agreement modifying its terms was incompetent.

Messrs Hamilton & Baird, writers, Glasgow, sued Edward Dillon Lewis for payment of various sums, amounting in all to £2868.

After proof had been allowed, counsel for the parties signed a joint-minute, wherein they "concurred in stating to the Court that the parties had settled this action by the defender consenting to pay to the pursuers the sum of £700 in full of the conclusions of the summons, including expenses, on or before the 30th day of June 1893, and failing payment of the said sum of £700 sterling by the defender on or before that date, then the defender consents to decree being granted against him in favour of the pursuers for the sum of £950 sterling, with expenses, in full of the conclusions of the summons; and they concurred in craving the Lord Ordinary to interpone authority to this joint-minute, and *quoad ultra* to assoilzie the defender from the conclusions of the action, and to discharge the diet of proof fixed for the 18th day of May 1893."

On 17th May 1893 the Lord Ordinary (KINCAIRNEY) allowed the joint-minute to be received, and discharged the diet of proof.

On 6th July 1893 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, in respect of the joint-minute for the parties, and also in respect of the defender's failure to pay to the pursuers the sum of £700, including the expenses of the action on or before the 30th day of June last, Decerns against him for payment to the pursuers of the sum of £950 sterling in full of the conclusions of the libel: Finds the pursuers entitled to expenses," &c.

The defender reclaimed, and lodged a minute in the Inner House craving to be allowed to amend the defences by adding a statement of *res noviter veniens ad notitiam*, with relative pleas-in-law.

In this statement he averred that before the 30th of June, being the date fixed for payment of the £700 in the joint-minute, one of the partners of the pursuers' firm had a meeting with the defender in a hotel in London. At this meeting the said partner, having full authority from the pursuers to settle the action, agreed, in lieu of the payment of £700 which the defender was bound to make under the joint-minute, to accept certain guarantee policies which an insurance company were under obligation to grant to the defender, and the action was settled on this footing. In breach of this agreement, and notwithstanding the protests of the defender, the pursuers moved the Lord Ordinary to pronounce the interlocutor reclaimed against.

The defender argued that he was entitled to prove the alleged agreement by parole—*Love* v. *Marshall*, June 12, 1872, 10 Macph. 795; *Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39.

Counsel for the pursuers were not called upon.

At advising—

LORD PRESIDENT—The parties in this action settled the case by joint-minute signed by counsel. The terms of that minute are quite unambiguous, and it constituted a contract upon which either party was entitled to take decree. The case now made is, that a meeting between the parties took place in a London hotel, at which it was verbally agreed that a different mode of payment should be accepted by the pursuers than that proposed in the minute, and a parole proof is asked. There is no warrant for allowing a party to get over a solemn contract by parole proof of communings of this sort.

I think the decree of the Lord Ordinary should stand.

LORD ADAM—There was here a written compromise of the action. What is now averred is a distinct variation of the terms of the written contract, and that is not proveable by parole.

LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuers—A. J. Young—A. S. D. Thomson. Agent—Robert John Calver, S.S.C.

Counsel for the Defender—M'Lennan. Agent—D. W. Paterson, S.S.C.

Wednesday, November 15.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* BAIN.

Railway—Mines and Minerals—Freestone—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

Held that freestone fell within the exception of "mines of coal, ironstone, slate, or other minerals" contained in the 70th section of the Railway Clauses Consolidation (Scotland) Act 1845, and was not carried to a railway company which had acquired lands under the powers of said Act by a disposition which did not mention mines and minerals.

Railway—Mines and Minerals—Right to Work Freestone Under Railway Line—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71—*Bona fides.*

A railway company sought to interdict the lessee of a quarry who had given them notice under section 71 of the Railway Clauses Consolidation Act that he intended to work the freestone under their line. They made averments to the effect that in the ordinary and

proper course of management said freestone would not be worked for years, and that the respondent had given them notice under the Act merely with the view of rearing up a fictitious claim against them.

Held that these averments were relevant, and proof *allowed.*

This was a note of suspension and interdict at the instance of the Glasgow and South-Western Railway Company against Marcus Bain, quarrymaster, Mauchline, in the county of Ayr.

It appeared from the record that the complainers' main line from Glasgow to Carlisle passed through the estate of Ballochmyle, in the parish of Mauchline. The line was constructed under the powers of the Glasgow, Paisley, Kilmarnock, and Ayr Railway (Cumnock Extension) Act 1845, with which was incorporated the Railways Clauses Consolidation (Scotland) Act 1845. The respondent was assignee to a lease of the freestone quarry of Haughyett, granted by the proprietor of Ballochmyle to James Gibson. This quarry was situated near the complainers' line, and was worked by open-cast workings.

The conveyance of the lands in the complainers' favour contained no express conveyance of mines and minerals.

Upon 16th November 1892 Bain through his agents gave notice to the railway company that after thirty days he would proceed to work the rock lying under the main line of the complainers' railway adjacent to the Haughyett Quarry, by open-cast workings from the surface downwards, and the railway company brought the present note to interdict him from doing so.

The complainers averred, *inter alia*—"The said rock is not included among the minerals exempted from the complainers' conveyance by the terms of the 70th section of the Railway Clauses Act 1845. . . . The subjects let do not include any portion of the complainers' said works or lands, or any of the rock or other substance therein. . . . Not only has the respondent no right to work the rock in question, in respect that the said rock is the property of the complainers, and in respect further that it is not included within the lease to the said James Gibson; but in any event the respondent was not entitled to give the said notice, and is not entitled to act thereupon. It is believed and averred that his intimation was given merely with a view of exacting a payment from the complainers to which he is not entitled. The lessee is bound under the said lease and at common law to work the Haughyett Quarry in a regular and proper manner. If the respondent is entitled to the said lease, which is denied, and if he works in accordance with the said stipulation, he will carry forward the workings on which he is at present engaged in the opposite direction from the complainers' railway and works. The stone in the vicinity of these workings is of the same or superior quality to that which is immediately alongside of and under the complainers' railway works and lands, and is much more accessible and less expensive to work than the stone last mentioned. If the respondent proceeds with the working of the quarry in accordance with the said lease, he would not in any event, whatever might be the rights of parties in the said rock, be in a position to give notice to the complainers in terms of section 71 of the Railway Clauses Act 1845 for very many years. It is believed, however, that with a view of rearing up a fictitious claim against the complainers, and not in the regular and workmanlike manner of working the present quarry in terms of said lease, the respondent proposes to open a new quarry at some distance from Haughyett Quarry, and in the immediate vicinity of the complainer's line and fence, and altogether clear of the works and outside the fences of the present quarry, and that only for the purpose of obtaining access to the rock under the complainers' railway works and lands."

The complainers pleaded—"(1) The rock in question being the property of the complainers, or otherwise not being removable except by underground workings, the respondent is not entitled to interfere therewith, and the note of suspension ought to be granted. (2) The complainers are entitled to the remedy asked in respect, 1st, that the rock in question is not within the lease in favour of the said James Gibson; . . . and 3rd, that in any event his operations are in express contravention of the terms of the lease. (3) The respondent's intimations and workings not being in the ordinary and regular course of working the quarry, but merely devised to rear up a fictitious claim against the complainers they are entitled to interdict as craved."

The respondent pleaded—"(3) In respect that the complainers, after due notice from the respondent, have failed to purchase the said mine of freestone, the respondent is entitled to work the same."

The Railway Clauses Consolidation Act 1845 enacts, section 70—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby." Section 71 provides—"If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, . . . and if the company be desirous that such mines or any part thereof should be left unworked, and if they be willing to make compensation for such mines or minerals,

or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire," &c.

Upon 20th July 1893 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"Finds that by virtue of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 the complainers have no right to the freestone under the portion of their land referred to on record, and repels their first plea-in-law: Finds further, that they have not made on record any averments relevant to be admitted to probation, therefore recals the interdict formerly granted: Refuses the note of suspension and interdict, and decerns: Finds the respondent entitled to expenses, &c.

"*Opinion.*—The respondent is assignee to a lease for twenty-five years from Whitsunday 1882 of the Haughyett Freestone Quarry on the estate of Ballochmyle in Ayrshire. Part of the freestone included in the lease lies under and adjacent to the complainers' line of railway, and the respondent has given notice of his intention to work the freestone under the line by open-cast workings from the surface downwards. The purpose of this note is to interdict him from doing so, and the first plea stated by the complainers is to the effect that freestone does not fall within the description of 'mines of coal, ironstone, slate, or other minerals' excepted from the general conveyance of their lands by virtue of the 70th section of the Railways Clauses Act of 1845. It is not said that in considering this plea any aid can be derived from a parole proof, and I am asked to dispose of it on the terms of the statute, interpreted as these have been by numerous decisions.

"Now, the state of the authorities is this. There is an express decision in Scotland—*Jamieson* v. *The North British Railway Company*, 6 S.L.R. 188—that freestone does not fall within the exception in the 70th section. It was a judgment of Lord Kinloch not reclaimed against, but it was quoted with approval by Lord Adam in giving the leading opinion in *Nisbet Hamilton* v. *The North British Railway Company*, 13 R. 454 (at p. 461). There is also an expression of opinion by Lord Watson (*obiter* no doubt, but still entitled to great weight) in *Magistrates of Glasgow* v. *Farie*, 13 App. Cas. at p. 679, in these terms—'The important question still remains, what are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata.' More important still, there is a judgment of the House of Lords, pronounced so recently as December 1889, in *Midland Railway Company* v. *Robinson*, 15 App. Cas. 19, to the effect that the section of the English Railways Clauses Act, which is couched in precisely the same terms as section 70 of the Scottish Act, includes not only beds and seams of minerals got by underground working, but also such as can only be worked by open or surface operations, and that limestone is a mineral within the meaning of the section.

"I am unable to see any distinction in principle between limestone and freestone. The only distinction suggested by Mr Guthrie was that limestone is worked for the purpose of extracting from it the mineral substance lime, while freestone is worked for the purpose of using the stone itself. But I find no trace of any such such distinction in the opinions of the noble and learned Lords, nor do I think that the purpose for which the substance is worked can be of any materiality. The real point of the decision is that a substance may be within the section though it is got by quarrying and not by subterranean mining.

"The only decisions which can be placed against this chain of authorities are *Menzies* v. *Earl of Breadalbane*, 1822, 1 Sh. App. 225, and *Duke of Hamilton* v. *Bentley*, 1841, 3 D. 1121. In the first of these it was decided that a reservation by a superior in a feu-contract of 'the haill mines and minerals' in the lands did not give the superior right to a freestone quarry. The second case simply followed the first. Both were fully in view of the House of Lords in *Farie's* case, and Lord Watson explains at pp. 674-5 of 13 App. Cas. why a case construing a reservation in a feu-contract is not of much assistance in construing an Act of Parliament. For one thing, it is obvious that the mention of slate in the 70th section gives a clue to the construction of the phrase 'other minerals' which is altogether awanting in a general reservation of 'mines and minerals.'

"For these reasons I am very clearly of opinion, both on authority and on a sound construction of the statute, that the freestone in this case (which is admitted to be of commercial value) is within the exception of the 70th section.

"But then the complainers say (and this is their second ground for demanding interdict) that there is no *bona fide* desire or intention on the part of the respondent to work the freestone, and that his notice is a mere device to extract money from the complainers. Of these allegations they demand a proof.

"Now, so far as they merely say that the respondent has other stone in his quarry which he might work less expensively and with more advantage to himself than the stone under the railway, I do not think that their averments are relevant. The respondent's proposal may be ever so capricious and vexatious, but if he has a right to work the stone, and a *bona fide* intention to do so, I do not see that he can be prevented. The complainers on record go a step further. They say that he intends to work the stone by opening a new quarry, and that he has no right under his lease to do so. If the complainers had adhered to this statement, I should not have disposed of the case with-

out requiring the respondent to make his right clear, either by reference to the lease or, if necessary, by producing evidence of the landlord's consent to the proposed operations. But Mr Guthrie stated at the bar that he did not maintain that the terms of the lease presented any obstacle to the proposed operations, and I am therefore in a position to dispose of the case by recalling the interim interdict and refusing the note."

The complainers reclaimed.

At advising—

LORD JUSTICE-CLERK—The question in this case which has been principally discussed in the Outer House and before us was whether freestone falls under the definition of minerals in the Act of Parliament, so that the railway company by means of the restrictions mentioned in the Act can prevent the respondent from working the freestone under the railway line. The words of the Act are these—[*Here his Lordship read the words of the statute*].

Now, it is plain that these words were intended to include a great many other things as minerals than are actually mentioned, and that these which are mentioned are intended to show the kind of thing which includes very numerous things which are held to be minerals in the sense of the statute. Mention is made of slate, which is certainly not what is commonly called a mineral. It is quarried out and used directly for building purposes just as stone is, and accordingly in the case of *Farie* in the House of Lords it seems to have been held impossible to exclude freestone and limestone strata when slate was included. On that part of the case, then, I adhere to the judgment of the Lord Ordinary.

It turns out now that the railway company have two other pleas which they wish to found upon now. These pleas are (1) that the rock underneath the railway line is not in the respondent's lease, and (2) that the tenant of the quarry in giving notice that he is going to work this stone is not going to engage in a *bona fide* process of work which would be valuable to him, and for which the railway company should compensate him if they prevent him going on with his work, but is merely putting pressure on the company so as to induce them to buy him off. We cannot decide these questions without proof, and therefore I think we should remit the case back to the Lord Ordinary.

LORD YOUNG—I agree with the Lord Ordinary with regard to the freestone under the railway, that it is not in the title of the railway company. I construe the Act of Parliament as he does. The only other point I shall notice is as to the *bona fides* of the respondent in giving the notice he did to the railway company. That point was insisted in before the Lord Ordinary, and he gives a special finding about it in his interlocutor. The Lord Ordinary finds that the complainers have not made on record any averments relevant to be admitted to probation.

I am of opinion that the complainers have made averments relevant to be admitted to probation, and I therefore think we should send them to proof.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court found in terms of the first finding of the Lord Ordinary's interlocutor; *quoad ultra* recalled the same; remitted to the Lord Ordinary to allow the parties a proof of their averments as to (1) the minerals not being within the lease assigned to the respondent, and (2) the respondent not having a *bona fide* intention to work the said minerals in terms of section 71 of the Railway Clauses Act 1845. . . .

Counsel for the Reclaimers — Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent—W. Campbell—M'Clure. Agents—Tait & Crichton, W.S.

Wednesday, November 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUNLOP (OFFICIAL LIQUIDATOR OF DONALD'S CHLORINE COMPANY, LIMITED) *v.* DONALD.

Company—Agreement—Vendor—Retention—Winding-up by Court—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 100—*Officer of Company.*

Under the 100th section of the Companies Act 1862, the Court, after pronouncing a winding-up order, may require "any officer of the company" to deliver to the official liquidator any effects of the company "which happen to be in his hands for the time being, and to which the company is *prima facie* entitled.

A patentee agreed to sell and assign his patents to a company about to be formed, the consideration to be given by the company being the allotment of a certain number of fully paid-up deferred shares, and the payment of £700 within thirty days of the company's registration, and of £500 when 100 tons of bleaching powder, under the patents, had been manufactured and *bona fide* sold by the company. The agreement also contained a provision that the patentee should enter the employment of the company on its incorporation as managing director, and should principally take charge of the technical and manufacturing department.

The company was duly incorporated, and adopted the agreement with the patentee, but its capital became exhausted before the necessary buildings were completed, and a winding-up