The case, which now resolved itself into a question of expenses, again came before the Court.

For the pursuers it was argued that Mr Bruce was the true debtor in the obligation, and that accordingly they were justified in suing him without calling Colonel Farquharson. They were entitled to their expenses; or at least no expenses should be found due to either party.

For the defender it was maintained that the whole expense of the action had been unnecessarily caused by the pursuers, who, if they had gone against Colonel Farquharson at first, would have got their debt paid, as the result showed.

At advising—

LORD DEAS—I have no doubt that, upon the face of this action, it was one to which it was right that Colonel Farquharson should have been called as a party. The case could not otherwise have been satisfactorily disposed of. When that plea was stated, the pursuer ought to have called Colonel Farquharson. One of two things must then have happened. Either it would have turned out that this was right and proper, which would have showed that the pursuers ought to have done so at first. Or else, in the event of its turning out that calling Colonel Farquharson was unnecessary, the pursuers would have had a claim against Mr Bruce for the expense so occasioned. It would have been better if the Lord Ordinary had insisted on this step being taken. But this does not exonerate the pursuers. When the case went to a proof, it became still more clear that Colonel Farquharson ought to have been called. There is no incompetency in calling a party at any stage, and the pursuers should have done so then if they had not before. The Court sisted the case to give the pursuers an opportunity of calling Colonel Farquharson. They have communicated with him, and the result is that he has paid the money. This is to me very good ground for finding the pursuers liable in expenses. The only question then would be, whether there ought to be some modification, in respect of the defender not sufficiently insisting on his plea? But, on the merits, I am of opinion that the Lord Ordinary is right, and in that view the defender is entitled to full expenses.

LORD ARDMILLAN concurred.

LORD KINLOCH — The pursuers should have called Colonel Farquharson at first. I do not say that they were so bound to call him that they could not otherwise go on with the case, but it was a very expedient step. They might have raised an action against Colonel Farquharson as liable on the statement of Mr Bruce, with an alternative conclusion against Bruce. To their not doing so the expense is mainly attributable.

I may at the same time state that, on the merits, I agree with the Lord Ordinary.

The LORD PRESIDENT—I concur. The chairs were furnished for the Ballater Railway, which belonged to Colonel Farquharson. These facts were known to the pursuers. *Prima facie*, then, Colonel Farquharson was the proper debtor. It may have been that Mr Bruce, though acting as engineer, may have interponed his personal credit, but *prima facie* the proper debtor was the person for whose benefit the goods were furnished. The pursuers chose to proceed, not against him, but against the engineer. It is possible that such an action might succeed. But Bruce being called, states a plea of all parties not called. This puts the pursuers in this position, that if they go on without calling Colonel Farquharson, and it turns out that Colonel Farquharson is liable, even though Bruce may be liable too, they cannot recover expenses against Bruce. They have chosen to run the risk. They took no notice of the defender's plea. They took an order from the Lord Ordinary for proof. This raised a question in evidence, and though I am not prepared to differ from your Lordships on the merits, it was a case of some little difficulty. The pursuers were not justified, while they had a clear case against Colonel Farquharson, in bringing a very doubtful case against Bruce. This is proved by what has occurred. Colonel Farquharson has paid the money. Had they called *him* alone, or along with Bruce, they would probably have got the money without further expense or litigation As your Lordships are clear on the merits, the defender must have full expenses.

The Court adhered.

Agents for Pursuers—Nisbet & Mathieson, S.S.C.
Agent for Defender—Thomas White, S.S.C.

Friday, June 2.

YOUNG *v.* CAMERON.

Joint Adventure—Managing Partner—Liability of Copartners—Loan. Where the subject of a joint adventure (which was latent and unknown to the public) was the lease of a sheep farm and the stock thereon, and the managing partner borrowed money, by means of an accommodation bill, avowedly for the purpose of paying the rent, and, having discounted it at the bank, afterwards applied the money for the purpose assigned—*held* that he had rendered his copartner liable, though he had not disclosed that there was a joint adventure, and had obtained the money solely on his own credit.

Observed that the judgment was confined to the question of borrowed money—the action being laid on the case, and not on the bill.

In this case the appellant Young had, in the year 1865, entered into a joint adventure with M'Nab, the then tenant of Dalchully sheep farm near Kingussie. The subject of the joint adventure was the lease of the farm held by M'Nab, and the sheep stock thereon. M'Nab was to remain as the sole managing partner; and, as the lease prohibited assignees, Young's name was not disclosed either to the landlord or to the public. In these circumstances, at Martinmas 1865, M'Nab went to the respondent Cameron, and asked him to advance him £150 to meet his rent then falling due. Cameron ultimately agreed, and the money was obtained by means of an accommodation bill drawn by Cameron, accepted by M'Nab, indorsed by Cameron to M'Nab, and then discounted with the British Linen Company's Bank, and the proceeds applied by M'Nab in payment of his rent. The bill was several times renewed, and finally on M'Nab's bankruptcy was met by Cameron. On receiving information of the existence of the joint adventure, Cameron thereafter sued Young as jointly liable with M'Nab for the money advanced for the benefit of the joint concern and so applied.

The particulars of the case will more fully appear from the opinion delivered by the Lord President.

WATSON and CAMPBELL SMITH for the appellant.

SHAND and MACKINTOSH for the respondent.

At advising—

LORD PRESIDENT—The facts, which are important to the decision of the case, are few and simple. The defender M'Nab was tenant of the farm of Dalchully for a period of nine years from Whitsunday 1859. The great bulk of the farm was sheep grazing, and there were only a few acres of arable land about the farm buildings. On July 18, 1862, a minute of agreement was entered into between the said defender M'Nab and the other defender Young, by which Young was made a partner in the lease. The lease itself was not assigned, nor had M'Nab indeed power to assign it because assignees and sub-tenants were strictly excluded by its terms, except with the landlord's consent first had and obtained; but a partnership—or more properly speaking a joint adventure—was entered into between these two parties, the subject of which was the lease of this farm. It was agreed that Young should pay to M'Nab one-half the value of the sheep stock on the farm, and that thenceforth they should be jointly interested in the lease, and in its profits. Now I do not entertain any doubt that this was a proper joint adventure. I do not think that the term joint adventure is to be confined to any particular class of adventure; it is just as applicable to the undertaking of sheep farming as to any mercantile enterprise.

This joint adventure thus entered into by these parties remained, however, latent and undisclosed. It was not known either to the public in general, or to the pursuer, or even to the landlord. M'Nab, it was arranged, should be the managing partner, remaining resident on the farm; while Young lived at a distance—somewhere in Northumberland, I think. Under these circumstances the foundation of the present action is a loan of money, advanced by the pursuer Cameron to M'Nab for the purpose of enabling him to pay the half year's rent of the farm due at Martinmas 1865. M'Nab in asking the advance from Cameron did not disclose that he had any partner, but pledged his own credit only. At the same time it was expressly explained to Cameron that the money was wanted to pay the rent. The money, amounting to £150, was raised by an accommodation bill drawn by Cameron, accepted by M'Nab, and endorsed by Cameron. This bill was at once discounted by M'Nab at the British Linen Company's Branch at Kingussie. It was several times renewed, and was at length retired by Cameron, after M'Nab had become bankrupt. The money raised was undoubtedly applied in payment of the rent of Dalchully. This present action was raised by Cameron in order to make M'Nab and Young jointly liable in repayment of the money. The circumstance that the money was raised in this manner between M'Nab and Cameron by means of an accommodation bill is in my opinion of no consequence in this case. It was by means of Cameron's credit that M'Nab obtained the money, and it does not matter how that credit was made use of. It would have been just the same, so far as this question is concerned, if M'Nab had got a simple cheque from Cameron, and merely gone to the bank and drawn the money. In fact, it was just a loan to enable M'Nab to meet his rent.

The general legal principle on which it is contended that Young is liable is perfectly well settled and defined. If the managing partner of a joint adventure obtain money or goods for behoof of the joint concern, though on his own individual credit only, and applies that money or these goods for the benefit of the joint adventure, the joint adventurers, though unknown to the lender or seller, will be all jointly liable.

But it is said, in the present case, that M'Nab had no right to raise money for the use of the concern, and certainly no right to raise it in this way. I think, however, it is very difficult to support this proposition generally; because in the transaction of the farm it may be absolutely necessary on some occasions to raise money, and that expeditiously, to save the joint adventure from breaking down altogether, and falling to pieces. It must be necessary, therefore, for the managing partner to have a discretionary power to borrow in such cases, and it seems to me that the rule of law will make all the *socii* jointly liable. A great deal was made of the fact that the subject of the joint adventure was a grazing farm. But the exigencies of a grazing farm are sometimes as great as those of any other business. And it is matter of notoriety that the obtaining of money in a hurry for the purposes of the concern is often imperative. The payment of rent is of all others the charge which must be most promptly met, and it was for that purpose that the money here was borrowed. It did strike me at first sight as probable that Young, not being joint tenant, though jointly interested in the lease, was not liable with M'Nab for the rent: that M'Nab was solely liable for the whole £150 of rent, and that Young was only liable to him in his share, namely £75: so that the rent was not properly a charge against the joint adventure. But I am now quite satisfied that this view is not sound. Though the joint adventure was unknown and unrecognised by the landlord, yet nevertheless the rent must be taken as a proper first charge upon the concern. Were it not paid the sheep stock would be liable to be hypothecated by the landlord, and the farm displenished. Besides the lease itself, the very subject matter of the adventure was dependent upon the tenant's prestation—upon his payment of rent. Had this half-year's rent been paid in the ordinary fashion, it would have been by a cheque upon the bank account of the joint concern, thereby showing that it was a proper charge against that concern. For these reasons I think that the ordinary rule of law applies to this case, and that Mr Young must be held jointly liable for this money—which was borrowed for the joint adventure, and applied for its purposes and benefit.

LORD DEAS—I have arrived at the same result as your Lordship. The written agreement of 1862 expressly bears that the joint adventure was the lease of the farm, including the stock of sheep upon the farm. The lease itself was in favour of M'Nab only, and bore to exclude all assignees without the landlord's consent. Whether the landlord would or would not give his consent was a matter personal to him. But that does not alter the position of these two persons; they were undoubtedly made partners in a joint adventure

by this agreement—in fact so far as their relation to one another went they were joint tenants. In short, it comes to be practically, so far as we are concerned just now, as if the lease contained no exclusion at all. The excluding clause might have raised additional difficulties if the question had arisen with the landlord instead of with a third party, but I don't need to point to these, as the present question is quite free of them.

The question, then, here simply comes to be, whether, under a joint adventure where the concern is entirely managed by one of the partners, there is an implied mandate to borrow money. In this case the money was borrowed expressly for the purpose of paying the rent, and it was in point of fact so applied. If in any such case, therefore, there could be joint liability, it would be in this. The main thing said in dispute of the liability was, that this was not a proper trading concern, that farming is a business which should be carried on without borrowing money at all. That is a total mistake. Farming cannot be carried on any more than anything else without borrowing. It is a well known and recognised fact in the agricultural history of this country that the great improvements of late years in that branch of industry are mostly owing to the introduction of cash credits, and other means of borrowing, among the agricultural community. Now I do not see how money could well be more directly borrowed for the use and benefit of a joint farming adventure than it was here. Had it not been so borrowed the sheep stock might have been carried off by the landlord, the farm displenished, and the joint adventure utterly ruined. Looking to all the circumstances, then, I think that we must adhere to the very able interlocutor of the Sheriff. A good deal of the reasoning of the Sheriff-Substitute's ingenious and equally able argument proceeds on what I consider a mistake, viz. on the assumption that the subject matter of the joint adventure was the sheep stock only, and not the lease. Had the Sheriff-Substitute had before him the fact that the lease itself was the subject of the joint adventure, I doubt much whether he would have come to the conclusion he did. I am therefore for dismissing the appeal.

Lord Ardmillan—I view this action not as an action on a bill, but as an action for recovery of an advance of money made to the managing partner in a joint adventure, and made and applied for the legitimate purposes of the joint adventure. The pursuer is the party making that advance, and he is now seeking payment of the advance. His entire good faith is not disputed. He advanced £150—now raised by interest to £154—to M'Nab, who personally managed the farm, for the purpose, stated at the time, of paying the rent of the farm of Dalchully; and it was so applied. Whoever was the true tenant—sole or joint—of Dalchully, the payment of the rent was a just and necessary expenditure, and was for the benefit of the tenant. If there was a joint adventure in the lease, and in the sheep-farming on the land held in lease, the payment of rent was necessary to the adventure, and contemplated by the parties to the adventure; and the money advanced and applied in payment of rent was *in rem versum* of such joint adventure. Of this I think there can be no doubt.

Then it is as clear that there was a joint adventure. (His Lordship then read the letter of agreement already quoted.)—This letter is quite distinct. Mr Young accepted half of the lease and became owner of half of the sheep stock in 1862; and in May 1868 he signed an agreement with M'Nab, designing himself and M'Nab as "the out-going tenants of said farm." It is thus manifest that the defender Mr Young was a partner with M'Nab in the joint adventure of sheep-farming on land held by M'Nab and himself as tenants; and that the rent of that farm was paid by M'Nab with the money advanced to him for the purpose by the pursuer.

That the advance and the payment of rent was for the benefit of the joint adventure, and of Mr Young as one of the partners therein, is beyond dispute. The subsequent bankruptcy of M'Nab does not affect this matter. The only question is, Was there in M'Nab, the resident and managing partner in the joint adventure, an implied mandate to borrow money to pay the rent? I have no difficulty in stating my opinion that, under the circumstances proved, M'Nab had an implied mandate to borrow, to a fair and reasonable amount, for payment of the rent, and that the sum borrowed was not unfair or unreasonable.

I think that joint adventure is, within its proper sphere, and in its fair prosecution, a limited partnership; and that is the opinion of Professor Bell (2 Bell's Com., 649, 652, 654). A deviation from the true aim and scope of the adventure—such as a separate speculation by one of several joint partners, or it may be an extravagant and unreasonable extension of the same speculation, materially altering the rights and interests of the partners—would raise a different question. We have no such case here, nor anything like it. The advance here obtained by M'Nab from the pursuer was not only within the limits, and for the true purposes of the joint adventure, but it was made and used for the most important object, for the best and most essential interests of the joint adventure. It has indeed, as your Lordship in the Chair has well said, the character of a preferential charge; for it may be said to have been expended in maintaining the very foundation of the joint adventure, the tenancy of the farm. The due payment of the rent was one of the primary purposes, and an essential element in the joint adventure; and the authority of the case of the *British Linen Co.* v. *Alexander*, 1853, 15 D. 277, seems to be in point.

The decisions in regard to action or diligence on bills are not applicable here. I give no opinion on such a question. I am satisfied that M'Nab obtained from the pursuer this money, and used it for the benefit of the joint adventure, and in its legitimate prosecution; and I think that the liability of the defender Young, under the circumstances disclosed, and as a partner in the joint adventure, is clear.

I therefore concur in the judgment of the Sheriff.

Lord Kinloch—It is proved by the writ of the defender Young that on 18th July 1862 he granted a missive to John M'Nab, then tenant of the sheep-farm of Dalchully, stating, "I hereby accept of half the lease thereof, entry at Whitsunday last." And at the end of the lease, he and M'Nab entered into arrangements with the in-coming tenant under the express designation of "the out-going tenants of said farm." I cannot entertain any doubt that the defender and M'Nab became, as between themselves, joint tenants of the farm, M'Nab being manager for both; and I think that

this contract between the defender and M'Nab is in nowise affected by the exclusion of assignees in the lease, which created a right purely personal to the landlord. To say, as the defender has said, that they were merely joint proprietors of the sheep stock, is to say what, to my mind, is not consistent nor intelligible. The stock could not be held without the farm, nor without the rent due to the landlord forming a charge on the occupation of the stock.

It is further, as I think, proved that in November 1865 M'Nab prevailed on the pursuer to give his name to a bill for £150, for the express and distinctly stated purpose of raising money to pay the half-year's rent of that precise amount, due at the then term of Martinmas; and that the money so raised was applied in payment of the rent. The bill now sought to be enforced against the defender as joint adventurer with M'Nab is the last of the renewals of this bill of £150.

I am of opinion that the Sheriff has rightly found the defender liable in the amount of this bill. I consider the arrangement between the defender and M'Nab to have constituted a joint adventure, rendering the defender liable for all the debts incurred by M'Nab in the fair exercise of the administration implied by the contract. And I think it does not matter that the pursuer, when accommodating M'Nab, did not know that the defender was concerned along with him in the farm. This amounts to nothing else than that the defender was a latent partner of M'Nab. All that I think requires to be established is that the transaction was within M'Nab's implied authority as manager of the joint concern. In the case of partnership proper, this is generally matter of very easy presumption. In the case of joint adventure as distinguished from partnership proper, the implied authority requires satisfactory establishment.

In the present case, I think it clear that the management of this farm and stock necessarily inferred pecuniary transactions on the part of the administrator. The buying and selling of stock infers money dealings, more or less extensive. It fairly implies the necessity of occasionally raising money for the purpose of the traffic; for money is indispensable, and always to have money in hand from the proceeds of the stock supposes a concatenation of events much too favourable for ordinary human dealings. I think occasional transactions on credit must have been contemplated as within M'Nab's course of procedure. I cannot doubt that if M'Nab bought sheep on credit for the joint adventure, the defender, when discovered to be a joint adventurer, was liable to the seller for the price. But if M'Nab, in place of buying on credit, borrowed the necessary amount for the express purpose of the purchase, and paid the seller in cash, I consider the defender to have been equally liable to the lender of the money so borrowed. If M'Nab offered in the market for a parcel of sheep for the farm, and got them on his bill to the seller for £150, I think the defender would have been clearly liable for this bill; which would, in the case supposed, be merely an expression of the stipulated credit. But if the seller hesitated about trusting M'Nab, and a man standing beside him in the market consented to lend M'Nab the amount for the express purpose of the purchase, I cannot see that the fact of the bill being given to this other party would make any difference in the liability of the defender.

The principle now alluded to directly applies, as I think, to the case of the rent, paid through means of the accommodation obtained from the pursuer. The rent was a necessary charge on the joint adventure. If the parties were not in funds to pay it, there was a necessity to raise the amount, otherwise the stock would have been sequestrated. In obtaining a bill from the pursuer for the purpose of paying the rent, I think M'Nab pledged the credit of the joint adventure for its retirement. It is to my mind of some moment in this question that the bill was granted on a distinct request for the accommodation, and for the express purpose of paying the rent. This entirely distinguishes the case from that other which may occur, where money is given to a person indefinitely, and without any reference to its application; in which case I can conceive it pleaded with great force that the loan was made to the individual, and that the individual becomes creditor of the joint concern by his after use of it. The bill was here given for the express purpose of paying the rent, and I think the defender as much liable in re-payment as if it had been given for the express purpose of paying for stock.

I have only to add that in so holding I decide the present case only, and no other. The liability in such a claim depends on the particular circumstances, and implied powers, of the special joint adventure. I can conceive a case, and in particular a case of joint tenancy, in which the same result might not hold. What I go upon is the peculiarity of the case, as a case of joint adventure, involving the necessity of pecuniary transactions, in a way not materially different from the case of proper trade. In this particular joint adventure I conceive that the transaction by the managing partner with the pursuer, for the express purpose of raising money to pay one of the charges of the adventure, was made under an implied authority, which bound the defender, the joint adventurer.

Lord President—I think it right to add that I must not be held as deciding that in a joint adventure a managing partner can bind his co-partner in a bill debt. I don't think M'Nab attempted this. I have merely decided that M'Nab had power to bind his co-partner in re-payment of the sum of money borrowed and applied for behoof of the concern.

Lord Deas—Your Lordship reminds me of what was an omission in my opinion. I should have added, that the summons in this action is not properly speaking a summons laid on the bill. It is a summons rested on the facts of the case, and not on the bill. I am not at all sure that we make the same sort of distinction between an action laid on a bill and an action laid on the case as they do in England. However that may be, the action here is laid on the case, and as it is not necessary to give any opinion beyond the case, I do not enter into any other question which might arise.

Appeal refused.

Agents for Defender and Appellant—Adam & Sang, S.S.C.

Agents for Pursuer and Respondent—Gibson-Craig, Dalziel & Brodies, W.S.