tion to that effect is contained in the closed record, even were it relevant in such an action as the present, and of necessity no proof can be allowed of what is not averred therein. A mere verbal allegation at the bar interposed to prevent judgment upon the case as it stands, cannot be listened to. Indeed some declaratory or reductive proceeding would, as I think, be indispensable ere an entry in the public records of the country,—for which the registrar and his clerks are alone responsible, and not the private party whose interests may be affected,—could be allowed to be impugned.

The other Judges concurred.

LORD JUSTICE-CLERK absent.

Agents for Pursuer—Mackenzie & Black, W.S.

Agent for Defenders—James Steuart, W.S.

Thursday, March 18.

FIRST DIVISION.

THOMSON *v.* GORDON.

Landlord and Tenant—Mineral Lease—Notice to Landlord of intended Abandonment. Under missives of lease which provided for the lease coming to an end when the coals were worked out, or proved unworkable to profit, on examination by competent persons,—*held* that the tenant, if he means to abandon the lease, must give due notice to the landlord, otherwise his obligation for rent will continue.

Amendment of Record—Court of Session Act 1868—*Diligence for Recovery of Documents.* Amendment of the record, as sanctioned by the Court of Session Act 1868, is such as can be made forthwith; and a party proposing to amend will not be allowed a diligence to recover documents in order to enable him to state his amendments.

Miss Jessie Thomson, proprietrix of the estate of Kirkhill, in the parish of St Quivox, and county of Ayr, brought this action against J. T. Gordon of Nethermuir, for payment of £150, as the five last terms' rent of a seam of coal leased by the defender from the pursuer on a nineteen years' lease from Whitsunday 1850. The defence was, that the coal having been worked out, or become unworkable to profit, at or previous to Whitsunday 1867, up to which time the rent was regularly paid, the lease had thus come to an end—this defence being rested on a clause in the missives of lease, which declared —"(First), the lease to be for nineteen years from Whitsunday 1850, with power to you to communicate with the adjoining coal field of Auchencruive, and to work the coal from pits on the lands of Auchencruive, with the ordinary clause providing for the lease taking end when the coals are worked out, or found unworkable to profit, on examination by competent persons, or an oversman, if they differ in opinion."

The Lord Ordinary (JERVISWOODE) allowed the parties a proof of their averments, doubting whether he ought not to appoint the defender to lead in his proof.

The pursuer reclaimed.

SHAND and BRAND for reclaimer.

CLARK and ASHER for respondent.

The respondent craved leave to amend by adding a statement to the effect that he had given intimation that the coal was exhausted, and the case was continued.

Thereafter the respondent moved for a diligence to recover his letters containing the intimation, he having kept no copies, in order that he might make his amendment more specific than he could otherwise do.

The LORD PRESIDENT thought that to grant the motion would be to introduce great confusion into the working of the new Court of Session Act. It was not a very common practice now to ask for a diligence in the course of preparing, or to enable a party to prepare, a record, though formerly there had been a great many discussions on the propriety of such practice. But if the Court were to grant a diligence to enable a party to make an amendment, the substance of which he had already proposed, that would be entering on a new cause altogether, and using this clause of the new Act for expanding and altering causes in such a way that there would be no end to them.

An amendment under the Act must be one which the parties must be in a position to make at the moment when it is suggested; and if any delay, as for a day or so, was granted, that was for convenience merely. This was just one of those cases where the party had the least possible right to make such a demand. He proposed to aver that he himself gave a precise notice that his coal was exhausted, and if he did not know the circumstance of his giving that notice, it was difficult to believe that he gave it at all.

LORD DEAS concurred. There was now a power to allow amendments even after the record had been closed; but if before allowing his amendment the Court were to grant a diligence for inquiry, which might perhaps extend over many months, that, instead of causing greater despatch in the conduct of a cause, would be doing the very reverse. Here was a final interlocutor appointing this amendment to be received, but only on payment of expenses, and the motion to hang up the lodging of the amendment was extravagant.

LORD ARDMILLAN and LORD KINLOCH concurred.

Amendment to be put in same day.

Thereafter the respondent declined to amend.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has allowed parties a proof of their averments, and he has stated in his note that he had some hesitation whether he ought not to have appointed the defender to lead in the proof. I don't know why he hesitated at all, for the only thing requiring proof, if any proof was requisite, is the allegation of the defender that this coal, of which he has a lease, is worked out or not workable to profit.

But there is a prior question to that, and that is whether there ought to be proof at all, or whether the defence ought at once to be repelled, and I have no hesitation on that point. I think the defence is entirely irrelevant as an answer to this action.

The summons concludes for payment of five sums of £30 alleged to be due by the defender for the terms after Whitsunday 1867. The only answer is this:—"The seam of coal let by the said missives had been worked out, or was unworkable to profit, previous to Whitsunday 1867, *i.e.*, the term up to which the rent had been paid by the defender, and has continued to be so ever since. The said lease had come to an end at that term. No part of the said seam has been wrought by the defender since that date." And then he says he is willing to enter into a reference to competent persons to examine the seam, if called on. This defence is rested on a clause in the lease which

empowers the lessee to abandon the lease in the event of the coal being found to be exhausted or unworkable to profit. Now, under a clause of that kind, the plain duty of the tenant, if he finds the coal to be worked out or unworkable to profit, is to take the initiative, and give notice to the landlord, so that the landlord may satisfy himself in the matter, or, if he chooses to relieve the tenant, may take measures for making the most of the subject for himself. But, until such intimation, there cannot be a doubt that the obligation to pay rent remains in as full force as ever. Again, if the tenant thinks the coal unworkable to profit, he surely does not imagine that a mere intimation of his opinion to that effect is sufficient. That is a fact which must be ascertained, and the mode of ascertaining it, as in all such cases, is by a remit to persons of skill. Until that is done, the lease remains in subsistence as much as if there had been no complaint. Now, the sole defence here is, that in fact prior to Whitsunday 1867 the coal either had been worked out, or had become unworkable to profit, the tenant apparently does not know which. But, supposing that he had adopted even one of these alternatives, and that the most favourable for such a defence, and had alleged that prior to Whitsunday 1867 the coal was worked out, he gave no notice of that, but went on paying rent up to Whitsunday 1867, and then omitted to pay any more, without giving any reason. I think, in these circumstances, the defence is plainly irrelevant, and I am therefore clearly of opinion that it must be repelled.

The other Judges concurred.

Agents for Pursuer — J. W. & J. Mackenzie, W.S.

Agents for Defender—Tods, Murray, & Jameson, W.S.

Thursday, March 18.

BRYAN *v.* GLASGOW & SOUTH-WESTERN RAILWAY CO.

Supplementary Summons — Reparation—Extent of Injuries. A party brought an action of damage against a railway company for injuries through a railway accident. When the proof had been partly led, he brought another action stating his claim at an increased rate for the different items of damage, but libelling the same item. Second action *dismissed.*

On 10th July 1868 Mrs Bryan and husband brought this action in the Sheriff-court of Ayrshire, the summons running thus: "Therefore this summons, on being called in Court, or thereafter, ought to be remitted to and conjoined with an action now in dependence in the Sheriff-court at Ayr between the pursuers and defenders, the summons in which is dated the 24th day of January 1868; and the said summonses being so conjoined, or whether the same shall be conjoined or not, the defenders ought to be decerned to pay to the pursuers the sum of £117, 10s. sterling, per claim annexed, in name for reparation, damages, and *solatium* due to the female pursuer for loss and injuries sustained by her, by and through the culpable and gross fault, negligence, or want of skill of the defenders, or of their directors or servants, &c., in the management of their railway; but under deduction from the said sum of such part thereof as may be decerned for in the said action in dependence at the instance of the pursuers against the defenders raised as aforesaid on 24th January 1868, and of such items or part of the items in the said claim as the defenders may be assoilzied from payment of in the said depending action, the said action having been raised when the male pursuer was abroad, and not in communication with his wife, and her injuries having turned out much more serious than they were originally known or supposed to be, the idea of their nature and extent being erroneous."

The account sued for was as follows:—

"1867.				
May 22.	To compensation for injuries to person, &c., . .	£100	0	0
1868.				
Jan.	To medical and other expenses incurred by and in consequence of the said injuries,	15	0	0
1867.				
May 22.	To loss sustained by injury to apparel and other articles of property, . .	2	10	0
		£117	10	0

The defence was, that there was another action pending, in which the record had been closed, and a proof partly led, and which libels the same grounds of action; that the only difference betwixt the summons was in the conclusions, the present action setting forth the compensation for injuries to the person of the female pursuer at £100 instead of £20, and the medical and other expenses at £15 instead of £8,—the whole sum sued for in the supplementary summons being £117, 10s. instead of £30, 10s.

The Sheriff-substitute (ROBISON) dismissed the action, and the Sheriff (CAMPBELL) adhered.

The pursuer appealed.

MACLEAN for appellant.

CLARK and JOHNSTONE for respondents.

At advising—

LORD PRESIDENT—I entertain no doubt that this action is incompetent.

The case just comes to this, that when a party is in course of trying his case, and has proceeded so far in his proof, it occurs to him that he has claimed too little, and that he had better increase his claim. Now, it is plain he cannot do so in that action, so he brings this supplementary action, by which he endeavours to convert this action for £30 into one for £117, for the very same injuries that he has already libelled in the other action, and not in respect of any damage emerging since that action was raised. That idea is excluded, for the items of the claim in the second action are the same and of the same date as in the first, and if it is true that the medical expenses at January 1868 are as stated in the first action, it cannot be true that they amounted to £15, as stated in the second action. It is explained that the action was raised "when the male pursuer was abroad, and not in communication with his wife" (the female pursuer), and that the injuries have proved more serious than at first anticipated. Now, I think a party must make up his mind what are his injuries, and what is the amount of his *damnum*, before he comes into Court, and that, having joined issue with his opponent, he cannot get rid of his action except on the principle of abandonment, as to which I say nothing at present.

I think the case of *Roy* v. *Hamilton* has no resemblance to the present. That was a case of