were in fault, and to that question the jury replied in the negative; and one of the first questions is, whether we are bound by this opinion of the jury? I do not think that we are. The bargain between the parties, expressed in the joint minute, must receive full effect, and by that minute the Court are entitled to look at the evidence and give an opinion on all the facts of the case. If this question put to the jury was intended to modify the minute, that minute should have been then and there altered. Even if their answer were to be regarded as a verdict, looking to the evidence, I should be disposed to come to a different opinion, and hold the verdict to be bad. But I prefer not to look upon it in the light of a verdict, but to take the ground that in this case the parties have made a bargain which is not to be easily departed from, whatever may have been the motive in putting this question to the jury. Be what it may, the effect of the bargain is to make the Court the sole judge of the facts of the case, and the jury merely the assessors of the damages.

Upon the facts of this case there can be no doubt whatever. The accident was due to the fault of three individuals. In the first place, there was that of the stationmaster at Dalbeattie Station. He violated a rule in allowing the train to go upon the single line without exhibiting the train-staff. There is an emphatic rule against doing this. It is permissible to give a ticket to the guard if the train-staff be there, but for obvious reasons this is not permitted to be done if that staff be away. He was further to blame in not having the tickets locked up in the box provided for them, which was intended to be opened only by means of the staff.

I think also that the driver and guard of the deceased's train were in fault, and contributed to this accident. They were bound not to have left the station without obtaining the staff or the ticket, and in the case of the ticket, without satisfying themselves that the train-staff was at the station. I think that the regulations, which were admittedly in their possession, sufficiently prove that. These rules provide that no engine is to be permitted to leave a train-staff station unless the train-staff is *then* at the station, and that the staff, in the case of a train ticket being given, is to be exhibited along with the ticket. I cannot read the word "exhibited" and hold that there was no duty upon the driver and guard to see the staff. The additional rule, which prohibits a guard from starting until he sees the staff, only renders the duty more explicit.

As to the question of law—in the first place, was the stoker, to whom no fault is attributed, the fellow servant of any of these individuals? He was of course the fellow servant of his own engine-driver and guard; and if the present action had been brought against the Caledonian Railway Company it would have been excluded by the well known doctrine by which a master is not liable for injuries caused to one servant by the act of his fellow servant. But was the deceased a fellow servant of the stationmaster? I am of opinion that he was not. The stationmaster was the servant of the Glasgow and South Western Railway Company alone. It would be absurd if the circumstance of one company having running power over the line of another were to make all the servants of the one company fellow servants of those belonging to the other. I think this question is quite settled by the judgment in the case of *Calder*. Douglas, the stationmaster, was not therefore a fellow servant of the deceased Adams.

The only remaining question is, whether the pursuer is disentitled to recover because of the fault of Robb and Robertson, who were the undoubted fellow servants of the deceased? Now, in the first place, I would observe that the principle by which a servant cannot receive damages from his master for injuries inflicted by his fellow servant does not prevent him from his direct action against that fellow servant himself. It is therefore clear that an action could have lain against Douglas, the stationmaster himself; and the question is, whether the pursuer has an action against Douglas' master? This, again, raises the question whether that action is barred by the fact that the fellow servants of the deceased were also in fault? It would be a strange thing to hold that it was. All wrongdoers are liable conjunctly and severally, and an action against Robb, Robertson, and Douglas would have been competent. There would be no difficulty in disposing of this question were it not for the cases of *Thorogood* and *Armstrong*.

Now, I am unable to find a principle upon which to support the judgment in these cases, and we have it proved to us that they have been received in England with disfavour. In particular, we have the judgment of Dr Lushington. Until, therefore, I have a better understanding of the ground upon which these decisions rest, I must proceed upon the general principle that a master is liable for the faults of his servants. We have here proved the undoubted fault of Douglas, who was the servant of the Glasgow and South Western Railway Company, the defenders, and I therefore think the answer which we are bound to give is that the Glasgow and South Western Railway Company are liable in damages to the pursuer.

Lord Neaves was absent.

The Court accordingly entered a verdict for the pursuer for the damages as assessed by the jury, with expenses.

Counsel for Pursuer—Johnstone—D. Crichton. Agent—Robert Pringle, W.S.

Counsel for Defenders — Balfour — Jameson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, December 10.

FIRST DIVISION.

[Lord Gifford.

MILLER & CO. *v.* WALKER.

Joint Adventure—Fraud—Guarantee.

A firm entered into a contract of joint-adventure with the lessee of a certain mine, by which they were to grant to him their acceptance of two bills, each for £1000, at twelve months, as a bonus for a half share in the lease, he giving a guarantee that the profits upon the mine should amount in the first year, or at all events in the first two years, to £2000, and be first applied to payment of their acceptance. After more than two years, as

the mine yielded no return, they brought an action for the purpose of having the agreement reduced on the ground of fraud, and themselves relieved of all claims under the bills.

Held that in the circumstances there was no proof of fraud, but that as there was no reasonable prospect of profits being realised, the pursuers were entitled to put an end to the joint-adventure, and that the defender was bound to make good his guarantee by retiring their acceptance.

Observations upon the legal principles applicable to joint-adventures.

This was an action by Messrs Miller against Mr Walker, to have it found and declared that a joint mining adventure in the island of Haaf Grunie, in Shetland, had come to an end, and to be repaid the sum of £2000, which they had spent in retiring certain bills, and which Mr Walker had guaranteed out of the profits of said adventure, there having been in fact no profits.

The pursuers alleged—In or about the month of March 1872, the defender represented to the pursuers that he had in the immediately preceding month (February 1872) obtained from Mr George T. Leisk, proprietor of the island of Haaf Grunie, one of the Shetland Islands, a lease for nineteen years of the chrome ore mines in that island, and the defender further represented to the pursuers that there was a large quantity of chrome ore in the said island, and that from 600 to 800 tons of chrome ore could easily be got from the mines per annum, and that by the working of them a large profit could easily be realised. The defender proposed to the pursuers that they should enter into a joint adventure with him for working chrome ore in the said island during the currency of the said lease, and that the pursuers should grant to the defender their acceptance for £2000 at twelve months, as a bonus for a half share or interest in the said lease. The defender further represented to the pursuers that the profits to be realised from the working of the said chrome ore would amount, within the first year, or at all events within the first two years, to not less than £2000, offering the pursuers a guarantee to this effect, and proposing that the profits of the chrome mining should be applied in the first instance in paying the said acceptance. In reliance and on the faith of the defender's said representations, the pursuers agreed to enter, and did enter, into a joint adventure arrangement with the defender for working the chrome ore mines let under the said lease, which arrangement was embodied in a letter addressed by the defender to the pursuers, and a letter by the pursuers to the defender, both dated 22d March 1872, of the following tenor:—

"*Glasgow, 22d March* 1872.

"Messrs James Miller, Son, & Co.

"Dear Sirs,—In consideration of your now having given me your acceptance for £2000 at twelve months as a bonus for a half share in George Leisk of Uyea, nineteen years' lease of his chrome ore mines in Haaf Grunie, I agree to same being worked on joint account, and the understanding is that I guarantee that the profits upon said mine shall amount to £2000, and are first to be applied to paying said acceptance, and that thereafter the profits are equally divisible between us, and if at the maturity of said bill (£2000) two thousand pounds have not been cleared, I agree to renew same for the balance, aye and until said amount has been made up.—Yours truly, JOHN WALKER."

And

"*Glasgow, 22d March* 1872.

"Dear Sir,—We confirm the arrangement come to between us to-day, as expressed in your letter of this date, anent the joint account of the chromate mine lease from Mr George Leisk of Haaf Grunie.—Yours truly,

"JAS. MILLER, SON, & Co."

The pursuers further alleged that after three years' trial no profit had been made, and that an examination of the island showed that there was no prospect of any ever being made. They contended that they were entitled to have the adventure put to an end, because the island contained no ore, and, *separatim*, alleged fraud on part of defenders, in that they had all along known it contained no ore.

The defenders maintained that the want of profit so far had been due to various temporary hindrances, and that there was every chance of profit in the future, and that in any case they were entitled to the use of the £2000.

A proof was led as to the workings on the island, and also scientific evidence as to the probability of finding ore.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 5th April* 1875.—The Lord Ordinary having considered the closed record, proof adduced, and whole process, finds that the pursuers have failed to instruct any relevant or sufficient grounds for reducing or setting aside as null and void *ab initio* the agreement for joint adventure entered into between the pursuers and defenders on 22d March 1872, and embodied in missives of that date, passing between the pursuers and the defender, being Nos. 6 and 8 of process: Therefore repels the reasons of reduction, and assoilzies the defender from the reductive conclusions of the summons, and decerns: Further, and in reference to the nature and effect of the said agreement, finds that the pursuers and defender, as joint adventurers under said agreement, have differed as to the mode in which the joint adventure is to be carried on; and, in particular, that they have differed as to the amount of capital to be advanced for testing or proving the amount of chrome ore in the island of Haaf Grunie, in Shetland, referred to in said agreement, or for working and mining the chrome ore in said island; and also as to the parties by whom and at whose risk said capital is to be contributed, finds that there are no *termini habiles* contained in the agreement, according to which the Lord Ordinary or the Court can be called upon to define the amount of capital to be advanced or expended, or to define or fix the mode in which the said joint adventure is to be carried on: Therefore, and in the circumstances disclosed in evidence, finds that the pursuers are entitled to bring the said joint adventure to an end; and finds, declares, and decerns that the same has come to an end accordingly: Finds, in point of law, that the pursuer having offered to renounce

in favour of the defender all right and interest of any kind belonging to the pursuers in the chrome ore mines of Haaf Grunie, or in the lease thereof granted to the defender by Mr George T. Leisk of Uyea, and now vested in the defender, the pursuers, on such renunciation, are entitled to demand that the defender shall relieve them of two bills for £1000 each, drawn by the defender upon and accepted by the pursuers, dated 21st and 26th March 1874; or otherwise, if the pursuers have paid said bills, that the defender is bound to repay the same to the pursuers, with all interest which has accrued or which may accrue thereon; and also to repay to the pursuers any interest or discount which the pursuers may have paid or incurred on previous bills, of which the said two bills are renewals; and to this extent and effect decerns in favour of the pursuers under the declaratory conclusions of the summons; and in order that effect may be given to the above findings, and the cause concluded, appoints the cause to be enrolled for further procedure: Finds the pursuers entitled to expenses hitherto incurred, subject to some modification, and remits the account thereof when lodged to the Auditor of Court to tax the same and to report: Meantime grants leave to reclaim against this interlocutor."

"*Note.*—Various questions are raised under the present action, some of which are attended with nicety and difficulty.

"The first question in order is raised under the reductive conclusions of the summons, and under the alternative declaratory conclusion that the agreement of joint adventure between the pursuers and defender is now, and has been from the beginning, null and void. If the agreement is to be reduced as *ab initio* null and void, this would be an end of the case, and would supersede all questions as to the nature, meaning, and legal effect of the agreement.

"The Lord Ordinary is of opinion, and on this part of the case he has really no difficulty, that the pursuers have failed to instruct any relevant or sufficient grounds for reducing or setting aside the agreement as having been from the beginning null and void.

"The grounds of reduction are not very distinctly stated by the pursuers, but they appear to be essential error induced by false and fraudulent representations on the part of the defender —the essential error being, as the pursuers say, that the island of Haaf Grunie does not contain any chrome ore workable to profit, and the defender having falsely represented that the island contained 'any amount of fine ore,' that is, abundance of the mineral; and the defender having by his representations induced the pursuers to advance £2000.

"The Lord Ordinary is of opinion upon the evidence that the defender made no such false or fraudulent representations as to entitle the pursuers to reduce the agreement. The defender was and is most sanguine in his expectations as to the mineral riches of Haaf Grunie. He seems to have believed, perhaps foolishly, and, as the Lord Ordinary thinks, without sufficient grounds, that the island was full of the precious ore, which was to be had almost for the lifting.

"The defender remains of this opinion still. He says, in his deposition—'Taking a reasonable supposition of the ore in the island, the profit, in my opinion, ought to be about £8000 from the land portion, and if it is possible to command it under the sea, it is not easy to say what the profit may be.' Now, in an agreement of so speculative a kind as unwrought mines—mines still to be opened and still to be proved—the Lord Ordinary cannot hold there was fraudulent misrepresentation, however sanguine the defender may have been. The pursuers must have known, or ought to have known, that all the defender's statements were speculative and uncertain; and, indeed, the pursuers have acted on this principle, for, as will be seen immediately, they secured themselves against the sterility of the mines by taking an express guarantee from the defender. They took the defender's express obligation, embodied in the missive—'I guarantee that the profits upon said mine shall amount to £2000.' The fact that the defender gave such a guarantee is evidence of his good faith, and by this guarantee the pursuers hold the defender's obligation to free them from all loss whatever.

"Still further, and upon the point of essential error, the Lord Ordinary is not prepared to find upon the evidence that the chrome ore mine in question is worthless, or even not workable to profit. What amount of outlay it may require, and what risk there may be of losing all the outlay, it is not easy to say; and certainly the speculation, in the Lord Ordinary's view, is not a tempting one; but to a bold, not to say reckless, speculator, there is or may be a chance of a great prize. To believe in chances is different from being fraudulent; and the circumstance that mining is a most hazardous speculation does not amount, in the present case, to proved essential error.

"In the circumstances, looking both to the nature of the speculation and to the terms of the agreement itself, the Lord Ordinary refuses to reduce and set aside the agreement as *ab initio* null and void. Indeed, ultimately, in argument, the pursuers did not press very strongly for decree of reduction, as they came to see that they could get almost precisely the same remedy under the terms of the agreement itself, and under their alternative declaratory conclusions.

"The main and the only difficult part of the case relates to the construction and legal effect of the agreement, assuming it to be valid and legally binding on both parties. The missives of agreement are in the following terms. The defender's offer to the pursuer is:—

'*Glasgow*, 22*d March* 1872.

'Messrs James Miller, Son, & Company.

'Dear Sirs,—In consideration of your having now given me your acceptance for £2000 for twelve months as a bonus for a half share in George Leisk of Uyea's nineteen years' lease of his chrome ore mines in Haaf Grunie, I agree to same being worked on joint account; and the understanding is that I guarantee that the profits upon said mine shall amount to £2000, and are first to be applied to paying said acceptance, and that thereafter the profits are equally divisible between us; and if at the maturity of the said bill (£2000) two thousand pounds have not been cleared, I agree to renew same for the balance, aye and until said amount has been made up.—Yours very truly, JOHN WALKER.'

"The acceptance is:—

'22*d March* 1872.

'We confirm the arrangement come to be-

tween us to-day, as expressed in your letter of this date, anent the joint-account of the chromate mine lease from Mr George Leisk of Haaf Grunie.

. . . .

'JAMES MILLER, SON, & Co.'

"A great many questions have been raised by the parties regarding the true meaning and construction, and regarding the legal effect of this agreement, which the Lord Ordinary now assumes to be binding on both parties. To aid in the construction, the Lord Ordinary has the advantage of the whole preceding circumstances being fully disclosed in the proof and correspondence.

"Without entering into details or into argument, the Lord Ordinary will state shortly the results to which he has come as to the construction and legal effect of this written agreement.

"(1) He thinks that the missives constitute an agreement of joint-adventure or limited partnership, the subject of the joint-adventure being the lease of the chrome ore in Haaf Grunie, then vested in the defender Mr Walker. The contract, then, has the incidents and legal effects of a contract of joint-adventure or limited partnership.

"(2) The defender by the contract guarantees that the profits of the joint-adventure 'shall amount to £2000.' The Lord Ordinary thinks this means, and must mean, that the net profits, after paying all outlay and cost of every kind, and after paying interest upon outlay and cost, shall amount to at least £2000. It is a guarantee not only against loss and against all sunk and irrecoverable outlay, but it is a guarantee that every outlay, including interest, shall be repaid, and that at least £2000 shall be over of clear profit.

"(3) This clear profit, the certainty of which the defender guarantees, is to be applied in retiring the pursuers' acceptance or acceptances for £2000, which were granted, in the first instance, at twelve months' date. No time is fixed in the agreement within which the net profits shall be forthcoming, but it is implied that the profits hall begin to emerge immediately, for the defender undertakes, if the £2000 of profits have not been realised the first year, to renew the balance of the bill or bills, 'aye and until the said amount has been made up.'

"(4) The Lord Ordinary thinks that this implies that the pursuers, while granting their bill and credit for the purpose of raising £2000 to start with, were not to be required to pay the said amount, for the defender agrees to renew the bills, that is, to keep the pursuers free from advance until the bills are paid from profits, and this payment is assumed to begin, to some extent, at least the first year.

"(5) Nothing is said in the agreement as to proving or testing the mines, or as to boring or searching for mineral. It is assumed that the defender had satisfied himself upon that head, for he guarantees productiveness, and agrees to the mines being at once worked 'on joint-account.'

"(6) There is no obligation laid upon either party to advance capital, no definition of the amount of capital which each partner or joint-adventurer may be called upon to pay, and no machinery is provided as to settling any disputes or differences which may arise between the two partners as to the mode of working the minerals, or as to the mode of carrying out the ends of the joint-adventure. All these matters are left unsettled, and to be determined by the rules of common law.

"The reason of the missives making no provisions for advance of capital, or for the other matters now referred to, appears to have been that the defender was confident that the mines had only to be touched to become instantly productive.

"It is established by the proof that the parties—that is, the two partners or joint-adventurers—have differed—hopelessly differed—as to the working or carrying out of the joint-adventure. The pursuers have satisfied themselves that the mines are wholly unproductive, and being of opinion that to attempt to work them would just be to throw away money hopelessly and irrecoverably, they decline to advance money or capital in the working of the mines, for the repayment of which capital they have no security whatever, for the defender denies that he will be personally bound to repay advances of capital which may be required for working and for proving the mine. The defender admits that he must guarantee profits to amount to £2000, but he maintains that in the meantime the pursuers must advance, and advance indefinitely and speculatively, whatever is necessary for sinking pits or shafts on the chance that ore will ultimately be found. As the Lord Ordinary understood the defender's argument, there is no limit to this either in amount or time. The advances may go on till near the end of the lease, and the amount is only to be limited by the defender becoming hopeless of ultimate success. The pursuers seem to have been willing to advance to some small extent at first, for they placed the half of the first year's outlay to the defender's credit in account with them, and the bills for £2000 have been twice renewed—that is, they have run not one year, but three years. By October 1874, however, the pursuers were satisfied that the mines were valueless; they refused to make further advances, and called upon the defender to relieve them from the current bills. The defender refused, and hence this action.

"(7) The Lord Ordinary is of opinion that the partners or joint-adventurers having differed in regard to the carrying out the highly speculative adventure in question, the Court cannot ordain this speculative adventure to be carried on, but the adventure must terminate on equitable terms.

"The Lord Ordinary declines to say or to prescribe to the parties how much money must be sunk in excavating pits or quarries or shafts in Haaf Grunie in the hope of ultimately getting a return. It is no part of the duty of the Court to conduct speculative mining, or to say how it is to be conducted, or how much the parties are to risk in the venture. If the joint-adventurers don't choose to define all this for themselves in their agreement, and if they differ, there is no alternative. Their vague agreement must come to an end. The Court cannot make an agreement for the parties which they have not made for themselves.

"In the present case the evidence does not

enable the Lord Ordinary to say either, on the one hand, that the mines are sterile, or, on the other, that they can be worked to profit, and he declines to decide this question. He thinks that the decision of this question is not necessary for the disposal of the case. Nor is it necessary or possible for the Lord Ordinary to fix how much money must be sunk before the mines are abandoned as hopelessly sterile.

"It is needless to refer to the evidence, which, even as to the experts, is of the most vague and inconclusive nature. The speculation at best is a matter of risk, chance, and hope; and as the parties themselves have not chosen to fix the extent of their risk and of their venture, if they differ the Court can only terminate their agreement.

"There has been here full and fair opportunity for trial. The defender in substance guaranteed that the working should be instantly profitable. Three years have elapsed, and the profit has not begun. The Lord Ordinary thinks that the pursuers are not bound to wait longer or to do more.

"(8) It follows that the pursuers are entitled to have the joint-adventure declared at an end, and to be relieved of their bills or of their obligation for the £2000. If they have paid or incurred interest either upon the ultimate bills or on previous renewals, they seem entitled to repayment. Interest on an advance is as much outlay as the advance itself, and as the defender guaranteed net profit to be £2000, he is liable to that extent over and above the outlay and interest.

"(9) Nor, in the Lord Ordinary's opinion, can the defender complain of the slightest hardship. He has himself to blame. If he wanted a copartner or co-adventurer who would bear equal risk with him he should have so stipulated in the written agreement. On the contrary, he undertook to relieve the pursuers of all risk whatever —he guaranteed that there should be no loss at all, but at least £2000 of profit. He is now simply called on to fulfil his guarantee.

"The Lord Ordinary is happy to think, however, that the defender himself must regard his present defeat as in reality a great gain. He is now receiving back by the present judgment the whole lease as his exclusive property, and as he values it as worth at least £8000, and no one can tell how much more, he has every reason to be satisfied. It is seldom that a Judge can by any judgment give gain and satisfaction to both parties. As the lease is fully vested in the defender he requires no reconveyance.

"As the bills last current fell due on 24th and 29th March last, and as the Lord Ordinary has not been informed whether they have been taken up or renewed, and as the exact amount of interest or discount is not stated or ascertained, the Lord Ordinary cannot exhaust the case by an absolutely final judgment. He has pronounced such findings, however, as he hopes will define the rights of parties, and leave nothing but the mere details of figures for adjustment. For this purpose he has appointed the case to be enrolled.

"As the present Lord Ordinary is only acting as Interim-Ordinary, under the authority of the Lord President, he has thought it right to dispose of the question of expenses, and as the pursuers have been substantially successful, they are entitled to their costs. Probably the reductive conclusions have not created any separable part of the expense, but the failure therein is a good reason for some modification. The Lord Ordinary has granted leave to reclaim the judgment, being in its form interlocutory."

The defender reclaimed.

At advising—

LORD PRESIDENT—There is one part of this case about which there can be no doubt—I mean that part of the Lord Ordinary's interlocutor which disposes of the reductive conclusions of the summons. There is not the slightest proof of fraud, and no such allegation ever ought to have been made, for while the defender seems to have been over sanguine, the pursuer has not shown any reason for bringing such a charge against him. The other part of the case is more difficult. The right of parties in a joint adventure to terminate their connection is clear, but the difficulty is to apply the rule to the circumstances of each case. As regards this contract, the first missive is a letter from the proprietor of the island of Haaf Grunie to Walker:—"Dear Sir, —Being hard pressed for funds to pay the minister's stipend—a thing I never paid before, or my father or brother William before me—I am now thinking as the spring of the year advances to try and see if any more of the chromate of iron can be got out of my island of Haaf Grunie. As Mr A. Sandison informs me, you might be induced to take a lease of the chromate ore mine. I therefore would now offer you a nineteen years' lease of these mines, on the condition that you pay me 15s. per ton of rent or royalty on all chromate ore lifted, whether first, second, or third; and that, should my tenant for the time being of said island require surface damage paid him, you to arrange and pay that. I shall be glad how soon you can let me know whether you can take the mine. There is some remains or rubbish left on the surface near the old mine—it consists of pieces of chromate about the size say of a hen's egg, and some larger, attached to what the miners called 'bad rock' or coarse serpentine. You could please to look at this refuse, and say what you could offer for it.—I am, Dear Sir, yours truly, GEO. T. LEISK."

He therefore offers Walker a nineteen years' lease of the mines for 15s. a ton royalty on all ore lifted, and the payment of surface damages, and Walker accepts and agrees to the conditions in these terms:—"Dear Sir,—I am to-day favoured with yours of 21st inst. offering me a lease of the Grunie chrome ore, and I agree to accept a nineteen years' lease of these mines, on the condition that I pay to you 15s. per ton of rent or royalty on all chromate ore lifted, whether firsts, seconds, or thirds; and that, should the tenant of the grazings require surface damage paid him, I will arrange and pay that.—I am, Dear Sir, yours truly, JOHN WALKER."

Now, it must be observed that this letter does not stipulate for any fixed rent, only the tenant is to pay 15s. per ton for ore actually taken, and so no ore no royalty. Therefore it is clear that the working was to be matter of option to the tenant, and on the other hand, if he does work, he may stop when he pleases. It seems to me that the Dean of Faculty correctly describes this

as a license to work. Now Walker having secured the lease proposes to share it.—

"*Glasgow, 22d March* 1872.

"Messrs James Miller, Son, & Company.

"Dear Sirs,—In consideration of your having now given me your acceptance for £2000 at twelve months, as a bonus for a half share in George Leisk of Uyea's nineteen years' lease of his chrome ore mines in Haaf Grunie, I agree to the same being worked on joint account, and the understanding is that I guarantee that the profits upon said mine shall amount to £2000, and are first to be applied to paying said acceptance, and that thereafter the profits are equally divisible between us, and if at the maturity of said bill (£2000) two thousands pounds have not been cleared, I agree to renew same for the balance aye and until said amount has been made up.—Yours very truly,

"JOHN WALKER."

Now there are some particulars that are plain enough on the face of this. First, the bonus, as it is called, given by the Millers to Walker, in consideration of being taken into the lease, is a *loan* of £2000, and is given in the form of a bill of exchange. It is a bill at twelve months, and it is anticipated that the profits of the mine will be sufficient to retire the bill either at the end of twelve months, or at some future time when it has been renewed and falls due. It is equally clear that Walker undertakes a guarantee, viz., that the mine shall yield £2000 profit, and that when it does the money is to be applied to retire the bill. The profit is first to be so applied, but afterwards is to be divisible between the two parties. All this is quite plain, and if the mine had turned out as profitable as Walker anticipated and the Millers hoped, there would have been no difficulty in working under this agreement. The difficulty the Lord Ordinary experienced I do not experience. He seems to think that there are no provisions as to advance, &c., of capital, and says, as a legal result of this that the parties are entitled to bring the joint adventure to an end. Now I cannot subscribe to that. No doubt nothing is said as to shares of capital to be advanced. But the law supplies that. When nothing expressed is said, the law presumes the two partners to advance equally whatever may be necessary to carry on the joint adventure. Therefore I cannot conceive how the absence of such clauses can put an end to such joint-adventure. I venture to say that there are many joint adventures of such a character now going on in Scotland, though there may be no *termini habiles;* the law supplies these, and the construction and effect of the contract is for a court of law.

The question therefore comes to be whether, in the circumstances, the pursuer has the right to bring this joint adventure to an end. The only general rule that can be applied in such cases seems to me to be that one partner in a joint adventure is entitled to bring it to an end against the will of the other only if it can be clearly shewn that the adventure is attended with greater risk than it was when entered into, and that there is no reasonable hope of profit in the concern. In applying this rule it is necessary to attend very carefully to what has been done. The first question that arises on construction is whether there is here any definite term of endurance for the joint adventure. This is attended with difficulty. There is no term specified in the letter, but there is a reference to the lease, which lease is for nineteen years. If the lease had been one in the ordinary sense of the term, there might be good ground to say that the term of the joint adventure naturally depends on the term of the lease, because while Walker was the only party bound to the landlord, he had communicated half of his interest to Miller, and they were jointly bound. But looking to the terms of this lease, I entertain great doubts. The lease did not bind the parties to work, and no doubt they might abstain if they found it unprofitable, and so the lease might be practically no lease at all. But I do not think that the absence of such a fixed term would entitle a party to put an end to the joint adventure when he pleased. It is obviously intended to last for some time, and neither party can put an end to it without cause. If it is being carried on, it is obviously out of the question that one party should be allowed to say he is tired of it; there must be some good cause. The cause alleged by the pursuer is that nothing has been made of the mine, and that there is no reasonable prospect of profit; and if that is so, then the pursuer is entitled to have it settled that the joint adventure is at an end. The question is therefore one of evidence, and having given it my best attention, it seems to come to this, that nothing seems to have come of the adventure as yet, and there is no reasonable hope of profit in the future. Here again I differ from the Lord Ordinary, who says it is not necessary to go into the evidence as to the probability of profit. I think it is at the bottom of the pursuer's case. That being so, what is to be the effect of the contract? The defender has guaranteed £2000 profit, and that it should be applied to pay the debt to the pursuer. I think that the guarantee comes into operation, and there being no profit, the defender is bound to make it good by retiring the acceptance.

LORD DEAS—It is impossible to concur with much of the reasoning in the Lord Ordinary's note. His views come to this, that it is sufficient to entitle parties to put an end to a joint adventure if they differ between themselves. We are quite familiar with another course, viz., to appoint a judicial factor; yet it requires a good deal of evidence to entitle the Court to do that.

There are no grounds here to impute to Mr Walker any misrepresentation, and it is not favourable to the result at which your Lordship has arrived that the case was based on such allegations. Still there may be sufficient grounds to put an end to the adventure, but I confess I have greater difficulty than your Lordship in arriving at such a conclusion. It is quite true that it is not a contract for a definite period. If it had been so, I suppose your Lordship would not have been inclined to interfere with it. But first, the fact that the foundation of it is a lease for nineteen years is proof that the contract was meant to endure for some years. It is a very peculiar lease, and I do not enter into a discussion of it.

The first part of the contract here is that expenditure should be made, time taken, and steps followed out to see if the ore could be worked to profit; and it is not clear if this part of the contract has ever been followed

out. The Lord Ordinary seems to think that from the terms of the contract it necessarily follows that a large profit should immediately be made. I cannot see any grounds for that. It was a sort of speculution, and all parties must have seen that it would require considerable time and expense. I can hardly see anything which could occur to relieve either party without consent of the other here, and my difficulty is to relieve them from the preliminary portion of the contract. I am not prepared to say that it has been ascertained that there is no reasonable chance of profit. It is far from clear to my mind that the ore cannot be profitably worked. Looking at it as a jury question, I am not satisfied that the ore has been tested in a way to shew it cannot be worked to a profit. [*His Lordship here went into further details as to the evidence.*] Your Lordship said that to entitle a party to bring to an end a joint adventure there must be shewn (1) greater risk than at commencement; (2) no reasonable chance of profit. I concur in the latter. I am not so sure that I concur in the former. I rather think that greater risk in testing the mineral would not here entitle a party to put an end to the adventure. After it had been tested, if it then appeared that there would be greater risk in going on than anticipated, then I concur in thinking it might entitle him to put an end to the adventure. There is no doubt it is within the competency of the Court to put an end to it, but it must be done with great hesitation. Ordinarily, if parties make a contract they must carry it out. Mr Walker has devoted great time and expense here. If it is a reasonable speculation and he is prevented from testing it, it is a great hardship to him, and we are not entitled to step in unless for some very strong reason. I doubt if a sufficiently strong reason has been shewn. It may be a time might come when we ought to put an end to the adventure, but I doubt if it has come.

Lord Ardmillan—I am of opinion that the Lord Ordinary has rightly disposed of the reductive conclusions of this action. There is no sufficient evidence—indeed there is no evidence at all—of fraud or of wilful misrepresentation inducing essential error. I do not think that there was any fraud or intentional misrepresentation on the part of the defender.

The parties entered on a mineral speculation or joint-adventure in regard to which the defender Mr Walker, having the best means of judging and being best acquainted with the locality and with the nature of the speculation, was the most eager and sanguine, and he may have expressed strongly his hopes and expectations. These, it seems to me, he honestly entertained and communicated. But there is nothing in his conduct which can sustain the conclusion for reduction.

The remaining conclusions, declaratory and petitory, are rested on different grounds, and cannot be similarly disposed of, though they also are of a nature requiring careful consideration. These conclusions, depending chiefly on evidence, are peculiar. The application of the rules of the the law of joint-adventure to the facts of the case is attended with difficulty. Mr Walker held a lease from Mr Leisk of the minerals on or in the island of Haaf Grunie, for nineteen years. The "rent or royalty" is 15s. a ton on all chromate ore lifted. There is no fixed rent. There is no obligation on the tenant to work the ore, but if he works it he pays 15s. a ton on all he lifts. That is the only obligation undertaken by the tenant. It is important to observe the nature of this lease. It must be read fairly. The landlord is, I think, bound to permit the tenant to work for nineteen years on the terms stated, if the tenant chooses to do so. It is to him a license to work at a certain lordship per ton. But the tenant, though not taken bound to work, could not, I think, hold the lease for its whole currency without working at all, and exclude the landlord or another tenant from working. If the tenants were to refrain persistently from working, and so escape all payment of rent, and yet to insist on occupying under the lease, so as to prevent all working by the landlord or by another, I am disposed to think that the lease could, at the instance of the landlord, be brought to an end. But however that may be, I am satisfied that the tenant Mr Walker was not under absolute obligation to work the minerals during the nineteen years. The proper prestations of a lease are absent. Therefore when Mr Walker assumed a partner, and introduced him into this joint-adventure, then nineteen years was not necessarily the endurance of the joint-adventure. I cannot so read it. When working this ore on the lordship as stipulated, becomes impracticable, in consequence of not finding sufficient quantity of ore, then I think that the joint-adventure must terminate or be terminable by either party. It could not in equity be permitted to one of the joint-adventurers, to force the other joint-adventurer to proceed in a disastrous speculation to the great loss of both. I cannot say that mere difference of opinion as to the possibility or probability of success is a sufficient ground for calling on the Court to declare the joint-adventure at an end. On that point I agree with your Lordship in the chair, and I do not quite agree with the Lord Ordinary. I think that we cannot avoid the question of reasonable probability of success—the question on which the parties have led proof—Is there now in Haaf Grunie such an amount of chromate of fair quality as to justify continued working? Or is it reasonable to hold that continued working cannot be conducted with profit, or indeed without loss? I cannot hold mere difference of opinion sufficient. I cannot recognise the pursuers' right to terminate the adventure because they doubt the prudence of proceeding. Inquiry is necessary in order to protect the one party from the caprice of the other. But on the answers to the two questions I have indicated the decision of this case must, in my opinion, depend.

In the view which I take of the lease or license to work, and the agreement, the mutual obligation of the parties to the joint-adventure cannot be held as continuing for the whole lease, so as necessarily to last for nineteen years. I scarcely think that the defender himself maintained that proposition. On the other hand, the pursuers cannot at their pleasure, and without reason or explanation, enforce the termination of the adventure. Between these extreme propositions the justice of the case appears to lie, and I think there is sufficient support for it in law. The pursuers can, in my opinion, put an end to the adventure if there has been reasonable trial, and

if the result is that the mineral does not exist in this island of such quality and in such quantity as to justify continued expenditure with any fair prospect of success.

To force the continuance of a very hazardous, perhaps ruinous, adventure against the will of the pursuers, would not be equitable, nor would it be in accordance with legal principle. The authority of Professor Bell (Bell's Com. v. 2, p. 632-3), and the decisions in the case of *Montgomery* v. *Forester*, June 17, 1791, Hume, 748, and in the case of *Barr* v. *Spiers*, May 18, 1802, and *Marshall* v. *Marshall*, February 23, 1816, are favourable to the pleas of the pursuers, and several decisions in England, mentioned by Mr Bell, confirm the same view of the law. I may also refer to the English case of *Crawshay* v. *Maule*, decided by Lord Eldon in 1818, 1 Wilson's Chans. Rep. 181.

Accordingly it is necessary to consider the proof in order to ascertain the true state of the facts,—whether the continued working of this chromate can be conducted with reasonable hope of success?

On the evidence in regard to the state of the chromate in Haaf Grunie I confess I have had difficulty in forming an opinion. It is in some respects conflicting, and in some respects unsatisfactory. But I have ultimately arrived at a conclusion unfavourable to the prospects of the adventure, and favourable to the pleas of the pursuers.

I think the joint-adventure was not properly an initiatory adventure nor a speculation for searching and ascertaining the existence of chromate. The mineral was believed to be, and stated by the defender to be, in the land, and it indeed was so to some extent. The object of the speculation was to develope it, and work it, and dispose of it profitably.

Taking this view of the speculation I think the result of the proof is that there is not in the land mentioned in this lease, and in the joint-adventure, such minerals of the kind specified as can be worked with reasonable hope of profit.

The speculation has, up to the present time, proved a failure, and nothing but a great outlay and a new and unexpected discovery can make it otherwise. This is the opinion of the pursuers. But not only so; I think it is a reasonable opinion so far as the truth has been or can at present be ascertained. Amid the conflicting evidence I cannot refuse to attach weight to the opinion of Professor Haddle and to the testimony of Mr W. G. Mowat.

Mr Walker says he is—and I do not doubt that he really is—of a different opinion. He is very sanguine as to the result. If he is right he will now get the whole adventure into his own hands, and then it is hoped he may find it as profitable as he anticipates. But since the date of the joint-adventure nothing has occurred to justify this prospect of success.

Taking this view of the evidence, and construing fairly the missives which express the agreement of 22d March 1872, I am of opinion that, looking to the ascertained character and position of the mineral, and having regard to the fair ends and objects of the joint-adventure, one of the parties cannot insist on continuing the connection or partnership against the wish of the other party, and apparently against the interests of both. The eager and sanguine disposition of Mr Walker may sustain his own efforts amid discouragement, but cannot justify the Court in compelling the pursuers to continue a hazardous speculation which they apparently, not without some reason, expect to be disastrous.

LORD MURE—I concur with the Lord Ordinary that here there is no ground for reduction on the score of fraud, but I cannot concur further, for I think we are bound to look at the evidence. I also concur in the exposition which has been given by your Lordship in the chair of the principles which apply to the right of terminating such joint adventures.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for John Walker, defender, against Lord Gifford's interlocutor of 5th April 1875, with the joint-minute for the parties, No. 325 of process, and heard counsel, Adhere to the said interlocutor so far as it disposes of the reductive conclusions of the summons: *Quoad ultra* recal the said interlocutor: Find that according to the sound construction of the contract of joint adventure between the pursuers and defender, dated the 22d March 1872, the defender guaranteed that the mine which forms the subject of the joint adventure should within a few years yield profits amounting to at least £2000, which sum was to be applied to repayment of the loan of £2000 obtained by the defender from the pursuers: Find that the said mine has not hitherto yielded any profit, and that there is no reasonable prospect of profits being realised in the future: Find that in these circumstances the pursuers are entitled to put an end to the joint adventure, and to call upon the defender to fulfil his guarantee: Therefore find, decern, and declare that the said contract of joint adventure has come to an end, and in respect it is admitted that the pursuers have retired with their own funds the bills for said advance of £2000, decern and ordain the defender to make payment to the pursuers of £2000, with interest from the date of citation: Assoilzie the defender from the 4th and 5th conclusions of the summons, and decern: Declare and decern in terms of the 6th conclusion, but in respect the sum of £139, 3s. 8½d has not been advanced and paid by the pursuers, but only credited to the defender as an item in an unsettled account, dismiss the action *quoad* the seventh conclusion, and decern: Find no expenses due to or by either party."

Counsel for Pursuer—Asher—Keir. Agents—Drummond & Reid, W.S.

Counsel for Defender—Dean of Faculty (Watson)—Balfour. Agent—George Andrew, S.S.C.