Annual income, subject to expenses of trust, say £94 15 1

Divisible as follows:—

1. For pensions to widows, the income of 6000 merks, 10,000 merks, and £1560 consols, say . . . £78 9 1⅓
2. For grants towards the maintenance of children, the income of 5000 merks and of £166, 5s., say . 16 5 11⅔

£94 15 1

"II. The trustees shall, from time to time, choose and elect as pensioners such number of widows, being not less than five, as the revenue of the trust at the time will permit. The widows shall be persons of good report, deportment, and conversation, the relicts of such as have been ministers, merchants, or tradesmen within the city of Glasgow, and they shall continue to hold the pensions for such period or periods as to the trustees may seem proper. The pensions shall be of such amounts as the trustees in their discretion may from time to time fix, but in no case shall any pension exceed the sum of £20 in a year.

"III. From the fund set apart for the maintenance of children the trustees shall make grants from time to time, as the income of the fund will permit, to assist in the maintenance of children under the age of fourteen years, the sons or daughters of widows who are pensioners of the trust, or who in the opinion of the trustees are duly qualified as such. The trustees shall, from time to time, in their discretion fix the amount of these grants, and may either continue them annually to the same persons or not as they may think proper."

The Court approved of the scheme.

Counsel for Petitioners—N. J. Kennedy. Agents—C. & A. S. Douglas, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEWART v. NORTH.

(On question of Jurisdiction, *see ante*, vol. xxvi. 650; 16 R. 927, and 17 R., H. of L., 60.)

Partnership—Joint-Adventure—Count and Reckoning—Mora—Right of Co-Adventurer to Accounting where Managing Partner Changes the Method of Carrying Out the Joint-Adventure, and Acquires New Rights by Some Use of the Joint-Property—Claim for Profits Barred by Mora.

A joint-adventure was entered into in 1877 for acquiring and working a concession to supply a seaport in Peru with water by laying pipes. In 1878 one of the joint-adventurers, who had the local management, instead of going on with the original scheme, negotiated for himself a lease of the business and property of an existing water company which brought water in steamers to that, amongst other, towns. His control over the concession helped him in obtaining this contract. He carried on the water company's business under the location until the bombardment and destruction of the town in 1879. In 1881 he purchased the water company's plant and business, and carried on operations till 1887, when he sold the business to a new company.

In 1887 the assignee of another joint-adventurer, who had contributed certain sums to the capital of the joint-adventure as originally projected, but had not claimed or offered to share in these later enterprises, brought an action of count and reckoning against the managing partner for a share of the profits made under the contracts of location, purchase, and re-sale of the water company's business.

Held (1) that he was entitled to an account of all intromissions with the funds and estate of the joint-adventure in respect of his author's contributions to its capital; (2)—*rev.* the Lord Ordinary's ground of judgment—that the joint-adventure had not lapsed prior to the date of the location contract; (3) that as the location contract covered the ground of the joint-adventure, and was obtained by means of the concession, which was joint-property, the pursuer would have been entitled to an account of any profits made in virtue of the rights acquired under that contract if his claim had been asserted in reasonable time; (4) that his claim was barred by his delay for nine years to take active steps to enforce it.

On 10th July 1876 John Thomas North obtained from the Municipal Council of Pisagua, Peru, by deed of agreement, a concession of the exclusive right to supply the port of Pisagua with drinkable water by pipe-conduit from the interior. The deed provided that the works were to be completed in three years, and that the concession should endure for thirty years.

By minute of agreement dated 13th October, 1877 North and William Speedie, engineer, Mollendo, Peru, entered into a joint-adventure for the execution of the necessary works in terms of the concession. By the first article, Speedie undertook to pay North £5000 at the ensuing term of Martinmas, in return for which obligation North assigned the concession to himself and his partner. By the second article it was provided that the capital stock of the joint concern was to be £50,000 in equal shares, and that "such portion of said sum as may be required to meet payments in Great Britain in connection with said works, but not exceeding £20,000," should be raised upon securities belonging to Speedie, to be placed in the hands of Mr John Welsh, S.S.C., Edinburgh. The fifth article provided that

"neither of the parties shall have any concern in similar works or undertakings whereby they may be prevented from devoting their whole time and attention to the interests of the company."

By another minute of agreement of the same date between North and Speedie on the one part, and Mr John Cockburn, wine merchant, Edinburgh, on the other, the latter was admitted to one-tenth share in the joint-adventure. By the first article he was taken bound "to contribute towards the expenses which have already been incurred in obtaining the said concession, and otherwise in beginning the said works, the sum of £1000 when demanded, and further, to contribute such further sums, not exceeding in all one-tenth part of the total sum which may be required for carrying on and completing the said works, and that in such sums and at such times as may be demanded by John Welsh, S.S.C., who is hereby authorised and empowered to demand and receive payment of the same." The second article provided that North and Speedie should have the exclusive right to manage the said works, and to purchase plant and materials therefor without being interfered with by Cockburn in any manner of way.

The facts proved in regard to what Cockburn did in implement of his obligations are sufficiently stated in the opening of the Lord Ordinary's note.

Certain purchases of plant were made, and certain engineering operations were undertaken, for the purpose of carrying out the pipe scheme, but beyond that it was not persevered in.

On 18th May 1878, North, who had gone to South America in March, entered into a contract in his own name for a lease or location of the business carried on by the Tarapaca Water Company, which consisted in supplying Pisagua and three other ports with fresh water by means of steamers plying along the coast.

On 7th June 1878 Speedie wrote to Mr Welsh, who represented the absent joint-adventurers in this country, in virtue of a factory and commission dated 13th October 1877, in the following terms—"*Water Scheme.*—You won't require to provide any funds for this for some time, as we have made other arrangements, which I hope will give us an income ere investing any more."

By minute of agreement, dated 9th July 1878, North took Speedie into partnership for the working of the Tarapaca Water Company, giving him an equal share in the enterprise.

The fifth article provided—"As the present contract is intimately connected with that for the supply of drinking water to the Port of Pisagua, for the works of which the contracting parties have also formed a partnership, the deed of partnership relating to which continues in force, Mr Speedie recognises or binds himself to pay to Mr North £5000 sterling for the share of expenses incurred in obtaining that the Municipal Council of Pisagua should award to him the construction of the work with a privilege."

On 18th July 1878 Speedie wrote to Welsh—"North won't go on with the pipes, he having by a bold stroke of diplomacy frightened the existing water company into handing us over all their stock and steamers. . . . North will go home I expect next month, when he will explain all to you. The funds he has drawn for traction engine he will refund, and as I stated before you will not require to make any further payments to him. He will also make the arrangements necessary with Mr Cockburn, either to hold over until the pipes are laid or pay him out. That I will leave to you and North."

On 5th October 1878 North wrote to Welsh in these terms—"We are now in partnership in another water concern as well as the one in which we are at present working together. We have not yet decided what we are going to do with the other concession, but as Mr Speedie will be here in about a month's time, when I shall come to Edinburgh to see him and yourself respecting our Peruvian interests; besides, we have to arrange with Mr Cockburn as to his share in the business, and this cannot be done until Mr Speedie's arrival."

On 21st December 1878 North wrote to Cockburn—"I may tell you, though we have not carried out our scheme, we have made all preparations for doing so, but on Mr Speedie's return I think we shall give you the choice of going on with us or without your money, but when I see you will explain more fully."

Shortly afterwards war broke out between Chili and Peru, which brought the working of the water company's business to a standstill, water being declared contraband of war, and Pisagua being nearly destroyed by bombardment. In consequence the location contract was held by an award of arbitrators, dated 22nd September 1879, to have come to an end "by reason of the matter located having been partly destroyed."

In 1881, after peace had been restored, the Tarapaca Water Company was wound up, and its assets and business were sold to North, who carried on the concern till 1888, when he sold it to a limited company for £100,000.

North had dissolved his partnership with Speedie in 1882. The deed of dissolution bore that "by virtue of this contract, and particularly by the extension of the society on 9th July 1878 [referring to the location contract] Mr North pays to Mr Speedie, &c."

On 27th February 1884 Cockburn wrote to North—"I write to inquire when I may have an interview with you, and thereby learn what has become of the Bolivian Water Scheme, &c., &c."; and on 31st March 1884 to the same effect—"I again write to inquire if you are now prepared to square up the Bolivian Water Scheme transaction?"

On 17th April North replied as follows—"I am sorry to inform you that the project for bringing down the water was like the 'Straiton Oil Company,' a failure. On

account of heavy losses through the war, &c., the concern was put into liquidation years ago. A great deal of expense, however, was incurred, and borne by Mr Speedie and myself. I have written out to the coast for detailed a/cs., and on receipt of same will further communicate with you as to the proportion of the loss accruing to yourself. . . . I need not tell you that the £250 in B shares of the Straiton Oil Company cost me £750."

These were the only communications that passed on the subject between 1878 and the date of the action.

Robert Stewart, farmer, Elibank, near Peebles, acquired Cockburn's right and interest in the joint-adventure by assignation from the trustee on Cockburn's sequestrated estate dated 13th and 14th April 1887, and brought this action of accounting against North in May 1887 having used arrestments *ad fundandam jurisdictionem*. He averred (Cond. 7)—"In entering into the said transaction (*i.e.*, the location contract), and in carrying on the said business Messrs North and Speedie were acting for behoof of the said joint-adventure. The transaction was in the line and within the scope of the said joint-adventure. . . . Moreover, in their negotiations for the purchase of the said water-works, and for supplying water to Pisagua, Messrs North and Speedie availed themselves of their connection with and control of the said joint-adventure, and of the rights and privileges conferred by the said concession." (Cond. 11) "The whole of the transactions and arrangements before narrated subsequent to the date when the defender went to Peru in 1878 were negotiated . . . for the benefit of the joint-adventure."

The defender answered—"To this contract" (*i.e.*, the location), "of which the object, considerations, and liabilities were wholly different, and which were outside the scope of the joint-adventure foresaid, Cockburn was no party, and had no interest therein." He also averred that the joint-adventure had come to an end, and the pipe scheme had been abandoned for want of the necessary capital, that this abandonment was known to and acquiesced in by Cockburn, and that he had failed to implement his part of the joint-adventure by contributing his share of capital.

The pursuer pleaded—"(3) The business carried on by the defender and Mr Speedie having been for behoof of the joint-adventure the pursuer is entitled to credit for a share of the profits thereof. In any view, the said business being in the line and within the scope of the agreements of 13th October 1877, the defender and Mr Speedie were not entitled to carry it on except for their joint behoof, and the defender being in right of the assets and responsible for the liabilities is accountable to the pursuer for the profits thereof."

The defender pleaded, *inter alia*—"(6) The said John Cockburn having abandoned whatever claims were competent to him in respect of his interest in the joint-adventure under the minute of 13th October 1877, the pursuer is not entitled to demand a count and reckoning as concluded for."

There was also a plea to the validity of the arrestments, which was sustained by the Lord Ordinary (KINNEAR), but repelled by the First Division by interlocutor dated 14th June 1889. The judgment was affirmed by the House of Lords on 14th July 1890—17 R., H. of L., 60.

At a proof taken before the Lord Ordinary (STORMONTH DARLING) on 24th November 1891, pursuer's counsel put in the documents and letters above referred to amongst others, and stated that they did not propose to lead oral evidence. The defender's proof consisted mainly of a lengthy examination and cross of the defender himself. He deponed—"(Referred to letter from Mr Speedie to Mr Welsh, dated 7th June 1878) — In that letter Mr Speedie says—'You won't require to provide any funds for this for some time as we have made other arrangements, which I hope will give us an income 'ere investing any more.' In regard to that paragraph I should understand that Mr Speedie knew Mr Welsh had got no money, and that there was no use bothering him any more. (Q) The words 'You won't require to provide any funds for this' refer to the joint-adventure in the water scheme?—(A) Yes; the joint-adventure between North and Speedie. No funds were required for the farming business. (Q) He goes on to say, 'as we have made other arrangements, which I hope will give us an income ere investing any more?'—(A) This would give an income by the profit we made—the farming business. In the meantime, as they could not get money for the pipes, it was left in abeyance. (Q) You have no doubt he refers there to the location which you had got from the company?—(A) The contract from the company. . . . (Referred to fifth article of defender's contract with Mr Speedie)—(Q) What was the intimate connection there referred to?—(A) Mr Speedie had not paid anything towards the expense that I was out of pocket in the preliminary work of the pipe scheme. (Q) Do you say that that is the connection you refer to? —(A) Yes. (Q) Was not the intimate connection this—that you were a member of two partnerships for doing the same thing? —(A) No. We could have brought water down with the pipes. (Q) Was not the intimate connection this—that both the partnerships had for their object the supply of water to Pisagua?—(A) Yes, the farming or leasing was to bring the water down as it was brought before; it was to continue what it was doing before. . . . (Shown letter by Mr Speedie to Mr Welsh, dated 18th July 1878)—(Q) In that letter he speaks about your diplomacy in having frightened the existing water company into handing over all their stock to you; do you know what he refers to there?—(A) No; but perhaps they thought I was going into opposition. (Q) You had in your pocket this concession from the municipality for a monopoly of the supply of water by pipes to Pisagua?—(A) Yes. (Q) Did that give you the whip hand of the company?—(A)

It would have its effect in their trying to avoid opposition. As regards Pisagua, there is a railway there, and we could not have driven them out of the field. (Q) In negotiating with the Tarapaca Water Company for the location you made use of your powers which you had got under the concession as an aid in making a bargain?—(A) To help us. They didn't know that we hadn't got capital, and we took good care not to let them know. It was quite well understood between me and Mr Speedie in July 1878 that Mr Cockburn had a subsisting interest in the matter of the supply of water to Pisagua. We found that the supplying of water to Pisagua under the contract we had got was a profitable affair at first."

On 16th March 1892 the Lord Ordinary (STORMONTH DARLING) assoilzied the defender from the conclusions of the action, and found the pursuer liable in expenses.

"*Opinion.*—[*After narrating the substance of the agreements*]—What actually happened was this—At the time when the joint-adventure was entered into, Cockburn contributed £125 by transferring to the defender 1000 B shares in the Straiton Oil Company, on each of which half-a-crown had been paid. The transfer proved a disastrous one to the defender, for the company soon afterwards went into liquidation, and the defender had to pay up the balance of £875. I notice this only because it may help to account for Cockburn's subsequent conduct in not asserting any partnership rights. But the transaction, notwithstanding its unfortunate result, must be held to have constituted a payment by Cockburn to the extent of £125. There is evidence in the letters of Mr Welsh that Cockburn was repeatedly asked to make further payments, and that owing to financial difficulties he could not pay more than a sum of £300 in June 1878. The letters of Welsh are not of course by themselves evidence of the reason why no more was paid, but they corroborate the defender's account of the matter, and as neither Welsh nor Cockburn were examined, I must assume that Cockburn's failure to make the stipulated contributions in full was due to inability, and not to the absence of demand.

"From the same source, and also from the evidence of the defender, it appears that shortly after October 1887 Speedie's property in this country became so depreciated in value that it was found impossible to raise money on the security of it as provided in the agreement, and that the only plant ever ordered for the water-works was an engine and boiler at a cost of £834, which sum seems afterwards to have been repaid by the defender to Speedie. Except this sum, and the two payments made by Cockburn, the only money spent in connection with the joint-adventure consisted of outlays by the defender in obtaining the concession and making preparations for the work, which he estimates at more than £5000.

"These being the facts, the question arises, whether in entering into his contract with the water company the defender was justified in treating the joint-adventure as at an end, or whether he must be held to have made the contract for behoof of the joint-adventure.

"I do not doubt the soundness of the legal propositions which the pursuer maintains, and which have been embodied in sections 29 and 30 of the Partnership Act 1890. I refer to these sections, not as in terms ruling the present case, for that would be to make the statute retrospective, but as containing a convenient and authoritative summary of the law which had previously been settled both in England and Scotland. Section 29 is in these terms—'Every partner must account to the firm for any benefit derived by him, without consent of the other partners, from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection.' And section 30 is as follows—'If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.'

"If the pursuer's author Cockburn had implemented his part of the joint-adventure, I do not think that the defender would have been entitled, without his consent, to abandon the pipe scheme, and enter into the contract with the Water Company. The operations of the latter were not confined to Pisagua, and the mode of supply was different, but its business was, *inter alia*, to do the very thing which the joint-adventure was to do, viz., to supply Pisagua with water. Cockburn, in the case supposed, might have declined to go into it, and might have claimed back his money, but if profits had been made, and he had chosen to claim a share of them, I think he would have been within his right. I do not know whether the case would have fallen under the rule compelling a partner to account for the profits of a business carried on in competition with the business of the firm, for probably the rule implies that the two businesses are actually in operation at the same time, but I think it is clear that in negotiating his contract with the Water Company the defender made use of the concession of 1876, which had become partnership property. He admits that it gave him a lever in making terms with the company, for he did not disclose to them that his attempt to raise capital for the pipe scheme had failed.

"It would have been, I think, a much more difficult question whether Cockburn or those in his right would have been entitled to follow the defender over the gap which occurred between the termination of what has been called the 'farming contract' in 1879 and the purchase of the Water Company's business in 1881, for it does not appear that the concession was of any use in enabling the defender to cheapen the purchase price, and indeed it hardly could be, because the three years allowed

for completing the works had run out in 1879. Moreover, there had been so complete a change caused by the war and the partial destruction of the town that it is difficult to see how even the fact of having held the abandoned 'farming contract' gave the defender any appreciable advantage in purchasing the business of the company. Undoubtedly also the lapse of time and the silence of Cockburn would have formed serious obstacles to the success of a claim to share in profits.

"But it seems to me unnecessary to consider these questions, for the fatal objection to the pursuer's case in my view is, that Cockburn, in whose right he stands, failed to implement his part of the joint-adventure. The failure was not Cockburn's alone, for there was a complete breakdown of the arrangements for raising money in this country, by which, according to the contracts, the payments for plant, &c. (not exceeding £20,000 and estimated at £16,000), were intended to be made. I think it must have been partly the consciousness of this which prevented Cockburn from pressing any claim to be regarded as a partner in the subsequent undertakings. He did write two letters to the defender, one on 27th February 1884, and the other on March 31st of the same year. In the first he asked what had become of 'the Bolivian Water Scheme,' and in the second (having received no answer to the first) he said—'Knowing your good intentions and sense of honour when we last parted at The Laurels, I again write to inquire if you are now prepared to square up the Bolivian Water Scheme transaction.' These letters do not indicate a very active or intelligent interest in the matter, for the scene of operations was not Bolivia but Peru. However, he got a reply from the defender dated 17th April 1884, which was either not very candid or singularly inaccurate, for it bore that 'the project for bringing down the water' had been 'like the Straiton Oil Coy., a failure,' and that on account of heavy losses through the war, &c., the concern had been 'put into liquidation years ago.' It was of course quite inaccurate to say either that the joint-adventure (which was the scheme referred to) had suffered losses through the war or had been put into liquidation. In the witness-box the defender was quite unable to give any satisfactory explanation of this letter, and perhaps his best excuse was given to his own counsel in re-examination, when he said that by the time he wrote the letter his papers relative to the pipe scheme had all been destroyed. But the important fact is that to this letter Cockburn made no reply. Perhaps he was scared by the mention of heavy losses, and by the defender's proposal to ascertain the proportion of these losses accruing to himself. At all events, he seems never to have renewed his demand for a settlement of accounts.

"It was strongly urged for the pursuer that the proper inference from the defender's letter of 17th April 1884 was that he regarded Cockburn as having an interest in the 'farming contract,' but I think it must be read in connection with an earlier letter from the defender to Cockburn on 21st December 1878, in which he said that 'on Mr Speedie's return I think we should give you the choice of going on with us or without your money.' The defender says that he recognised a certain claim on Cockburn's part to have the option of joining in the 'farming contract' provided he paid his share of the expenses already incurred, just as Speedie did. But that is a very different thing from having an absolute right to an accounting without making any contribution.

"It was also urged that Cockburn was not bound to make any payments towards the expenses of the joint-adventure except such as were demanded by Mr Welsh, and that there was no evidence of any demand except for the two sums which were paid, but I cannot assent to the view that Welsh had any power to relieve Cockburn from payment of any part of the sum of £1000, which was his stipulated contribution to the expenses already incurred. He had only power to regulate the time when payments should be made, and I must conclude, in the absence of Welsh's evidence, that the reason for the full amount not being paid was either that Cockburn could not pay, or that everybody recognised that the scheme had proved abortive for want of the necessary capital.

"I am of opinion therefore that the pursuer has failed to make out his case for an accounting."

The pursuer reclaimed, and argued—Cockburn contributed £550 to the joint-adventure, and the pursuer as his assignee was at least entitled to know what had become of it. The subject-matter of the contracts entered into by the defender fell within the scope of the joint-adventure or competed with it; in either case, he must communicate the benefits, for though a joint-adventure is a limited partnership, yet once its scope is determined, the same rules apply as in partnership. There was no evidence to support the Lord Ordinary's view that the joint-adventure collapsed for want of funds; no demand was made on Cockburn for more than he paid. In fact, no more capital was required for the pipe scheme, because the location contract was followed out instead of it; the accounting should therefore include the working of the location. By the purchase in 1881 the defender acquired the permanent right in the Water Company's business in place of his temporary right under the location. He again made use of the concession to negotiate favourable terms with the company. There was no ground for the suggestion that the concession had lapsed; the Municipality had never challenged it, and there was no right surely in one of the *socii* to raise that question, and it was recognised as existing in the dissolution of the partnership between North and Speedie. The accounting should therefore embrace the rights acquired under the contract of 1881, and extend down to the sale of the business in 1888—Lindley on Partnership, pp. 303-305; Bell's Comm. ii. 632 (5th ed.); Ersk. iii.

3, 20; *Pender* v. *Henderson*, July 20, 1864, 2 Macph. 1428; *M'Niven* v. *Peffers* December 2, 1868, 7 Macph. 181; *Dean* v. *Macdowell*, 1878, L.R., 8 Ch. Div. 345; Partnership Act 1890, secs. 29 and 30.

The defender argued—There was nothing in the record to cover the limited accounting now sought. There was no real proof that the possession of the concession was the means of procuring the location, and still less the purchase of the Water Company's business, for it was a lapsed privilege at the latter date, and if it had been so used, the pursuer could not claim an accounting as for a share of partnership profits; the proper conclusion would be for damages. Joint-adventure being a limited partnership, the rules of partnership as to communicating benefits arising from any other enterprise *in pari materia* did not apply; joint-adventurers usually had many schemes on hand, and some might overlap. In any view, the pursuer was barred from claiming a share in the profits by his having lain by so many years—*Davie* v. *Buchanan*, December 17, 1880, 8 R. 319; *Clegg* v. *Edmondson*, 1857, 8 De Gex, M'N. & G. 787; *Miller* v. *Walker*, December 10, 1875, 3 R. 242; *Featherstonhaugh* v. *Fenwick*, 1810, 17 Vesey, 298; Lindley on Partnership, p. 467-8.

At advising—

LORD PRESIDENT — The claims of the pursuer arise out of a minute of agreement dated 13th October 1877, by which John Cockburn (whose rights have been assigned to the pursuer) became interested in a joint-adventure of the defender and William Speedie, the scope and terms of which are defined in another agreement between these two persons bearing the same date. From the latter agreement it appears that the defender had obtained a concession from the municipal authorities at Pisagua for supplying that port with water by pipes, and the working of that concession was the subject of the joint-adventure into which Cockburn was admitted, to the extent and on the terms set out in the agreement to which he was a party. His position under that deed was this—he was to contribute towards the expenses which had already been incurred in obtaining the concession, and otherwise in beginning the works, the sum of £1000 when demanded; he was also to contribute such further sums, not exceeding in all one-tenth of the total, as might be required for carrying on and completing the works; and he was to be entitled to one-tenth of the profits and chargeable with one-tenth of the losses of the adventure. On the other hand, the defender and Speedie (the two original joint-adventurers) were to have the exclusive right to manage the works, and to purchase plant and material, without being interfered with by Cockburn in any manner of way.

While the rights of the pursuer arise initially out of this contract, the present claim depends upon certain actings of the defender, most of which took place in South America, and the rehearsal of which upon record presented a somewhat complicated set of facts. Yet, singularly enough, the pursuer thought fit to lead no parole evidence at all, contenting himself with putting in evidence a large number of documents, most of them letters, as to which all that was admitted was that they had passed between the persons purporting to address and to be addressed, and which were therefore no evidence of the truth of their contents. Had the defender therefore led no proof, I do not at present see that there would have been evidence of the several matters which I am now to notice. Upon the case as it stands, however, now that the defender has led evidence, I think that the following facts are sufficiently established.

After the execution of the agreements of 1877, Cockburn was applied to for certain sums of money for plant required for the purposes of the adventure, and what he was asked to pay he paid partly in money and partly in shares of the Straiton Estate Company, which shares were (something too readily as afterwards appeared) accepted as money's worth. In March 1878 the defender set out for South America, ostensibly on the business of the adventure. While there, however, in May 1878, he in his own name entered into a contract with the Tarapaca Water Company, and this is the central part of the case. By this contract he virtually took over the whole property and business of an existing water company, whose object (as expressed in its articles) was to supply fresh water to the ports of Pisagua and three other towns, and which was in fact supplying Pisagua with water, and had been doing so for eight or ten years. Having entered into this contract, the defender took possession of the property of the Tarapaca Company, assumed Mr Speedie as a partner, appointed a manager, and carried on the business until his operations were interrupted by the bombardment and destruction of the town in 1879.

Upon the face of the defender's own evidence, it seems to me to be manifest (1) that the business which he thus entered into was one which covered the ground of the joint-adventure with Cockburn, and (2) that he used the concession in which Cockburn was interested, and which was the property of that joint-adventure, in obtaining the contract with the Tarapaca Company. Now, this was done without previous notice to Cockburn, who, under the agreement between him and the defender, had no part in the active execution of the joint-adventure, and was entitled to rely on its being followed forth by the defender in the common interests of the joint-adventurers.

It appears to me that unless the relation of joint-adventurers had previously ceased to exist between the defender and Cockburn, the defender by using the rights of the joint-adventurers in obtaining this Tarapaca contract must be held to have made himself liable to account to Cockburn for all profits obtained by him out of the Tarapaca contract during its subsist-

ence. On the other hand, I do not think that the facts admit of the subsequent enterprise entered into in 1881 being treated upon the footing of its being a continuation of the Tarapaca Company's business.

The Lord Ordinary, however, has held that the joint-adventure had come to an end prior to the Tarapaca contract being entered into, because Cockburn had failed to implement his part of the joint-adventure. Now, the only duty which Cockburn had under the agreement to fulfil was to pay money when required. The defender is unable to point to any demand upon Cockburn made and not complied with, and this was virtually admitted by the defender in the witness-box. The failure of other people, and particularly of Mr Welsh, to raise as much money as the defender may have been led to expect does not seem to me to affect the question unless it could be shown that by May 1878 this had led to all parties recognising the enterprise to be at an end. The evidence and the acts of the defender seem to me entirely to negative this latter proposition.

In May 1878, therefore, in all matters affecting the joint-adventure, I think that the defender was the agent of the joint-adventurers.

Upon the whole, I hold that had the defender been in good time called to account for his management of the concerns of the joint-adventure he must have accounted to Cockburn for what he drew under the Tarapaca contract. It remains to be considered whether the claim of the pursuer can now be given effect to.

Now, there is authority and also reason for holding that claims for profits in joint-adventures, particularly of a speculative character, must not be allowed to slumber; and this has a special application to a claim for profits made by some use of the property of the joint-adventure which was not in contemplation of the contract. The principle of the law of partnership gives to the absent joint-adventurer a right to claim an account of the profits so made in the extraneous enterprise if he chooses to do so; but it is necessary that he should assert his right in reasonable time and should not lie by.

Well now, in the present case we have a very long lapse of time to begin with, as the trading for which the defender made himself liable to account for began in 1878 and terminated in 1879. What is still more important is, that by August 1878 the news was in this country that the original enterprise of laying pipes was departed from, and that the defender had got possession of the property of the existing water company. That intelligence was conveyed by a letter addressed by Mr Speedie to Mr Welsh, dated 18th July 1878, which seems to me to be a document of very great importance. Mr Welsh, it is to be observed, was, under the agreement between the defender and Cockburn, the gentleman who was to keep the enterprise in funds by requisitions on the individual joint-adventurers. He was therefore to some extent the representative of the joint-adventurers. Now, if the letter of 18th July 1878 be read, it is manifest that the contents concerned Cockburn directly, and that Cockburn had a right to the information conveyed. The pursuer has put this letter in evidence, and founded upon it. He has also, as I have already pointed out, led no parole evidence, and in particular he has not examined either Mr Cockburn or Mr Welsh although both are alive. It seems to me that in these circumstances it must be assumed that Mr Welsh communicated to Cockburn the contents of the letter in question, and if this be so, then from that time Cockburn is charged with knowledge of the essential facts which give rise to the present claim. Yet from that time until 1884 Cockburn made no claim of any kind whatever, and when in 1884 he asked to know what had become of what he, with apparently rather languid interest, called the Bolivian water scheme, and was told that it had resulted in loss, but that if he liked particulars as to the share of loss which would fall on him he could have them, he seems to have thought it prudent not to mention the subject again, and never reverted to it at all. The present claim is made by some one who after Cockburn had become bankrupt got an assignation from the trustee in his sequestration. Confronted by somewhat invidious averments as to the abandonment of the claim by Cockburn, and the circumstances of its recent resuscitation, the pursuer apparently has thought that his case would be most favourably presented if no one of the gentlemen mentioned were examined. In this state of things it seems to me that the necessary inference from the undisputed facts of the case is adverse to the subsistence of the present claim.

My opinion is therefore that the claim comes too late, and that the pursuer has no right to an accounting for the Tarapaca contract. If this view be adopted, the real controversy between the parties is decided. But Cockburn having paid moneys to the defender under the agreement which are said to have been applied in the purchase of machinery and other expenses of the original scheme, the pursuer is entitled to know what has come of them, and therefore to an accounting for what was due under the original agreement. Whether the pursuer has any interest to seek a judicial accounting of this limited scope is a matter for himself to determine, and which his counsel will probably desire to consider.

Lord Adam—I am of opinion that the pursuer as assignee of Cockburn is entitled to an accounting as to the joint-adventure of North and Speedie. Cockburn appears to have contributed a sum of £250, and apparently a further sum of £300, towards the joint-adventure, but the accounts of the adventure have never been settled.

The real question, however, in this case is, whether the pursuer is entitled to have included in such accounting the matter of the location of the Tarapaca Water Com-

pany by Colonel North on 18th May 1878, and of the purchase of that undertaking by him in April 1881. If the pursuer is not entitled to this he would not appear to have any interest in pressing for an accounting, as he would probably have to bring into the account the unpaid balance of the £1000 which he agreed to contribute towards the preliminary expenses, and so far as appears his share of any assets of the joint-adventure which there might be to account for would not be equivalent to this. But this matter was not argued to us.

With reference, first, to the location of the Tarapaca Water Company I am of opinion that that contract was entered into by North on his own account alone, and not on behalf of the joint-adventure. He had in fact no power to bind his co-adventurers by any such contract. North has always maintained that position, but has stated his willingness to admit his co-adventurers to a share of the contract, not as a matter of right but as a matter of arrangement. Although that was so, I think, assuming that the pursuer is not barred from now insisting in the claim, that North would nevertheless have been bound to account for the benefit, if any, derived by him from this transaction. I agree with the Lord Ordinary that the business of the location was, *inter alia*, to do the very thing which it was the object or business of the joint-adventure to do, viz., to supply the town of Pisagua with water. The means to be employed no doubt were different, but that does not appear to me to be material. I think also that the fact that North held the concession of September 1876, which was the property of the joint-adventurers, materially contributed to his obtaining the contract, and was made use of by him for that purpose.

The Lord Ordinary, however, has not given effect to his view in this matter, because he thinks that when the contract was entered into North was entitled to treat the joint-adventure as being at an end.

I do not agree with this view. I think that when North entered into this contract in May 1878, although possibly he might not have had much expectation that Welsh would be able to raise the funds necessary for carrying out the pipe scheme, still that scheme was by no means abandoned. Colonel North himself says—"When I made the contract with Mr Speedie in July 1878 (that is, the contract by which Mr Speedie became a partner in the location-contract) I quite understood that the joint-adventure was still in force;" and in point of fact the engineers were kept working at the pipe scheme, sinking wells, &c., for four or five months after the date of the location-contract; and there is much other evidence to the same effect. While, therefore, I think that the pipe scheme had not been abandoned when the location-contract was entered into, I nevertheless think that the present claim comes too late.

I think that where a partner is not bound by a contract entered into by a copartner, but is entitled and desires to have the benefit of it, he must make his claim without delay. He is not entitled to lie by in order to see whether the contract turns out a profitable one or not. If he is to have the benefit he must be prepared to run the risk of loss. North made no secret of his having entered into the contract. Mr Welsh, the agent of the joint-adventure, was informed of it a few months after it had been entered into by direct communication both from Speedie and North, and he no doubt communicated the fact to Cockburn, with whom he was in constant communication, as it was his duty to do. Neither Welsh nor Cockburn have appeared in this process to deny their knowledge of the contract.

The contract came to an end in September 1879, but no claim was made under it until the present action was raised in May 1887. In my opinion that claim comes too late.

North says that the contract resulted in a loss to him of some £7000, and just as I see no ground on which he could compel Cockburn to share that loss, if there was a loss, so I see no ground on which he can be compelled to share the gain with Cockburn if there was a gain.

With reference to the purchase by North of the undertaking of the Tarapaca Water Company in April 1881, I think the circumstances under which that contract was entered into were entirely different from the circumstances under which the location-contract had been entered into.

By this time the concession had come to an end in consequence of the works not having been completed within three years from its date. The town of Pisagua, to which the water was to be supplied, had been almost wholly destroyed during the war between Chili and Peru, and it was perfectly clear that Welsh could not raise the funds necessary to carry out the scheme in terms of the joint-adventure agreement.

In these circumstances I am satisfied that when Colonel North made the purchase the original joint-adventure had, as he states, lapsed. There is no evidence to the contrary. I think therefore that he was entitled to make the purchase without reference to his partners in the joint-adventure. But had it been otherwise, and that the copartners were entitled to claim a share in the benefit of the contract, I think, for the reasons stated, with reference to the location-contract, that the present claim comes too late.

Lord M'Laren—I agree in the judgment proposed by your Lordships.

Lord Kinnear—I agree with your Lordship that the pursuer, as coming in the place of Cockburn, is entitled if he desires it to call for an accounting with the defender's intromissions with the funds and assets of the joint-adventure to which Cockburn was a party. Cockburn had put

money into the hands of the defender as manager of the joint-adventure, and he and the pursuer as his assignee is entitled to inquire what became of it. I think he is also entitled to demand an accounting of his copartner's dealings with the plant and stock of the company, and any money which may have come into his hands in the course of prosecuting the adventure or winding it up. The defender alleges that if the accounting goes on he will be entitled to debit the pursuers with Cockburn's liabilities under the contract, and that in the result the balance will be against the pursuer. That may be the result of the accounting, but it does not bar the pursuer's demand for an accounting, and it may be that questions may be raised which are not fully before us now, and upon which we have not heard any argument. The question which we have to determine—whether the accounting so far as your Lordships propose to sustain it is or is not to be given to the pursuer—stands entirely apart from those questions which will arise as the process goes on. The Lord Ordinary's view seems to be that the joint-adventure had broken down because the arrangement for raising money in this country had failed, and because Cockburn himself had failed to make the contributions required of him by the contract, and in those circumstances the Lord Ordinary, as I understand it, holds that the defender was entitled to abandon the enterprise already effectually dissolved, and to enter into a new contract in which Cockburn had no share. I cannot agree with his Lordship that that is the result in fact or law of the proceedings of the defender. If it were so, it would be no answer to the demand for an accounting, so far as your Lordships propose to sustain the accounting, because although the joint-adventure had been effectually dissolved, the defender would still remain liable to account for the assets of the adventure if there are any in his hands. Accordingly, Mr Murray, for the defender, did not seriously maintain that there was no room for such an accounting if the action had been brought for the purpose of enforcing it. His view was that the real object of the action was something different. That seems very probable. But still the claim for an accounting to this limited extent is within the conclusions of the summons, and I think the pursuer is entitled to have it if he desires so far to proceed.

The true object of the action, however, was, as your Lordships have pointed out, to obtain from the defender an accounting not of the profits of the joint-adventure, but of the proceeds of two separate enterprises into which he had entered for his own benefit, and not for the benefit of the joint-adventurers. Now, I agree with your Lordships that in so far as regards the contract under which the defender farmed the Tarapaca Water Company, it will be extremely difficult for him to secure for himself the benefit of that contract, having regard to the scope and object of the originator of the joint-adventure, and the manner in which he obtained the contract for the Tarapaca Water Company. But then I think that the raising of that question at the instance of the pursuer is excluded by the lapse of time, by the delay which he allowed to take place, and because his statement is that the defender entered into this arrangement for the benefit of the joint-adventurers. There was no attempt to prove that that was the true contract which the defender made with the Tarapaca Water Company. On the contrary, it can, I think, not be doubted that he made a new arrangement altogether for his own benefit to which the other joint-adventurers were not parties. But then he made this contract for the purpose and with the effect of obtaining benefit to himself within the scope of the original joint-adventure by making use of the right which he had already acquired for himself and his co-adventurers. Therefore it would be, as I said, extremely difficult for him to have retained the exclusive benefit of that contract as against those joint-adventurers if they had come forward in time. But then it was an arrangement which necessarily involved a certain risk. It required expenditure, it required skill in management, and the defender proceeding to carry out his new arrangement with these risks in 1878 is not called upon to account for the profits to the pursuer, alleging himself to stand in his copartner's place, until 1889. Now, I think it quite clear, upon the grounds which your Lordships have stated, that that lapse of time is an insuperable bar to the present claim. If the pursuer had been in a position to say that Cockburn was left entirely ignorant or kept in ignorance of the material facts upon which his claim is founded, I could understand that there might have been a different question. I do not say there would have been a different question, because even then the pursuer would have been in this position, that while the joint-adventure, the benefit of which he was claiming, had been in course of prosecution for a period of years with risk of loss, he was seeking to obtain the benefit without having incurred any liability for loss. At all events, it would seem to be quite indispensable that a partner making a claim of this kind after such a lapse of time should explain how it came about that he has allowed the claim to slumber for so many years. It appears to me to be quite a conclusive answer to this claim that he makes no attempt to give any such explanation, and that neither Mr Cockburn nor himself nor the agent of the joint-adventure in this country is put into the witness-box for the purpose of clearing up the facts which the documentary evidence, if it can be called evidence, leaves in doubt. I therefore entirely agree in the result at which your Lordships have arrived.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note, &c., Recal the said interlocutor: Find that the defender is

bound to account to the pursuer for the intromissions had by him and William Speedie, or either of them, with the funds and estate of the joint-adventure constituted by minute of agreement dated 13th October 1877 between the defender and the said William Speedie, and another minute of agreement of the same date executed between the defender and the said William Speedie on the one part, and Mr John Cockburn, wine merchant in Edinburgh, on the other part: Find that the defender is not bound to bring into said account any profits made under or in consequence of the rights acquired by him from the Tarapaca Water Company, Limited, in 1878 and thereafter in 1881, or to render any account to the pursuer of the intromissions had by him under and in virtue of his contracts with the said Tarapaca Water Company; And remit to the Lord Ordinary to proceed as shall be just."

Counsel for the Pursuer and Reclaimer—Sol.-Gen. Asher, Q.C.—Wilson. Agents—J. & A. Hastie, Solicitors.

Counsel for the Defender and Respondent—Graham Murray, Q.C.—N. J. D. Kennedy. Agent—Alexander Campbell, S.S.C.

Tuesday, November 29, 1892.

OUTER HOUSE.

[Lord Low.

MARQUESS OF AILSA, PETITIONER.

Entail—Improvement Expenditure—Entail Amendment Act 1875 (38 *and* 39 *Vict.* c. 61), *sec.* 3.

Held that repairs on the roofs of farm buildings which made the buildings practically as good as new, the walls being in good order and capable of lasting out new roofs, were improvements in the sense of the Entail Amendment Act 1875.

Entail—Improvement Expenditure—Shop or Store—Rutherfurd Act (11 *and* 12 *Vict.* 36), *sec.* 26—*Entail Amendment Act* 1875 (38 *and* 39 *Vict. c.* 61), *sec.* 3.

Held that the erection of a store or shop was a permanent improvement in the sense of section 26 of the Rutherfurd Act, but was not an improvement in the sense of the Entail Amendment Act 1875.

This was a petition at the instance of the Marquess of Ailsa, heir of entail in possession of the entailed estates of Cassilis and Culzean, under the Entail Acts, and particularly under the Acts 11 and 12 Vict. c. 36, and 38 and 39 Vict. c. 61. The petitioner craved the Court to find that a sum of £6844, 0s. 3d., expended by him on the entailed estates, had been expended "on account of improvements of the nature contemplated by the said Act 38 and 39 Vict. c. 61," and to authorise him to uplift a sum of £1758, 4s. 4d. of consigned money, and apply the same *pro tanto* in repayment of said sum of £6844, 0s. 3d., and to charge the balance of said sum upon the entailed estates.

On 3rd August 1892 the Lord Ordinary on the Bills appointed Mr A. O. M. Mackenzie, advocate, to be curator *ad litem* to the three next heirs of entail, two of them being in minority and one in pupillarity, and further remitted to Mr George Dunlop, W.S., and Mr James Johnstone, Ayr, to report.

The curator *ad litem* thereafter lodged a minute objecting to certain of the items included in the account of expenditure lodged by the petitioner, viz. (1) sums amounting to £348 expended in stripping and re-slating the roofs of various farm buildings on the estates, and (2) a sum of £258 expended in erecting a new bake-house, stable, cartshed, and wash-house in connection with a store or shop at the village of Maidens. He submitted that the operation of stripping and re-slating roofs was a repair necessary for the upkeep of existing buildings, and was not an improvement in the sense of the Entail Acts, and that a store or buildings in connection with the same were not improvements in the sense of the Entail Act of 1875.

Mr Dunlop and Mr Johnstone reported that in their opinion the items objected to by the curator were improvements in the sense of the Entail Acts. With regard to the buildings erected in connection with the store at the village of Maidens, Mr Dunlop explained that the store was of great benefit to the inhabitants of the village, as otherwise they would have to go some distance for their supplies; that the whole of the village was upon the petitioner's estate, and that accordingly there was no risk of competition. He expressed the view that the buildings were beneficial to the estate, and that if not an improvement in the sense of the Act of 1875 they were a permanent improvement in the sense of the Rutherfurd Act.

With reference to the first head of his objections the curator explained at the bar that he had ascertained from the reporters that the nature of the operations described as "stripping and re-slating roofs" was as follows—The roofs having fallen into considerable disrepair the old slates had been stripped off, the sarking had been renewed where necessary, in a few instances new joists had been put in, and the roofs had then been re-slated, the old slates being used if in good order, and new slates where required.

Curator's Authorities—*Fraser* v. *Lord Lovat*, December 16, 1841, 4 D. 266; *Hope Johnstone, Petitioner*, November 21, 1856, 19 D. 68.

Petitioner's Authority—*Carnegie, Petitioner*, January 19, 1856.

LORD LOW—I have been in communication with the reporters, and am satisfied that the improvements to which the curator