BARGADDIE COAL COMPANY, . . APPELLANTS.
WARK, ... RESPONDENT.

1859.
March 11th, 14th, and 15th.

The Court below had held: 1. That a parol agreement by a lessor to permit his lessee to depart from a written stipulation in the instrument of lease could not competently be admitted to proof; 2. That part performance by the lessee of the parol agreement under the eyes of the lessor could not be taken even to aid proof of the parol agreement; and, 3. That acquiescence in the part performance of the verbal agreement was no bar to the enforcement of the execution of the written agreement. The Court below had further interdicted the lessee from availing himself of the operations which he had thus executed, and they further authorized the lessor to erect a barrier on the premises at the expense of the lessee.

The House reversed this Judgment, and directed an issue.

Agreement. — Rei interventus. — Acquiescence. — Per the Lord Chancellor: By the law of Scotland a written agreement cannot be waived or varied by words only.

But if after a parol agreement there occurs, what the law calls *rei interventus*, that is, if acts and circumstances follow upon the agreement, in performance of it, the the agreement will, in that case, be as binding as if it had been originally in writing; p. 477.

Per the Lord Chancellor: The acquiescence which will support and give validity to a previous parol agreement, is something less than the facts and circumstances which will be required to enable you to presume an agreement; p. 480.

Per the Lord Chancellor: It seems an improper way to deal with the case, first to say that an agreement cannot be proved, because it is parol, and then, having got rid of that parol agreement, which is the only foundation of the subsequent acquiescence, to treat that acquiescence

BARGADDIE COAL COMPANY v. WARK.

independently and separately, and to say that it does not establish facts and circumstances sufficient to prove an independent agreement; p. 481.

Per Lord Cranworth: I should be very sorry to think there was any doctrine in the Scotch law, which rendered it at all possible, that, if a lessor authorizes something to be done by his tenant in contravention of his lease, and it is done accordingly, the tenant is still liable as for a breach of contract; p. 486.

Revocation of Licence.—Per the Lord Chancellor: The fact that a licence has been abused, or turned to a purpose different from that which was intended, will not entitle the lessor who has granted the licence to say, "I revoke it," although he may have a claim of damages against the lessee; p. 482.

Privileged Documents.—Circumstances under which certain documents, which had been prepared with a view to an action at law, were deemed to be of a confidential nature, and so not liable to production at the requisition of the other party; and this confidentiality was held to protect not only the writer to the signet who had conducted the legal proceedings, but also a mining engineer employed in the business; p. 488 *et seq.*

Per the Lord Chancellor: These documents clearly may be privileged, as having been written with a view to the information of the Pursuer under the instructions of Counsel, previous to raising the present action; just in the same way as a brief prepared for a trial, or as a case for Counsel's opinion, would be privileged; p. 496.

THE Pursuer, Mr. Wark, of Bargaddie, in his revised condescendence, stated as follows:—

1. By contract of lease, dated 25th December 1839, between the Pursuer on the one part, and the Bargaddie Coal Company on the other part, the Pursuer had let to the Company the whole seams of coal which might be found on the lands of Bargaddie for the period of twenty-five years from and after Whitsunday 1839, which was declared to be the commencement of the said lease, for which the Company bound and obliged themselves, and their heirs, executors, and successors, as well as their sub-tenants and assignees, to pay to the Pursuer the sum of 500*l.* sterling of

fixed yearly rent, or, in his option, a lordship of $5\frac{1}{2}d.$ per cart of the gross output of coals, such cart weighing 13 cwt., and the coals being riddled through a riddle of the customary size, the said fixed rent or lordship payable at the terms of Martinmas and Whitsunday, by equal portions.

2. By the lease it was declared that the lessees should "be restricted from working the coal within the space of fifteen feet from the boundaries of the land with the neighbouring proprietors."

3. By the lease the lessees bound themselves to pay to the Pursuer the whole surface damage which might be occasioned to the said lands or the houses, or crops and fences thereof, by or in consequence of the coalhills, roads, boring, pitting, shanking engines or machinery, or any other operation connected with the working or taking away of the said coals, as the same should be ascertained by two neutral men, to be mutually chosen by the said parties, with power to choose an oversman in case of their differing in opinion.

4. The lessees had continued in possession in virtue of said lease, and were then engaged in working the coal, by themselves, or others acting under their employment, or in virtue of powers derived from them, or for whose acts they were otherwise liable.

6. The lessees had, in several parts of the said coalfield, worked out and removed the space of fifteen feet of coal, which they were taken bound to leave as a barrier between Bargaddie coalfield and the coalfields of the neighbouring properties; and, in particular, they had done so in several parts of said coalfield next the Bredisholm coalfield, which is possessed by the said lessees, or by some of them, as tenants thereof; and also in a part or parts of the Bargaddie field next to the lands of Drumpellier, the coal in which last field was not let to them.

7. The lessees had used the said openings in the barrier of fifteen 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 worked by the said lessees, or some of them, as tenants, and they had thereby prevented the Pursuer, and, if said openings were allowed to remain, would continue to prevent the Pursuer, from checking the output of coal from his field of Bargaddie.

8. The lessees had used said openings in the barrier of fifteen feet for the purpose of conveying water by artificial means from the Bredisholm pits to the Bargaddie field, in order to the removal of said water through the Bargaddie pits; and these openings also 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.

BARGADDIE COAL COMPANY v. WARK.

9. The lessees had also refused to agree to a reference of the question of the amount of surface damage caused by the operations of them, or some of them, to the decision of neutral men, in terms of the lease, upon the ground that they were not liable therefor.

10. The extent of ground belonging to the Pursuer occupied and damaged by the coalhill, roads, and branch railway connected with the mining operations of the lessees, or some of them, or others acting as set forth in article 5, for reparation of which the Defenders are liable, was 2 acres 2 roods and 20 poles, imperial measure. The Pursuer had also suffered damage by the severance of his fields caused by said operations. The value of said ground, and the damage done by the severance of his fields, he estimated at 300*l.* sterling.

The conclusions of the summons were as follows:—

1. It ought to be found and declared, that the Defenders have violated the prohibitions of the lease, in so far as they have removed from a part of the said coalfield the barrier of fifteen feet of coal, which the Defenders obliged themselves to leave unworked along the whole boundaries of said coalfield; and the Defenders ought to be decerned and ordained, at the sight of some person or persons to be appointed by the Court, to restore or erect a barrier or wall of equal thickness and strength, wherever the said fifteen 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 fifteen feet, in so far as the same at present exists. 2. It ought to 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 coalpit; and that the Defenders are 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 they ought to be prohibited and interdicted from carrying on their operations in future in any manner in opposition to, or contravention of, the above conclusion. 3. The Defenders ought to be decerned and declared to concur with the Pursuer in the appointment of proper persons for the purpose of ascertaining the amount of surface damage due to the Pursuer; or failing their doing so, the Court ought to remit to persons to be named by the Pursuer, or by the Court, for the purpose of ascertaining the amount of said surface damage; and on the amount thereof being ascertained, the Defenders ought to be decerned and ordained to make payment to the Pursuer of the sum of 300*l.* sterling, or such other sum as

may be found to be the amount thereof, with periodical interest thereon from the time when the same was incurred and ought to have been paid.

The Pursuer's pleas in law were these :—

1. The Defenders, lessees of the Bargaddie Coal Company, or others acting as set forth in article 5 of the condescendence, having, in violation of the express prohibition contained in the lease, removed the barrier of fifteen feet from several parts of the boundary of the Pursuer's coalfield, the said Defenders are bound to erect a barrier of equal thickness and strength wherever the coal has been so removed, and ought to be interdicted from violating said prohibition against the removal of the barrier in question.

2. The said lessees, or others acting as aforesaid, are not entitled to remove, and ought to be prohibited from removing, any part of the coal worked out of the Bargaddie coalfield by or through the Bredisholm pit, or in any other way than by the Bargaddie pit.

3. The said lessees, or others acting as aforesaid, ought to be prohibited from using any part of the Bargaddie coalfield or pit, for the purpose of removing water from the Bredisholm field or pit, at least in so far as the same exceeds the natural amount of drainage, if any, which would have existed if the barrier had not been removed.

4. The said lessees ought to be ordained to concur in the appointment of proper persons for the purpose of ascertaining the amount of surface damage caused by the operations of the said lessees, or others acting as aforesaid.

5. Or, failing their doing so, the Court ought to remit to parties to be named by the Pursuer or by the Court, to ascertain the amount of said surface damage; and the Pursuer is entitled to decreet, in terms of the conclusions of the summons, for the amount so ascertained to be due to him.

6. The Defenders, the said lessees, having expressly bound themselves as liable, jointly and severally, along with their assignees and subtenants, for all the stipulations of the lease, the Defender William M'Creath is liable, in terms of the conclusions of the summons, even if he had ceased to be a partner of the Bargaddie Coal Company, and due and formal intimation to that effect had been given to the Pursuer.

On the other side, the "Statement of facts" presented by the Company in defence was to the following effect :—

7. It was found that the coal workings were obstructed by what are called "upthrow dykes," and that the coal could not be worked

BARGADDIE COAL COMPANY v. WARF.

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 fifteen 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.

8. 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. But, in doing so, they observed the proper precautions against injury, by leaving sufficient pillars of coal for support and otherwise.

9. Of all the lessees' operations the Pursuer was fully aware. He 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 to 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.

10. In the full knowledge of the lessees' operations, the Pursuer received lordship on the Bargaddie coal wrought out in passing through the fifteen 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 lands of Bargaddie. He did so in the full knowledge of the said communications and the lessees' operations, to which he assented.

11. A small isolated portion of Bargaddie coal was, by means of the said communications, passed through and taken out at a pit on the lands of Bredisholm. This quantity extended to about 5,000 carts, and the lordship on it amounted to about 115*l*. The Pursuer was also fully cognizant of these facts, and was fully compensated for the said sum by a much greater amount of lordship paid to him on a larger quantity of Bartonshill coal, passed through and put out at the Bargaddie pit, as above mentioned.

12. The Bargaddie field being in a lower level than the Bredisholm, the water of the latter naturally reached or was drained into the former before the lessees performed the operations above referred to, and the water required to be taken away by the Bar-

gaddie pit. There has been no material increase of water in the Bargaddie pit since or in consequence of the said operations, and the lessees have been removing all the water by the Bargaddie pit. The erection of a barrier so as to prevent the passage of water from Bredisholm to the Bargaddie pit would not be practicable.

13. The Defenders expect that the whole of the Bargaddie coal will be wrought out, in virtue of the lease, before its stipulated expiry in 1864. The Pursuer has no fair or legitimate interest to insist that the lessees shall erect a barrier or wall, as demanded; and the claim that they shall be at the cost of such an erection is nimious, oppressive, and in violation of his previous consent and proceedings in reference to the foresaid operations.

14. In reference to the Pursuer's conclusion for 300*l.* in name of surface damage, the lessees aver that it is altogether exorbitant. In 1843 the Pursuer agreed with the Defenders in submitting a claim then made by the Pursuer to Mr. Black of Easterhouse, and Mr. Baird of Highcross, two experienced valuators mutually chosen. After meeting the parties on the ground, these valuators fixed the amount of the damage then in question at 8*l.* 6*s.* 3*d.*, by a written award, of which the Pursuer obtained possession, and which he is called on to produce. The lessees thereafter repeatedly tendered the amount to the Pursuer, but he refused to accept it, on the pretext that it was too small. Having no desire to dispute with the Pursuer about such a trifling matter, the lessees agreed, in 1851, to enter into a submission with him, of all his surface damage claims, to Mr. John Baird of Lochwood, and a Mr. Baillie. The Pursuer, however, objected to that submission being proceeded with. The Defenders are still quite willing to have the surface damage ascertained by men mutually chosen, and they are ready to name Mr. John Baird of Lochwood as valuator on their part. The present action was and is altogether unnecessary for procuring a valuation. The counter averments denied.

The pleas in law on behalf of the Company as annexed to the above statement were these:—

1. The action is untenable in so far as directed against William M'Creath (*a*), in respect he ceased, in May 1844, to be a tenant under the lease libelled on, in the circumstances before set forth.

2. The Pursuer has not established or set forth matter relevant or sufficient in law to support this action, or his title and interest to insist in it.

3. The Pursuer is not entitled to complain of the Defenders having partially worked through the fifteen feet of coal referred to in the lease, or to insist that they shall erect a barrier as demanded,

(*a*) The Defendant M'Creath joined in the defence, but his case had a specialty of no interest except to himself.

seeing (1) the Pursuer assented to and acquiesced in all the Defenders' operations; (2), the Pursuer cannot qualify any injury thereby sustained; (3), the erection of a barrier to any useful purpose is impracticable.

4. The Pursuer has not set forth, and does not possess, any right, title, or interest to insist that the Defenders shall not remove Bargaddie coal by Bredisholm pit, or shall not remove, by the Bargaddie pit, water reaching it from Bredisholm; and his conclusions are groundless and unreasonable.

5. The Defenders never having refused to concur in naming valuators for the purpose of ascertaining surface damages, the action is unwarranted.

6. The Pursuer's allegations being either groundless in point of fact, or irrelevant and insufficient in law to support the action, the Defenders are entitled to *absolvitor*, with expenses.

Lord *Handyside* pronounced the following Interlocutor on 12th June 1855:—

The Lord Ordinary repels the first and second pleas in law for the Defenders, and, before further answer, allows them to give in a minute in reference to the averments in article seventh 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; and, to that effect, to waive the restriction in the lease there specified, and the date of the Pursuer's alleged consent to the request so made, and in what way or manner he gave that consent, and by what mode of proof they propose to establish it.

The Appellants having presented a reclaiming note against Lord *Handyside's* Interlocutor, in so far as it repelled their first and second pleas in law, the Second Division of the Court below, on the 9th February 1856, adhered to the Interlocutor.

Thereafter, the following minute and amended minute were successively lodged for the Company:—

Minute.—In obedience to the prefixed Interlocutors, the Defenders aver that,—

1. The request referred to in the 7th article of their statement of facts was made in or about June or July 1845.

2. The said request was made, not in a written form, but verbally, at a meeting or meetings at Bargaddie, betwixt the Pursuer and Defenders, or Robert Paterson, one of the partners of the Defenders' firm.

3. The Pursuer consented to the said request in or about June or July 1845, and—

4. He did so, not in writing, but verbally, to and in presence of the Defenders, or of the said Robert Paterson, at a meeting at Bargaddie, at which there were also present Neil Blair, then a salesman in the employment of the Bartonshill Company, and now deceased, and James Wingate, then manager to the Bartonshill Company, and now or lately coalmaster at Craigend, near Linlithgow, or one or other of them.

Amended Minute.—In obedience to the foregoing Interlocutors, the Defenders aver and offer to prove that,—

1. The request mentioned in the 7th 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 fifteen feet from the boundaries with neighbouring proprietors, and allow the Defenders to work through the said fifteen feet at such places as they might consider proper.

2. The Pursuer, at the said meeting, made a verbal statement to the said Robert Paterson, in presence of the said James Wingate and of Neil Blair, then a salesmen in the employment of the Bartonshill Coal Company, and now deceased, to the effect that he consented to the said request, and agreed that the Defenders should hold the said restriction as waived, and that they might conduct their future workings through the said fifteen feet at such places as they might consider proper.

From what passed in conversation betwixt the said 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.

3. 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.

BARGADDIE COAL COMPANY v. WARK.

Additional Pleas in Law.—1. The Pursuer having consented and agreed to waive the restriction in the lease, as above mentioned, the action is untenable.

2. The said agreement having been acted on in manner averred in the Defender's statement of facts, the Pursuer is not entitled to object that the same was not reduced to writing.

3. *Separatim.* The Pursuer having acquiesced in the Defenders' operations, the action is untenable.

The Second Division of the Court pronounced the following Interlocutor on 6th March 1856 :—

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 tenant, sanctioned by the landlord; and repel the pleas in law founded on these two alleged grounds of defence.

Thereafter, the Second Division pronounced the following Interlocutor on 8th March 1856 :—

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 work 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: Find the Pursuer entitled to expenses, so far as hitherto incurred in the action.

Against these Interlocutors of the *Lord Ordinary* and of the Second Division, the Company appealed to the House.

Mr. *Roundell Palmer* and Mr. *Rolt* for the Appellants.

The *Solicitor-General* (*a*) and Sir *Richard Bethell* for the Respondent.

The arguments on both sides, and the authorities cited, are commented upon fully in the following opinions delivered by the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

By the law of Scotland, a written agreement cannot be waived or varied by words only; and if the permitted waiver or variation rests entirely on parol, there remains a *locus pœnitentiæ* to the person who has consented to the waiver or variation. It cannot be enforced against him.

But if after a parol 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.

This is clearly stated in Bell's Principles (*c*), "*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 agreements 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 requested you, the lessor, to give us permission to make communications between the Bargaddie coal pit and the adjoining coal pit of Bredisholm, to waive the restriction under the lease of working

(*a*) Sir Hugh Cairns.
(*b*) Lord Chelmsford. (*c*) Sect. 26.

BARGADDIE COAL COMPANY v. WARK.

Lord Chancellor's opinion.

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 years 1845, 1846, and 1847, you, being fully aware of them, acquiesced without complaint or objection."

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 ~~Pursuers~~ 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 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 parol evidence It is in vain to say, We will prove such a request was made, and that the subsequent operations tend to show that there were actings 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 averments in the leading part of the Defender's statement cannot be admitted to proof, it being stated distinctly that these were parol statements which are only to be proved by parol evidence."

Having thus dismissed the parol agreement entirely from the case, the Court then proceeded to consider the allegation of acquiescence, not as following upon a parol agreement, but as something substantive 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 fifteen feet being removed, by acquiescence in the actings 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." The other Judges held that there were no averments on the record amounting to acquiescence.

This appears to me not to be the proper way of dealing with the Appellants' case. The Appellants' case, as I have said, is a case which is entire; which depends upon a parol agreement, followed out by proof of acquiescence.

That acquiescence will be sufficient to give validity and force to a parol agreement appears clearly from another passage in Bell's Principles, to which I must also direct your Lordships' attention :—" The principle seems to be that mere acquiescence may, as *rei interventus*, make an agreement to grant a servitude

BARGADDIE COAL COMPANY v. WARK.

Lord Chancellor's opinion.

to transfer property binding, or may bar one from challenging a judicial sentence; but that where there is neither previous contract nor judicial proceeding, 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 cost is 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 parol 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 those 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 cases of *Gibb* (*a*) and of *Scott* (*b*). 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, that there being no

(*a*) 7 Sh. & Dun. 677. (*b*) 9 Sh. & Dun. 246.

previous agreement, it was necessary for the party who claimed to be entitled to pay the rent with an abatement, to show 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 an 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, that upon a mere verbal agreement it is necessary to do something more than to prove consent to that agreement. You must show facts and circumstances in order to establish a completely binding agreement upon the landlord.

My Lords, 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 parol agreement cannot be proved, because it is parol; and then, having got rid of that parol 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 circum-

BARGADDIE COAL COMPANY v. WARK.

Lord Chancellor's opinion.

stances sufficient to prove an independent agreement, I think the Appellants might very well say, Although separately those two things, consent and acquiescence, will not do, yet *juncta juvant.*

Now, my Lords, 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 Bargaddie coal pit more favourably. *Rei interventus* will not avail, unless it establishes facts and circumstances which are unequivocably 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 the permission which was given to them, and consequently any acquiescence which may be shown in those particular acts will not be referable at all to the orignal 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 licence 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 licence, 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 to work the barrier of fifteen feet, he could compel the lessees to replace the barrier in *statu quo*. Now, my Lords, 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 Respondent 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 declares, prohibits, and interdicts as craved in 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 field or pits or any other way than by the Bargaddie coal pit, and that the Defenders are not entitled to use the Bargaddie coalfield or pit, for the purpose of removing water from the Bredisholm field

BARGADDIE COAL COMPANY v. WARK.

Lord Chancellor's opinion.

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 declarator 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 upon 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 been already 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 result of the consent of the lessor to make those openings, and to work the Bargaddie coalfield 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 pit, 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.

Lord Chancellor's opinion.

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 of 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.

My Lords, under these circumstances, therefore, I shall advise your Lordships that the Interlocutors of the 12th June 1855 and 9th February 1856 ought to be affirmed, that the Interlocutor of the 6th March 1856 ought to be reversed, and that the Interlocutor of the 8th March 1856 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's opinion.

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 of 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 Interlocutor of the 6th March 1856, and

BARGADDIE COAL COMPANY v. WARK.

Lord Cranworth's opinion.

so much of the Interlocutor of the 8th March 1856 as authorizes the Respondent to erect and restore the barrier at the expense of the Appellants, and directs the Respondent to furnish to the Appellants, if required by them, a plan and specification of the the work which he proposes to carry through for the above purpose. That leaves the rest of the Interlocutor untouched. This is a mere matter of form, but the alteration I suggest makes the meaning more clear.

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, authorizes 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 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, namely, 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 ancillary to something which is to follow the acting of 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 parol 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 proposes 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 parol 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.

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 shall deal with the whole question as justice may require.

Ordered and *Adjudged*, That the Interlocutors of the 12th June 1855, and the 9th February 1856, so far as complained of, be affirmed; and that the Interlocutor of the 6th March, 1856, be and the same is hereby reversed: And it is further *Ordered*, That the said Interlocutor of the 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 it is declared, that the Second Division of the Court of Session in Scotland ought to have directed an issue whether the barrier coal worked and removed by the Defenders was so worked and removed with the consent of the Pursuer: And it is also further *Ordered*, That the Cause be remitted back to the Court of Session in Scotland, to do therein,

BARGADDIE COAL COMPANY v. WARK.

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.

In the preceding case a question of professional privilege or confidentiality arose, which, being distinct from the merits, it is thought best to keep separate.

The rule in England as to this sort of protection is well laid down in Mr. Stephen's edition of Mr. Lush's Common Law Practice (*a*) :—

"A counsel, attorney, or solicitor is neither bound nor at liberty to divulge the secrets of the cause with which he may have become confidentially intrusted, nor can official persons be called upon to disclose any matter of State, the publication of which may be prejudicial to the community ; but this is the only privilege allowed by the law in this respect ; and clergymen, medical men, friends, servants, and others are bound to tell such secrets (being facts relevant to the issue) with which they may have become by whatever means acquainted."

After the Record had been closed, on 22nd February 1854, in the case of the *Bargaddie Coal Company* v. *Wark*, the *Lord Ordinary* (Handyside), on the motion of the Defenders, issued a Commission for the examination of witnesses, with a special reservation of "all objections on the ground of confidentiality on the part of the Pursuer to the decision of the Commissioner."

In the course of the proceedings before the Commissioners objections were taken to the production of a certain report, prepared by two mining engineers, and relative correspondence, as being confidential, in respect that the reports were obtained

(*a*) p. 400.

under the advice and by the direction of counsel who were consulted by the Pursuer in reference to and immediately before the commencement of the action. The *Lord Ordinary*, by his Interlocutor of 8th November 1854, instructed the "Commissioners to require the havers (*a*) to produce, for the inspection of the Commissioners, the documents falling within the specification, and to the production of which the havers or the Pursuer object on the ground of confidentiality, in order that the Commissioners, after inspection, may dispose of said objection, and in doing so state the nature and description of the document, and the date thereof, and explain the ground on which they dispose of the objection; and with the farther instruction, that the Commissioners have regard, in disposing of any objections on the ground of confidentiality, to the fact that the dispute between the parties leading to the present action became the subject of correspondence between their agents in the beginning of March 1848."

The following documents were called for under the Commission :—

1. Minute of reference entered into between the Pursuer and Defenders to Mr. Black of Easterhouse, and Mr. Baird of Highcross, of the Pursuer's claims for surface damages against the Defenders; and letters and other documents by or between the Pursuer and Defenders, or other persons, for behoof of the parties, or either of them, containing or importing a reference of or agreement to refer the said claims, or consent to or homologation of the said reference.

2. The award or awards pronounced by the referees in the said reference.

3. Statements or accounts of the output from the Bargaddie Coal-field, furnished by the Defenders, or any of them, or others on their behalf, to the Pursuer, and letters transmitting the same to him, and correspondence betwixt the parties, or others on their behalf, relating thereto.

(*a*) *i.e.*, holders of documents.

4. Plans, sections, and drawings of the Defenders' workings of the Bargaddie Coal-field, made from time to time, including the period during which the alleged operations complained of in this action were going on, and letters transmitting the same to the Pursuer, and all correspondence betwixt him and the Defenders and any other parties relating thereto.

5. Reports, letters, memoranda, and other documents regarding the coal workings, and the Defenders' alleged operations referred to in the record, and letters transmitting the same to the Pursuer, and correspondence betwixt him and the Defenders and any other parties relating thereto.

6. All accounts of engineers, coal inspectors, or other persons relating or containing entries relating to the Defenders, or to the coal workings, and the Defenders' alleged operations referred to in the record, and also the Pursuer's books, in order that excerpts may be made therefrom of all entries therein relating to the Defenders, or the said coal workings, or the Defenders' alleged operations referred to in the record..

The following proceedings took place before the Commissioner, Thomas Ivory, Esq., Advocate :—

Edinburgh, 13*th March* 1854.

Compeared James Rose, Writer to the Signet, who being sworn and required to produce in terms of article first of the before-mentioned specification, depones, and produces a document backed "Dft. Submission between Robert Wark, Esquire, and the Bartonshill Coal Co., 1851;" and produces further, under the same article, copy correspondence, backed "Copy Correspondence in connection with the proposed Submission between Mr. Wark and the Bargaddie Coal Co., 1851." And being required to produce in terms of article second of said specification, depones, I have not, and never had, anything falling under that article. Being required to produce in terms of article three of said specification, produces a document backed "14 Output of Coal from Bargaddie Pit, from 15th May 1851 till 14th May 1852." Depones further, I may have a letter from Mr. Ritchie, a haver formerly examined, transmitting the last-mentioned document, and I shall search for and exhibit it, but I decline to produce it, being a private letter.

And the Commissioner makes avizandum with this objection to the Court.

Being required to produce in terms of article four, depones, I have none of these documents in my possession, all such documents I ever had I sent to Mr. Ritchie before mentioned. Required to produce in terms of article five of said specification, depones, I once had in my possession several reports such as are called for in this article, but I sent them to Mr. Ritchie, and, to

the best of my recollection and belief, I never received them back from him. Depones, I have made a search, and have been unable to find any of these reports or other documents falling under article five; but even if I could find them I would decline to produce them, on the ground that they were confidentially made with a view to the present action.

And the Commissioner makes avizandum with this objection to the Court.

Being required to produce in terms of article six of said specification, depones, I have not, and never had, anything falling under this article. Depones, with the exception of what I have already produced, and an account which I now produce, backed "Measurement of ground occupied at Bargaddie by the Bartonshill Coal Company, 1851," I have nothing falling under any of the articles of said specification, and I have not destroyed or put away anything falling under the specification; and, with the exceptions above mentioned, I do not know where anything falling under the said specification may be. And the four documents produced are marked by the deponent, Commissioner, and clerk as relative hereto.

T. IVORY, Comr.

Compeared David Landale, Mining Engineer, who being sworn, and required to produce in terms of articles first and second of the said specification, depones, I have not, and never had, anything falling under these articles. Being required to produce in terms of articles third, fourth, fifth, and sixth of said specification, depones, I have nothing falling under article three, with the exception of some correspondence with the agents for the Pursuer, and a copy abstract received from them. I have nothing at all falling under article four, unless it be a letter from myself to the Pursuer's agents, returning the plans called for, which were once in my possession. Depones, I have a draft report and correspondence relating thereto, falling under the fifth article. Depones, with the exceptions above mentioned, I have nothing falling under any of the six articles of said specification.

And the agent for the Pursuer having objected to the haver producing any of the documents above deponed to as being in his possession, on the ground of confidentiality, as being written and prepared with a view to the present action, the Commissioner makes avizandum with the objection to the Court.

T. IVORY, Comr.

Edinburgh, 7th December 1854.

Compeared James Rose, Writer to the Signet, who being sworn, and having had his attention called to his former deposition in process, depones, in reference to article three of the specification, I have in my possession a certificate of output of coal under the hand of the Defender's foreman. I have omitted to bring it with

BARGADDIE COAL COMPANY v. WARK.

me, but I will send it to the Commissioner. And being required to produce the documents specified in article five of the said specification, and previously objected to, for the inspection of the Commissioner, depones, I produce copies of five reports dated in 1848, 1851, and 1852. I object to producing any of these copies, on the ground that the original reports were all made with special reference to the proceedings which have resulted in the present action. I have not the principal reports of which the above are copies, and if they are not in the hands of the Glasgow agent, he or I must have mislaid them. I am certain the copies are correct. I produce also for the inspection of the Commissioner, under the same article, a copy of a letter to Mr. Landale, with a copy of his answer annexed to it, both in March 1852, to which the same objection applies.

T. IVORY, Comr.

Compeared David Landale, Mining Engineer, who being sworn and required to produce, for the inspection of the Commissioner, the correspondence and copy abstract previously objected to under article third of the said specification, depones, and produces, for the inspection of the Commissioner, the said correspondence, consisting of four letters from the Pursuer's agents to the haver, dated in January and March 1852. Depones, I believe I have copies of my answers to the said letters, and if I have I shall produce them also to the Commissioner for his inspection. Depones, the copy abstract forms page 22 of the draft report which I formerly objected to produce under article five of the said specification. I now produce the said copy abstract and draft report for the inspection of the Commissioner. Depones, I will also send, for the inspection of the Commissioner, a copy of the letter from myself, being the letter mentioned in my previous examination under article four of said specification.

The agent for the Pursuer objected to the production of these several documents on the ground of confidentiality. The report having been prepared in terms of special instructions from the Dean of Faculty and Mr. E. S. Gordon, the Pursuer's counsel, with immediate reference to the present action.

(Signed) T. IVORY, Comr.

Edinburgh, 10*th December* 1854.

Since the date of the last diet the Commissioner has received from Mr. Rose the certificate mentioned in his deposition, and from Mr. Landale copies of five letters written by him in 1852 to Messrs. Horne and Rose; and the said certificate and paper containing the copies letters are marked by the Commissioner and clerk as relative hereto. The Commissioner has also been informed by the agent for the Defenders that the production of four of the original reports, of which copies were produced by Mr. Rose, and

one of which a draft was produced by Mr. Landale for the inspection of the Commissioner, had been required.

The Commissioner finds that the report bears date 30th March 1848, and that the letters were all written in the year 1852, and either by Mr. Landale to Mr. Rose, or by Messrs. Horne and Rose to Mr. Landale, and he is of opinion that the objection to their production cannot be sustained. The report dated March 1848 was made by an engineer at the request of the Pursuer himself after inspection, and contains merely findings of fact as to the way in which the Bredisholm and Bargaddie coal mines had been worked, and his opinion in regard to the effect of such working, and to the mode in which they ought to be worked. The general rule is, that the plea of confidentiality only applies to "communi-
" cations which pass between a client and his professional
" adviser, and the protection has not been permitted to extend to
" any matters communicated to other persons, though such com-
" munications were made under terms of the closest secrecy.
" Thus clergymen and medical men are bound to disclose any
" information which, by acting in their professional character,
" they may have confidentially acquired, and clerks, bankers,
" stewards, and accountants" are "equally obliged to reveal
" what has been imparted to them in confidence."—1 Taylor on Evidence, sect. 664. The Commissioner does not look on the present call as tantamount to a call to produce precognitions of witnesses. He considers it strictly analogous to a call for opinions of counsel, and he considers that the opinion of an engineer embodied in a report is not privileged, but must be produced at whatever time given.—See *Wright* v. *Arthur*, 1831, 10 S. & D. 139; *Earl of Falmouth* v. *Moss*, 11 Price, 455; *Beauwell* v. *Lucas*, 2 B. & C. 745; *Kelly* v. *Jackson*, 13 Irish Eq. Reports, 139, 140; 2 Starkie on Evidence, 3rd ed., 320, 323; 1 Taylor on Evidence, sects. 663, 677, 678; 15th & 16th Victoria, cap. 27, sect. 3.

The letters produced by Mr. Rose and Mr. Landale have reference solely to matters of fact contained in Mr. Landale's report, and the Commissioner is of opinion that they are not privileged.—See *Mayor and Corporation of Dartmouth* v. *Houldsworth*; *Mackenzie* v. *Yee*, 2 Curteis, 866, 871, 872.

T. IVORY, Comr.

The following proceedings took place before Professor Maconochie, Commissioner, at Glasgow, 21st December 1854.

Compeared James Ritchie, Writer in Glasgow, who being sworn and examined, and called on to produce, in terms of article third of the specification, No. 16 of process, depones, I think I produced all the documents of the description called for at a previous exami-

BARGADDIE COAL COMPANY *v.* WARK.

nation. Being called upon to produce in terms of article fourth of the said specification, depones, and exhibits the plans called for, which, however, I decline to produce, except in terms of the Interlocutor of the Lord Ordinary. Being called on to produce in terms of article fifth of the said specification, depones, I have in my possession four reports falling within the call, which I now hand to the Commissioner, objecting to produce them on the ground of confidentiality.

The Commissioner having examined these documents, finds that they are reports on the coal workings in the lands of Bargaddie, of dates August 1851, October 11, 1851, January 6, 1852, and 24th of March 1852, and sustains the plea of confidentiality. And the Commissioner having indorsed the said documents, returned them to the haver.

I also exhibit and hand to the Commissioner for perusal a letter, dated 22nd December 1853, objecting to its production on the ground of confidentiality.

The Commissioner having examined the document, sustains the plea of confidentiality, and in respect, like the other documents, it is of date subsequent to March 1848. And the Commissioner having indorsed the same, returned it to the haver.

(Signed) A. A. W. MACONOCHIE, Comr.

The agent for the Defenders moved that the Commissioner, before returning the documents produced to him under the fourth article of the specification, should state more specifically than has been done their nature and description, and set forth by whom they are prepared or written, and explain more fully than he has done the grounds on which the objection is sustained.

The Commissioner is of opinion that if, under the circumstances of this case, the description of the documents in question were to be more explicitly detailed, it would defeat the Pursuer's right to withhold them on the ground of confidentiality, and therefore he adheres to his former decision, and refuses the motion.

(Signed) A. A. W. MACONOCHIE, Comr.

On the 7th Feb. 1855 the following Interlocutor was pronounced by Lord *Handyside*:—

Having examined the documents, Sustains the objections to the production of the correspondence between Messrs. Horne and Rose, agents for the Pursuer, and Mr. Landale, engineer, employed by them. Sustains also the objections to the production of the report by Mr. Landale, bearing date 24th March 1852, and to the other report, bearing date 5th April 1852, referred to in said correspondence. Repels the objections to the production of the paper titled "Copy Report by Mr. Alex. Howieson as to the Bargaddie Coal-field," and bearing date 30th March 1848, and to the report of Mr. Neil Robson, dated 22nd August 1851, and of Messrs.

Simpson and Lockhart, dated October 11, 1851. Also repels the objection to the production of the two plans of the coal workings by Messrs. Simpson and Lockhart, dated 11th October 1851, and to the plan of the Bargaddie splint workings by Neil Robson, dated June 1845. Sustains the objection to the production of the letter dated 22nd December 1853. Sustains the objection to the production of the three accounts and receipts, and adheres to the Commissioner's deliverance in regard to said letter, accounts, and receipts. Repels the objection to the production of the letter of Mr. Robson of 2nd August 1851; but sustains the objection to the production of the letters of the 26th March 1852 and 25th August 1853.

His Lordship explained this Interlocutor in the following Note:—

The letters and reports, the production of which has been refused, appear to the Lord Ordinary after examination to be protected, as having been written with a view to the information of the Pursuer, and under the instructions of counsel, previous to raising the present action, and production of them has therefore been refused. The other reports and plans are of an earlier date, and do not appear to have had reference to the present action, which was not raised till more than a year after the latest of them; while the correspondence with Mr. Landale, and his report and that of his coadjutor, bear the character of a precognition. The reports of Mr. Robson and Messrs. Simpson and Lockhart are of the character of information to the landlord of the state of the coal workings at the time, and their correspondence or otherways with the obligations in the lease. It is true that in March 1848 a complaint was made by the Pursuer of the proceedings of the Defenders in working the coal; but four years were allowed to pass before the Pursuer proceeded to take immediate steps towards bringing the present action.

The Appellants having reclaimed against the Interlocutor, so far as it went against them, the Second Division affirmed it, and it was consequently included in the Appeal to the House of Lords, whose final judgment of affirmance was explained in the following terms by

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, these documents appear to consist of certain correspondence between Messrs. Horne and

(*a*) Lord Chelmsford.

BARGADDIE COAL COMPANY v. WARK.

Lord Chancellor's opinion.

Rose, who were the law agents for the Pursuer, with Mr. Landale, the engineer; and of two reports by Mr. Landale 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 having been written with a view to the information of the Pursuer, and under the instructions of counsel previous to raising the present action. Now, my Lords, 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. My Lords, 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.

GRAHAME, WEEMS, AND GRAHAME—RICHARDSON, LOCH, AND MCLAURIN.