits, or in any other way than by the Bargaddie coalpits, and that the defenders are not entitled to use the Bargaddie coalfield or pits for the purpose of removing water from the Bredisholm field or pits, or to convey the said water into or through or along the Bargaddie field or pits: And they ought and should be prohibited and interdicted from carrying on their operations in future in any manner in opposition to, or contravention of, the above conclusion."

After a condescendence and answer by the respective parties, the appellants gave in a state of facts which constituted the defence. By the sixth statement they say—"The said lands of Bargaddie, belonging to the pursuer, and containing the coal let to the lessees by the said lease, march in an irregular or zigzag manner with the adjoining lands of Bredisholm, also containing coal, and belonging to a different proprietor. Portions of Bargaddie are also surrounded, or nearly, by portions of Bredisholm. In April 1843 the defenders acquired right to a subtack of the coal and other minerals in a part of Bredisholm estate, called Bartonshill, at a fixed rent without lordship." They go on to say—"It was found that the coal workings within the pursuer's land of Bargaddie were obstructed by what are called upthrow dykes, and that the Bargaddie coal could not be worked in a satisfactory manner without making communications between the workings in the adjoining lands of Bredisholm and the workings of Bargaddie. In consequence, the lessees requested the pursuer to allow them to make such communications as were necessary, and to that effect to waive the restriction in the lease against the tenants working within the space of 15 feet from the boundaries of the pursuer's lands with the neighbouring proprietors. To this the pursuer consented, after making himself acquainted with the plans of the underground workings, and fully informing himself on the subject." Then they go on to state that, "after obtaining the pursuer's consent, the lessees made communications betwixt the underground workings in Bargaddie and those in the Bartonshill part of Bredisholm, by working through the coal at a part of the boundary betwixt the properties." Then they say—"And of all the lessees' operations the pursuer was fully aware. He is, and then was, personally resident in the mansion house at Bargaddie, in the immediate neighbourhood of the coal workings, and has always had access by himself, and the engineers or surveyors employed by him, to inspect the workings and become fully acquainted with the lessees' operations. The operations connected with the communications betwixt the workings of Bartonshill and Bargaddie were conducted with perfect openness, and without any attempt at concealment. The pursuer was aware of them, *inter alia*, by reports, drawings, and information furnished to him by surveyors

and others at different times during the currency of the lease; and he acquiesced in them without complaint or objection. Further, and in the full knowledge of the lessees' operations, the pursuer received lordship on the Bargaddie coal wrought out in passing through the 15 feet next to the part of Bredisholm called Bartonshill. He also received lordship on a large quantity of Bartonshill coal, which was taken through the said communications with Bargaddie, and put out at the pit mouth on his land of Bargaddie. He did so in the full knowledge of the said communications and the lessees' operations, to which he assented."

The case was brought before the Second Division of the Court of Session by a reclaiming note against an interlocutor of the Lord Ordinary, upon two pleas in law for the defenders, which it is unnecessary for me to state. The Second Division of the Court of Session, by an interlocutor, allowed the defenders to give in a minute to that Division of the Court, "in reference to the averments in article 7th of their statement of facts, setting forth specially the date and form of the alleged request made by them to the pursuer, to allow them to make the communications referred to as previously allowed by the Lord Ordinary." Upon this an amendment was given in for the defenders in these terms:—"The request mentioned in the seventh article of the defenders' statement of facts was made to the pursuer verbally by Robert Paterson, one of the partners of the defenders' firm, and Mr. James Wingate, then the defenders' manager, at a meeting with the pursuer at Bargaddie, in or about July 1845. The request was to the effect, that the pursuer should waive the restriction in the lease against the tacksmen working the coal within the space of 15 feet from the boundaries with neighbouring proprietors, and allow the defenders to work through the said 15 feet at such places as they might consider proper." Then the defenders say—"From what passed in conversation betwixt the parties, as well as from the pursuer's previous knowledge, he was fully aware of the defenders being tenants of the neighbouring coal, and of the state of the coal workings, when he consented and agreed to waive the restriction as above mentioned. In or immediately after the said month of July 1845, the defenders, in reliance on the said consent and agreement, commenced, and thereafter, in the course of the said year and following years, carried on the coal workings and output, and other operations which are mentioned in articles 8th, 9th, 10th, 11th, and 12th of their statement of facts. The pursuer also acted in the manner therein mentioned. Of the defenders' operations, as they proceeded, the pursuer was fully aware, in the years 1845, 1846, 1847, and subsequently; and in the full knowledge of them, he acquiesced in the defenders' operations, without complaint or objection." And the appellants pleaded additional pleas in law.

The Court pronounced the following interlocutors. They find "that it is incompetent to prove a verbal communing by which consent by a landlord to abandon and withdraw an important stipulation in a written lease is proposed to be established, and that the offer of proof is incompetent by the law of Scotland: Further, find that on the record no facts are averred sufficient in law to establish against the landlord his acquiescence in or adoption of the mode of working through the barrier of coal excepted from the lease as a legal act of the tenants sanctioned by the landlord, and repel the pleas in law founded on these two alleged grounds of defence." In their second interlocutor, which is the sixth appealed from, they "find, in regard to the conclusions for restoring or erecting a barrier equal in strength and thickness to that which has been broken, that the defenders prefer that decree should issue authorizing the pursuer to restore the same at their expense, so far as the expense of the works shall be ascertained, and found to be necessary and proper: Therefore, authorize the pursuer to erect and restore the said barrier at the expense of the defenders as above, and direct the pursuer to furnish to the defenders, if required by them, the plan and specification of the work they propose to carry through for the above purpose, and interdict and prohibit the defenders from in any way removing any part of the said barrier which at present remains: Further, declare, decern, prohibit, and interdict, as craved in the second conclusion of the summons."

My Lords, it is upon these last two interlocutors that the principal question arises before your Lordships. By the law of Scotland a written agreement cannot be varied or waived by words only, and if the permitted waiver or variation rests entirely on parole, there remains a *locus pœnitentiæ* to the person who has consented to the variation or waiver. It cannot be enforced against him. But if, after a parole agreement has been made, there is what the law calls *rei interventus;* that is, if there are acts and circumstances following upon the agreement in performance of it, then it is no longer revocable. It is as valid as if it had been made in writing.

My Lords, this is clearly stated in a passage cited from Bell's Principles, § 26, "*Rei interventus*," he says, "raises a personal exception which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obligor to take place on the faith of an imperfect contract as if it were perfect, provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable." And the case of the appellants is put entirely upon this ground. They say, "We request you, the lessor, to give us permission to make communication between the Bargaddie coal pits and the adjoining coal pit of Bredisholm, to waive the restriction under the lease of working within the distance of fifteen feet from the

neighbouring coalfields. You consented to that. That request is stated, with the date and the circumstances. And upon that consent we proceeded to work with your full knowledge and acquiescence. And during our operations in the year 1845, 1846, and 1847, you, being fully aware of them, acquiesced without complaint or objection."

My Lords, observations have been made with regard to the nature of these statements. It was urged that they were not sufficiently explicit. I apprehend that these statements are not to be viewed with the technical strictness and accuracy of pleadings.

There can be no doubt whatever, that what is meant to be alleged by the defenders is sufficiently alleged to enable the Court to know what are the facts and circumstances which are intended to be established, and that the case which was proposed to be made by the appellants was an entire case, consisting of previous consent, and subsequent acquiescence.

The Court of Session dealt with this case in a manner which I must say, to my mind, is not satisfactory. They divided the case into two parts, first, consent, and afterwards acquiescence. And upon the subject of the consent, the Lord Justice Clerk stated his opinion thus: "They say that the request was verbally agreed to. Now, I hold it to be perfectly incompetent to prove such a relaxation or departure from an important part of a written lease by parole evidence. It is in vain to say, we will prove such a request was made, and that the subsequent operations tend to shew, that they were acting upon an agreement. That is reasoning in a circle. The first thing to be established is, that there was such an agreement as that averred. Therefore, any operation which takes place after that date never can be of the smallest value in proving the existence of that agreement." And he says further, "Therefore the averment in the leading parts of the defenders' statement cannot be admitted to proof, it being stated distinctly, that these were parole statements, which are only to be proved by parole evidence."

Having thus dismissed the parole agreement entirely from the case, the Court then proceeded to consider the allegation of acquiescence, not as following upon a parole agreement, but as something substantial and independent, and to be determined entirely upon the circumstances connected with it. And, with regard to that, the Lord Justice Clerk says,—"We must lay aside everything as to the agreement, and confine ourselves to the single question whether the pursuer lost his right to enforce the obligations in the lease, and the right to prevent the barrier of 15 feet being removed, by acquiescence in the acting of the defenders." "Here we have no averment, even of acquiescence at the time when the operations were carried on, but only of knowledge afterwards, which is not enough to take away an heritable right, or restrain a landlord in the exercise of such a right." And the other Judges held that there were no averments on the record amounting to acquiescence.

My Lords, this appears to me not to be the proper way of dealing with the appellants' case. The appellants' case, as I have said, is one which is entire,—which depends, first of all, upon a parole agreement, followed out by a proof of acquiescence. And that acquiescence will be sufficient to give validity and force to a parole agreement appears clearly from another passage in Bell's Principles, to which I must also direct your Lordships' attention. In section 946 he says—"The principle seems to be, that mere acquiesence may, as *rei interventus*, make an agreement to grant a servitude or to transfer property binding, or may bar one from challenging a judicial sentence. But that, where there is neither previous contract nor judicial proceedings, there must be something more than mere acquiescence,—something capable of being construed as an implied contract or permission followed by *rei interventus*. Where great costs are incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right."

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 costs incurred by the operations,—something allowed to be done which manifestly cannot be undone; and, under these circumstances, the law will presume an agreement or conventional permission.

If this case had been rested entirely upon the mere verbal consent, then the authorities which were cited on the part of the respondent would have been applicable. I allude to the case of *Gibb* and of *Scott*. In *Gibb's* case there had been an abatement of rent for eight years, no agreement being proved for that abatement. And it was held, that that was not sufficient to warrant the presumption that the lessor had agreed to an abatement of rent for the term. Now, it is evident in that case, there being no previous agreement, it was necessary for the party who claimed to be entitled to pay the rent with an abatement, to shew facts and circumstances sufficiently strong to prove a consent and agreement on the part of the lessor to waive the rent for the term. For the mere acceptance of a lower amount of rent certainly was not sufficient to establish more than that, for the particular periods in which that rent was received, the landlord had agreed to receive that amount.

With respect to *Scott's* case, that was the case of a person who had commenced to use a house as a hotel or inn, contrary to a stipulation in the lease, and he alleged, that the landlord had verbally agreed to his so using the house. But your Lordships will observe that, in that case the moment the lessee began to use the house in a way which was prohibited by the lease, the landlord proceeded by interdict to stop him, and therefore there was nothing whatever which could be considered to amount to a consent. That case, therefore, merely establishes the proposition for which the respondents have been contending, namely, upon a mere verbal agreement it is necessary to do something more than to prove consent to that agreement. You must shew facts and circumstances in order to establish a completely binding agreement upon the landlord.

If the case of the appellants is that which I have described, and which it clearly appears to me to be, namely, that of previous consent followed by acquiescence, it certainly seems an improper way to deal with the case, first of all to say that a parole agreement cannot be proved because it is parole, and then, having got rid of that parole agreement, which is the only foundation of the subsequent acquiescence, to treat that acquiescence independently and separately, and to say that it does not establish facts and circumstances sufficient to prove an independent agreement. I think the appellants might very well say, although separately, those two things, consent and acquiescence, will not; yet *juncta juvant.*

Now, the respondent's counsel have argued ingeniously in this way. They say, the consent that was given was a consent merely for the purpose of enabling the lessees to work the Bargaddie coal pit more favourably. *Rei interventus* will not avail unless it establishes facts and circumstances which are unequivocally referable to the agreement. But in this case the lessees, after having opened the communications between the Bargaddie coal pit and the Bredisholm coal pit, used the Bargaddie coal pit and the Bredisholm coal pit for the purpose of removing the Bargaddie coals through the Bredisholm coal pit. They, therefore, went beyond the limits of their permission which was given to them. And consequently any acquiescence which may be shewn in those particular acts will not be referable at all to the original consent, but must be such as to be sufficient to have raised an independent agreement without that consent.

I apprehend, that although this argument is extremely ingenious, yet it is not sound. The lessees say, we had a license to remove the barrier of fifteen feet coal between the Bargaddie coal pit and the adjoining coal. We have done so; that was the liberty which was given to us. If that liberty has been abused, or if it has been used for a different purpose from that which was intended, that will not enable the lessor to say, I may revoke that license, and call upon you to restore the barrier, although undoubtedly it might give a claim to the lessor to recover damages for the use of those openings beyond the purpose for which they were intended.

The question on this part of the case appears to me to be, whether, after the lessor had granted the liberty to open communications and work the barrier of fifteen feet, he could compel the lessor to replace the barrier *in statu quo.* Now, it appears to me that, under the circumstances, the offer of proof on the appellants' part of the landlord's having consented to waive the restriction as to the working, is not incompetent, because it does not stand alone, but is followed by an averment of acquiescence which is a sufficient allegation to admit proof of facts and circumstances to establish it. And the appellants having had the verbal consent of the respondents to remove the barrier, and having acted upon that consent, they may defend themselves against the proceeding of the respondent to procure the restoration of it. And the interlocutor directing this to be done cannot, in my opinion, be sustained.

It appears to me, therefore, that it will be right to reverse the interlocutor, which is the fifth appealed from, as to its being incompetent to prove a verbal communing, and as to there being no facts averred sufficient in law to establish against the landlord his acquiescence in, or adoption of, the mode of working through the barrier of coal excepted from the lease as a legal act of the tenant sanctioned by the landlord. And that it will be right also to reverse all the sixth interlocutor appealed from, with the exception of that part of it which grants interdict as craved, in terms of the second conclusion of the summons, which is with regard to the defenders "being entitled to take coal from the Bargaddie coalfield by the Bredisholm fields or pits in any other way than by the Bargaddie coal pit, and that the defenders are not entitled to use the Bargaddie coal pit or field for the purpose of removing water from the Bredisholm field or pit, or to convey the said water into, or through, or along the Bargaddie field or pit, and that they ought and should be prohibited and interdicted from carrying on their operations in future, in any manner, in opposition to, or contravention of, the above conclusion." And then that the case ought to be remitted to the Court of Session, with a declaration that the Court ought to have directed an issue, whether the barrier coal worked and removed by the appellants was so worked and removed with the consent of the respondent, and that, after the trial the Court will deal with the interdict and the rest of the case as justice requires.

My Lords, there may be some difficulty in the statement of facts, as it at present exists, with regard to the extent of the consent which was given by the lessor. It may be that the consent

will only extend to that which has already been done, and that the lessees would not be entitled to go on further, and to make any additional openings or communications.

It may be, that in consequence of the expensive workings which have taken place, as the results of the consent of the lessor to make those openings and to work the Bargaddie coal field in a particular manner, that consent may be considered to extend to all the operations which may be necessary in the whole line of the barrier from one end to the other. And with regard to the openings allowing the Bredisholm pit to drain into the Bargaddie coal pit, it may be, that that is a necessary consequence of acting upon the consent which has been given to make those openings. At all events, it is difficult to understand how the lessor can at the present moment, during the existence of the lease, object to the lessees allowing water to drain from the Bredisholm pit into the Bargaddie, although at the expiration of the lease he might be entitled to require the lessees to put the Bargaddie coal into a proper state, the state in which they ought to have kept it, and in which they ought to render it up to the lessor.

However, the issue which is suggested will, as it appears to me, raise all the questions which it will be necessary for the Court ultimately to decide. It will raise the question, whether there was a previous consent on the part of the respondent to make these openings, or whether there was such a ratification or acquiescence in the acts which were done as would amount in itself, without a previous verbal agreement, to an independent agreement, so as to bind the lessor to allow these operations to continue during the continuance of the term.

There is one other question which it is necessary to say a very few words about, which is as to the admissibility of the documents. They appear to consist of certain correspondence between Messrs. Horne and Rose, who were the law agents for the pursuer, and Mr. Landale, the engineer referred to in the correspondence. The Lord Ordinary states, that after examination he has considered that their production ought to be refused; that these documents were protected as written to inform the pursuer, and under the instructions of counsel previous to raising the present action. Now those documents clearly may be privileged under the circumstances stated by the Lord Ordinary, just in the same way as a brief prepared for a trial, or as a case for counsel's opinion, would be privileged. The Lord Ordinary, after examination of these documents, has come to the conclusion, that they were entitled to the privilege upon the grounds he has stated. We have not had the advantage which the Lord Ordinary possessed of seeing those documents, but I think we ought to be bound by the judgment which has been expressed by the Lord Ordinary upon the subject, unless we see very clearly that, under no circumstances, could documents of this kind be privileged. I therefore should submit to your Lordships, that the judgment of the Lord Ordinary, in that respect, as to the inadmissibility of these documents as evidence, ought to be upheld.

Under these circumstances, therefore, I shall advise your Lordships, that the first four interlocutors ought to be affirmed; that the fifth interlocutor ought to be reversed; and that the sixth interlocutor ought to be reversed, with the exception of that part of it which grants the interdict according to the second conclusion of the summons.

LORD CRANWORTH.—My Lords, I have hardly a word to add to what my noble and learned friend has said. I entirely concur with him in all the principles he has laid down. The main reason for my rising is to offer a suggestion with reference merely to the form in which the order should be drawn up with regard to the last interlocutor, which appears to me a matter of some nicety. I doubt whether what my noble and learned friend read of the interlocutor would include all that he meant to retain. I should propose, therefore, to reverse the fifth interlocutor, and so much of the sixth as authorizes the respondent to erect and restore the barrier at the expense of the appellants, and directs the respondent to furnish the appellants, if required by them, a plan and specification of the work which he proposes to carry through for the above purpose. That leaves the rest of the interlocutor untouched. It is a mere matter of form; it has the same meaning; but it seems to me that it makes it more clear.

With regard to the general principle which has been argued, I should be very sorry indeed to think there is any principle in the Scotch law which rendered it at all possible, uniting law and equity together, that if a person, having what we call here a legal right under a lease, authorizes something to be done by his tenant in contravention of that lease, and it is done accordingly, that the tenant is still liable for a breach of contract, having done that which his landlord authorized him to do. Now I entirely agree in the principle laid down by the learned Judges of the Court of Session, and should be very sorry to suppose, that this House at all interfered with it—that previous consent, taken by itself, is nothing—and probably no such issue as that which is now ordered would rightly be directed, unless as auxiliary to something which is to follow the acting on that consent. Unless my memory greatly deceives me, (there are many at the bar who can contradict me if I am wrong,) I think I have known proceedings in the Court of Chancery for specific performance of parole contracts after part performance, when a doubt having been raised whether there was any agreement at all, although there was no doubt a part performance, there has been an express issue directed whether it was verbally agreed to do so, and so I think

I remember cases of that kind, and I see no harm in such an issue being directed by the Court of Session.

By the way in which my noble and learned friend has proposed to direct the issue, any difficulty in point of form is got over, because what he proposed is to direct the Court of Session to direct an issue, whether the working and removal of the barrier of coal since the time when the alleged parole agreement was given was with the consent of the respondent. The consent of the respondent, in my mind, will include everything, because, although we do not use the word "acquiescence," acquiescence necessarily involves consent, for in truth acquiescence is only important as being evidence of consent. Therefore I entirely agree with the motion of my noble and learned friend. The form of the order may perhaps be improved by putting it in the way I have proposed.

LORDS WENSLEYDALE and KINGSDOWN concurred.

Mr. Rolt.—As I understand your Lordships, the interdict will still be under the control of the Court of Session.

LORD CRANWORTH.—Yes; my noble and learned friend proposed that, after the trial of the issue, the Court should deal with the whole question as justice may require.

The following *order* of the House of Lords was made:—"Ordered that the said interlocutors of 7th February 1855, 27th February 1855, 12th June 1855, 9th February 1856, so far as complained of, be affirmed: and further ordered and adjudged, that the said interlocutor of 8th March 1856, be, and the same is hereby, reversed, save and except so far as it interdicts and prohibits the defenders from in any way removing any part of the barrier therein mentioned, which at present remains; and so far as it declares, decerns, prohibits, and interdicts, as craved, in the second conclusion of the summons, and so far as it finds no procedure to be necessary in regard to the separate defence for Mr. M'Creath: and declared that the said Second Division of the Court of Session ought to have directed an issue, whether the barrier coal was worked and removed with the consent of the pursuer: and also further ordered, that the cause be remitted back to the Court of Session to do therein, as well in regard to the said interdict, after the said issue shall have been tried, as in regard to all claims of either party to the expenses hitherto incurred in the Court below, and in all other respects as shall be just and consistent with this declaration and judgment."

Appellants' Agent, Alexander Hamilton.—*Respondent's Agents*, Horne and Rose.

MARCH 24, 1859.

DAVID STEWART GALBRAITH, JOHN CULLEN, W.S., and DAVID STEWART GALBRAITH, Junior (MacCrummon's Trustees), *Appellants*, *v.* The EDINBURGH and GLASGOW BANK, and JOHN WHITEHEAD, S.S.C., and CHARLES MORTON, W.S., Assignees of the Bank, *Respondents*.

Writ—Probative Deed—Act 1696, c. 15—Pagination—Testing Clause—Reduction.

HELD (affirming judgment), *That a bond, the pages of which were not marked with the numbers first, second, &c., as required by the Statute* 1696, *c.* 15, *was invalid, although the testing clause set forth correctly the number of pages of which it consisted.*[1]

In 1814 the late Malcolm MacCrummon, formerly Sheriff Clerk of Skye, and Margaret Frazer, his wife, on the narrative, that there were no children of their marriage, and with the view of settling the succession to their property, conveyed their whole heritable and moveable estates to Rear Admiral Bisset, the appellant David Stewart Galbraith, and Charles Stewart, W.S., as trustees for payment, 1st, of debts and funeral charges; 2nd, of the free produce of the whole property to the spouses in liferent; 3rd, of certain legacies; and 4th, of the remainder and residue to the survivor.

In 1818, Mrs. MacCrummon died; and on the 31st May 1822, Mr. MacCrummon executed a trust disposition and settlement, and other testamentary deeds, by which he made additional provisions for the wife and children of the appellant, David Stewart Galbraith. He also conveyed the whole residue of his property belonging to him at his death, after satisfying these

---

[1] See previous report 18 D. 470; 28 Sc. Jur. 205. S. C. 31 Sc. Jur. 425. See Statute 19 and 20 Vict. cap. 89, abolishing the necessity of numbering the pages of deeds.