tions. It follows that it was entirely optional on the part of the barracks whether they would take it on such terms and conditions or not. If they were not satisfied with the terms and conditions they need not have taken the water. Therefore it is not compulsory, but it is entirely a voluntary contract between the two parties. In other words, it simply appears to me to be this, that the Water Commissioners are selling water to the Hamilton Barracks at certain rates and on certain conditions. It humbly appears to me that that is exactly the case which we had to deal with in the *Glasgow* case. I cannot assume on the facts stated here that the Hamilton Barracks would have a right to get the water at the domestic rate, and treat the case upon that footing. I assume that they know their rights, and that if they had that right they would have exercised it. But they have not done so. They have entered into an entirely voluntary agreement with the Commissioners to buy water from them at certain specified rates. That is the only case we have to deal with, and it is no hardship on the Hamilton Barracks to take it in this way, for this reason, that they may use the water not only for domestic purposes, but for public and general purposes without paying any more for domestic use, because they are not charged for domestic use. The price they pay covers that.

That being so, I think this is purely the case of a sale of water by the Water Commissioners to the Hamilton Barracks on the terms agreed on between them, and the case therefore distinctly falls under the *Glasgow* case in my view.

Lord Mure was absent.

The Court reversed the determination of the Commissioners, and remitted to them to sustain the assessment to the extent of £567.

Counsel for Appellant (the Surveyor of Taxes) —Sol.-Gen. Robertson, Q.C.—Young. Agent—David Crole, Solicitor to Inland Revenue.

Wednesday, February 23.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

YOUNG *v.* DOUGANS.

Partnership—Joint-Adventure—Term of Endurance.

Terms of a correspondence between the inventor of a patent and a person with whom he was negotiating as to its working, *held* by the Court not to disclose any concluded contract of joint-adventure for its working, in respect that the terms of the alleged contract were never settled, and in particular that no period for its endurance had ever been agreed on.

In September 1885 W. J. Young applied for a patent for improvements in commodes or closets for indoor use. The application was accepted in March 1886. This was an action by him against Andrew Dougans for £1000 as damages for breach by the defender of an alleged contract of joint-adventure for obtaining the patent and working the same under the name "Young's Patent Earth Closet Company," under which the pursuer should contribute the invention and the defender as an equivalent the capital necessary for the proper conduct of the business, the profits being equally divided.

The defence was that negotiations took place but no concluded agreement was ever come to, and, in particular, no time of endurance ever mentioned; that the defender had during the negotiations made certain experiments, but in April 1886 had decided not to proceed further with the proposed joint-adventure, and intimated that intention to the pursuer; that he was willing to bear the expense of these and the pursuer's expenses pending the negotiations and in connection with showing commodes at an exhibition in Edinburgh, and had already borne great part thereof.

He pleaded—"(3) There being no concluded contract of joint-adventure between the parties the action should be dismissed with expenses. (4) *Separatim*—No term of endurance having been specified, the alleged partnership was terminable at will, and the defender was therefore entitled to withdraw from the same."

It appeared from the documents put in evidence that between April and July 1885 there was correspondence in which it was still a moot point whether there was to be a sale to the defender of the invention, or a joint-adventure, or any arrangement at all. On 7th July 1885 the pursuer wrote—"On considering your alternate proposals about the working of my commode, permit me to put the following questions:—A joint-venture, what does it mean, will it be necessary to value my patent? If so how much value do you put on it? . . . Please explain what position I shall occupy in carrying out this proposal? . . . I shall be glad to receive written replies." Scroll reply by the defender.—"Joint-venture means fair division of profits, value of patent; any undertaking to provide capital for proper working of business would be sufficient. . . . Position in carrying out proposal of joint-venture—have no fixed idea on this. Have you any? Above hurriedly written at fireside. You can alter or amend for my perusal. I send your letter containing queries for your guidance." Letter, pursuer to defender, 6th August 1885.—"I am willing to go on with you in a joint-venture with my commode on the terms you name, viz., You to provide all funds for the proper conduct of the business to enable us to execute orders, print circulars, advertise, exhibit, appoint agents throughout the United Kingdom and Ireland, and otherwise bring the article prominently before the public, all of which is to be held as equivalent to my patent. Profits to be equally divided between us. The name of company to be 'Young's Patent Dry Closet Company.' A set of books to be kept for the company. Commodes at first to be contracted for. My position, I think, should be bookkeeper and manager under your surveillance." Letter, pursuer to defender, 8th August 1885.—"Considering the stage of our negotiations, also of my finances, I think it proper to let you know that I am urgently in need of £100. This has arisen partly from my being ill the whole of last summer, and partly from business not paying, and possibly from my being too much taken up with this patent and outlays

connected therewith. Will you give me your name for this sum on the security of my share of the patent? I hope that you will see your way to do so, as I want to get clear of a few troublesome accounts before joining you in this adventure. As I said yesterday, if you deal generously with me now, I am willing to put the whole patent on the same terms. Rather unexpectedly I am called upon to pay some £50 beginning of next week." Letter, defender to pursuer, 10th August 1855.—"Your favour of 8th inst. to hand. In reply I cannot agree to your request. I will be willing to carry out all I have promised to do in putting your commode before the trade and provide funds, &c., for doing so, but I would not be warranted in its present stage complying with yours now replied to." Letter, Mr Young to Mr Dougans, 11th August 1885.—"Yours received. As arranged I hope to see you on Thursday afternoon. I hope that Mr C. Bennet is not now so busy, and that he will be able to give you probable cost, also Mr Clerk, and that we will get arrangements complete for my sake."

Then followed correspondence with regard to the preparation of the commodes as samples, and with a view to ascertain what would be the cost of manufacturing them. Letter, pursuer to defender, 20th February 1886.—"I have been expecting a letter from you every day this last week, saying whether you are now satisfied with the commode and patent. Surely we are losing time, especially in view of the Exhibition. Your immediate attention will oblige." And on the 23d he wrote asking that agents be appointed and commodes made for sale, and offering to give his whole time for a year at a reasonable salary.

Then followed a large mass of correspondence with complaints by the pursuer as to the delay in manufacturing the commodes for the market. Letter, Mr Dougans to Mr Young, 10th April 1886.—"When you first named your closets to me both my sons were with me, and I had the desire then to push it in the form so often talked over with you, but this secession of those who could have wrought it under my direction has so completely changed my personal position that I am compelled to say it is quite out of my power to take further active steps in promoting their sale. I daresay from former letters you are prepared for this decision, one, I can assure you, very reluctantly come to. I trust therefore that you will be able to arrange with a more suitable party, one who could devote his whole time and means to pushing what I still think a decided want in Scotland."

The pursuer was unsuccessful in inducing the defender to withdraw from this attitude, and on 14th July 1886 this action was brought.

After a proof the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds that the defender in the month of August 1885 entered into a joint-adventure with the pursuer, whereby, in consideration of his obtaining an equal share in a private 'commode,' upon a plan designed by the pursuer, the defender agreed to join him in putting the said 'commode' before the trade, and to provide funds, &c., for doing so: Finds that the defender wrongfully failed to implement his part of said agreement of joint-adventure, and on 18th April 1886 wrongfully and in breach of said agreement withdrew from the same, to the loss and damage of the pursuer: Assesses the damage at the sum of £100 sterling, for which sum decerns against the defender in terms of the conclusions of the summons," &c.

"*Opinion.*—1. I think it proved by the correspondence (brought to a point in the pursuer's letter of 6th August 1885), and by the proceedings which followed, that the defender agreed to enter into a joint-adventure with the pursuer with regard to a 'commode' upon a plan designed by him, and for which he obtained acceptance of a provisional specification; and it appears to me that the terms of the adventure are sufficiently and satisfactorily explained. The defender's letter of 10th August 1885 contains an acknowledgment that he had promised to join the pursuer in putting the 'commode' before the trade, and to provide funds, &c., for doing so. His subsequent actings confirm this view, and in my opinion the defender's attempt now to represent this agreement as having been subject to conditions which were not fulfilled is not supported by the evidence. He had sufficient opportunities of considering these matters before he agreed to join the pursuer in the adventure. His letters show that to the end he professed to consider the 'commode' a 'good thing,' deserving of success; and that he broke off from the pursuer, not on account of any failure on the pursuer's part to fulfil his part of the agreement, but on account of want of time to attend to the matter. Even in his letter of 10th April 1886 the defender speaks of the pursuer's 'commode' as being 'a decided want in Scotland.' The evidence adduced by the defender against the character of the pursuer's invention is inconsistent with the opinion expressed by him at the time, and gives a more serious and disagreeable aspect to the defender's case than it otherwise would have had. I am not satisfied that the objections spoken to by Dr Russell and Mr Cooper affect the value of the pursuer's principle. The ground of these objections is not well explained. It rather appears that these may have arisen from some defect in the construction of the particular specimens which were examined.

"The defender may no doubt be able to show that he had a sufficient ground for putting an end to the joint-adventure. That is a separate question. But he was not entitled to keep the pursuer bound to him from August 1885 to April 1886, and then to break off merely because it did not suit his convenience to go on. I think that there was a concluded agreement by which he acquired right to an equal share of the pursuer's patent, and became bound to join the pursuer in working it, at least to the extent of giving it a fair trial in the market.

"2. As to the alleged breach of agreement, there is no question that by the letter of 10th April the defender announced his resolution not to go on. The question is, whether his breaking off at that time was wrongful, or was done under circumstances which entitled him to put an end to the joint-adventure? It is not doubtful that circumstances may arise in the course of carrying on a joint-adventure which justify one of the adventurers in refusing to go farther. In the case of *Miller* v. *Walker*, 3 R. 242, which was cited by the pursuer's counsel, the rule was stated by the Lord President as follows:—'The general rule is that one of two joint-adventurers is entitled to put an end to the joint-adventure if

it comes to be attended with greater risk than when the contract was entered into, or if there be no reasonable belief that profit will be made for either party.' In applying that rule to the present case, it is necessary to keep in view that, though the agreement was for no definite period of time, it was for a definite purpose, and contemplated a reasonable endeavour on the part of the defender, jointly with the pursuer, to place the article in the market.

"I am of opinion that at the time when he broke off, the defender had not made a sufficient endeavour to fulfil his part of the agreement, and that nothing had occurred to justify him in putting an end to the adventure. He knew all along that the pursuer had not the means himself of pushing his invention, or even of presenting it in the market. He acknowledges, in the letter by which he announced his withdrawal, that the article was what he called 'a decided want in Scotland.' He had frequently been applied to by the pursuer to arrange and carry out some course of action; and the correspondence, particularly after December 1885, affords proof of the defender's dilatory conduct and his unwillingness (notwithstanding inquiries about the article) to concur in the expenses necessary to put the article before the trade. Prior to December 1885 some delay appears to have been caused by a suggestion of the pursuer's to get up a company upon a more comprehensive basis, including the public closet and a contract for disposing of the sewage of the town of Greenock But this proposed scheme was dropped, and there is no satisfactory explanation of the defender's failure to concur in any joint action for the promotion of the object of getting the private commode into the market.

"I am of opinion, on the evidence, that the defender has wrongfully failed to implement his part of the agreement, and wrongfully broke off from it on 10th April.

"With regard to the damages, I am of opinion that the defender is responsible for his share of the liabilities incurred after 6th August in connection with the joint-adventure, and also the loss caused to the pursuer by his breach of agreement. The Exhibition expenses were, I think, clearly incurred upon his responsibility, and the pursuer must have lost by the break-down of the arrangement to which he trusted for about eight months for getting his closets introduced to public notice and put into the market. A break-down at that stage was obviously a very serious matter to him. It seems to have destroyed the prospects of success almost entirely.

"Holding, as I do, that the defender has been in the wrong in maintaining that there was no concluded agreement, and in acting as he did, I think that the damages sustained by the pursuer cannot be estimated below £100.

"I shall find accordingly, and with expenses."

The defender reclaimed, and argued — The action as laid was one of breach of contract, and therefore under it the pursuer was not entitled to recover the share of disbursements connected with the joint-adventure. The defender, however, was willing to concede that this point should be waived in order that the accounting might be settled in this action. (1) On a sound construction of the letters which passed between the parties there was no concluded contract. Nothing was positively settled as regards it; not even the price or the mechanism of the "commode." It amounts to no more than an agreement on the defender's part to pay the expense necessarily to be defrayed in finding out by experiments whether it would become a valuable subject in the market, with a view ultimately to its becoming the subject of a completed joint-adventure between the parties. But (2) assuming that there was a concluded contract between the parties, it was not one which the Court could enforce. It contained no *termini habiles*, and it was thus just a mere partnership-at-will, dissoluble at the will of either of them—*Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587; *M'Arthur* v. *Lawson*, July 19, 1877, 4 R. 1134; *Traill* v. *Dewar*, March 8, 1881, 8 R. 583. The Lord Ordinary had relied on the *dicta* of the Lord President in *Miller* v. *Walker*, December 10, 1875, 3 R. 242, as establishing the proposition that unless either party to a joint-adventure could show a change of circumstances, *e.g.*, improvement, risk, or loss, he could not withdraw, and he held that the defender had not made sufficient endeavour to fulfil his contract. But to apply such a rule here was an unjust straining of the *dicta*. Before that case was decided it was settled that joint-adventure was just nothing more nor less than limited partnership to which the general rules of partnership applied—Lindsay on Partnership, 55; Bell's Com. (M'Laren's ed.), 535 (5th ed.) 649. That being so, assuming there was a completed contract the ordinary rules of partnership must apply, and the defender was entitled to withdraw.

The pursuer supported the interlocutor of the Lord Ordinary, and cited *Reade* v. *Bentley*, January 22, 1858, 4 H. and J. Rep. 656.

At advising—

Lord Justice-Clerk—After giving the evidence a careful consideration I am confirmed in my impression that there is no concluded contract at all here between the parties, and consequently the considerations under which such a partnership was entered into do not necessarily arise. But this view does not prevent my thinking that the defender did hold out to the pursuer that the experiments made in altering the models which were from time to time made, in order to show what the value of the patent was ultimately to turn out, were actually to be borne by the defender. Indeed he himself admits as much with perfect frankness. The two things are not at all inconsistent, because he might very well be willing to bear the expense of necessity to be incurred in perfecting the machine, and at the same time have no intention of binding himself in a partnership with the pursuer. I am not going into the evidence, because the question whether there was concluded contract turns on a very few documents. These are in the shape of letters, and they do not bear to be documents constituting a contract. No doubt a contract may be spelt out of them, but I do not think that either the obligations entered into in the letters or their phraseology constitute a contract. The question arises, then, whether, looking to the circumstances in which they were written, they can be said to show any substantial agreement to enter into a joint-adventure on specific terms? The real truth of the matter is that the defender was willing to negotiate if he thought the work-

ing of the patent was likely to be beneficial. But two things had to be satisfactorily concluded —(1) The price, and (2) the mechanism of the machine itself, and the evidence proves distinctly that down to the last the defender was never satisfied on these two points, and they were really at the bottom of his refusal to go any further with the matter. It is said that on the 6th August the pursuer wrote a letter which was assented to by the defender, which did in point of fact constitute a contract. The letter is, as I view it, an offer, after certain preliminary negotiations have taken place. It is an important letter, as on it everything depends—"I am willing to go in with you in a joint-venture with my commode on the terms you name, viz., you to provide all funds for the proper conduct of the business to enable us to execute orders," &c.; then he specifies the terms, and adds—"Commodes at first to be contracted for. My position, I think, should be book-keeper and manager under your surveillance." He refers there to scroll replies in answer to questions which he had put, and which I think illustrate what I have been saying, because they are replies by Mr Dougans to queries by Mr Young. No. 4 runs—"Please explain what position I will occupy in carrying out this proposal." The answer runs—"Position in carrying out proposal of joint-venture—have no fixed idea on this. Have you any?" There is thus far, then, no contract, and only a mere statement that the pursuer is willing to go on in a joint-venture on terms not yet settled, and therefore that is only part of a tentative negotiation which might or might not ultimately end in a completed contract. The next letter corroborates me in this view. It is written on the 8th August, and is in reply to the pursuer's demand that the defender should make him an advance of money. It runs thus—"I hope that you will see your way to do so, as I want to get clear of a few troublesome accounts before joining you in this adventure." Then the letter of 10th August founded on is not a reply to the letter of 6th August, but to the last letter, and in it the defender says he is willing to carry out all he had promised to do in putting the commode before the trade, and providing funds, &c., for so doing, but he declines to grant the advance asked for. I think the matter rests there. I think the defender honestly meant to bear the preliminary and tentative expense, and is still willing to do so. And further, I think he is bound to do so because, as I have said, it is one thing to make a contract for an indefinite period and another to undertake the expense of promoting such a scheme as this. Even if it were not so, I should not have thought a joint-adventure where one man contributes an invention and the other contributes the whole expense of working it would endure for a longer period than that on which both parties were agreed—that is to say, I think it would be terminable at the will of either, and if either party wished he could put an end to it. It was certainly the view adopted in the old Roman law. Pothier lays it down very clearly that a partnership without a term, where no term is expressed, is terminable at the will of either provided the withdrawal is in the first place in good faith, and second, in good time. It is quite in accordance with that to say that the nature of the document may give a term though none is expressed in words, and if this had been a joint-adventure for a patent for a term I could have understood the force of that.

The only other question is as to the preliminary expenses incurred for ascertaining whether the article would easily meet the demands of the market. I think we should award the pursuer a sum for these expenses. I am of opinion then, on the whole matter, that we should alter the Lord Ordinary's interlocutor, and assoilzie the defender from the conclusions of the action in regard to the joint-adventure, but I think he should pay a sum of £40 as the preliminary and incidental expenses of promoting the scheme.

Lord Craighill—I agree that there is no proof whatever of a concluded agreement here. I think the terms of the letters are absolutely exclusive of the view that anyone concerned was committed. The truth is that information had not been obtained by either party which would lead them to conclude a bargain. It was not ascertained whether the subject of the patent was to be made by them or bought from others ready made, nor what it was actually to cost, nor what price it would fetch in the market. The parties also had not made up their mind how or where the business was to be carried on. No doubt there were expressions in the letter of 6th August which might suggest that it would bear interpretation to the effect that there was a concluded agreement. But we are not bound by any particular words which may occur in a letter written in the course of such negotiations. The letter itself may be called an instrument of negotiation. I use that expression as it was used by Lord Selborne in *M'Kenzie* v. *Fowler*, March 5, 1872, 9 S.L.R. 379, and April 17, 1874, 11 S.L.R., 485, when he said that the words in the document before the Court bore to be words of obligation, but after all, when the surrounding circumstances were looked at, and the letter read as a whole, it was no more than a mere instrument of negotiation, which was never carried to final completion. One letter has affected me in coming to this decision, and that is one dated 20th February 1886, in which the pursuer urges the defender—not to do anything, but to make up his mind whether there is to be an agreement for the working of the patent. How can this be reconciled with the pursuer's contention that something had occurred in the August preceding which constituted a binding agreement to work the patent? But more than this, there was no term—a matter of the greatest importance for the protection of both parties. I am, then, quite clear that the agreement between the parties was no more than that the defender agreed he would bear the preliminary expense of making the experiments by which the value of the article might be determined, with a view to its contingent launching on the market.

Lord Rutherfurd Clark—I think the pursuer has failed on every view of his case. He brings this action for the purpose of recovering damages under a contract. The contract is one of joint-adventure, and the breach alleged of it is that the defender in April 1886 wrongfully withdrew and so caused loss. Now, of course all the liabilities which the defender incurred so long as the joint-adventure, if ever entered into, was in force remain as liabilities notwithstanding his withdrawal,

and if there be such he is liable for them as debts and not as damages. It is therefore impossible for us, in estimating the damage which the pursuer is entitled to recover if he proved that there was a breach of contract, to take into account the liabilities of the defender during the subsistence of the joint-adventure, but throwing them aside I do not think the pursuer has proved that he has sustained any damage whatever. I have looked carefully into the proof, and even if I were to affirm that there had been a contract of partnership and that the defender had withdrawn in breach of it I could not have found that the pursuer had sustained more than mere nominal damages. The result of that in my opinion would be that according to the pursuer's own view of the case he should fail to recover anything more than merely nominal damages.

But further, I agree in thinking that there was no contract made for a joint-adventure. I think there was nothing more than an agreement on the defender's part to pay such expense as would be sufficient to enable the pursuer to test whether the article invented by the pursuer would be a paying article, with a view to its becoming the subject some day of a joint-adventure. Hence in that view too the pursuer's case fails. I think, however, that the defender acted well in agreeing to allow the Case to be used as a means of adjusting accounts.

Lord Young was absent.

The Court recalled the Lord Ordinary's interlocutor and ordained the defender to make payment to the pursuer of £40 ; *quoad ultra* assoilzied the defender from the conclusions of the summons, and found him entitled to expenses.

Counsel for Reclaimer—Graham Murray—Salvesen. Agent—H. B. & F. J. Dewar, W.S.

Counsel for Respondent—Strachan—Wilson. Agent—Wm. Officer, S.S.C.

Friday, February 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG *v.* BEGG.

Proof—Recal of Witness—Evidence Act 1852 (15 *Vict. cap.* 27), *secs.* 3 *and* 4—*Husband and Wife—Divorce.*

It is incompetent after a witness has been examined to recal him for the purpose of putting to him the question whether *after* he had been examined as a witness he had made statements inconsistent with his evidence in the cause.

Circumstances in which it was *held* that a witness for the pursuer in an action of divorce ought not to be allowed to be recalled by the defender after the pursuer's case was closed for the purpose of asking her whether *before* giving her evidence in the cause she had made certain specified statements inconsistent therewith.

Such a motion must be specific both as to the alleged statement and the time and place at which it was made.

In an action of divorce at the instance of Charles Begg, bachelor of medicine, residing in China, against his wife on the ground of adultery, proof was led on the 15th and 16th July 1886. On the former day a domestic servant, Christina Fairbairn, was examined on behalf of the pursuer. The proof was adjourned till October the 16th, and at the close of the defender's proof, and before the pursuer's conjunct proof was led, counsel for the defender, according to the notes of evidence, moved the Lord Ordinary (Fraser) "to be allowed to recal the witness Christina Fairbairn, a witness for the pursuer [examined on the first day of the proof], in order to prove through her that she stated to her sister Mrs Margaret Fairbairn or Whitson, with whom she was living at the time at Dunbar, on the evening of the day on which she gave evidence, that her evidence against Mrs Begg was false, that she knew nothing whatever against Mrs Begg, and that the charges against her were not true ; also, whether three or four weeks thereafter, at 14 Pipe Street, Portobello, in the house of Mrs Mary Clark or Fairbairn, she made a similar statement to Mrs Fairbairn, her aunt.

"Counsel for the defender also moved the Lord Ordinary to recal the same witness Christina Fairbairn to prove a statement made by her to Mrs Mary Clark or Fairbairn *before* giving evidence, and the second day after being examined by Alexander Macdonald (a sheriff officer who made enquiries on the pursuer's behalf), to the effect that she knew nothing against the defender, and that false charges were being got up against her; and also that she repeated the same statement to Mrs Fairbairn or Whitson a day or two before her examination in the cause. Counsel stated that he had discovered this since the cross-examination of the witness Fairbairn."

The Lord Ordinary refused both motions. The motions were founded on sections 3 and 4 of the Evidence Act of 1852, by which it is provided—"3. It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding, and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified. 4. It shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled.

On 10th November 1886 the Lord Ordinary pronounced an interlocutor finding the adultery proved and granting decree of divorce.

The defender reclaimed, and when the case came on for hearing her counsel moved that he should be allowed to recal Christina Fairbairn for the purposes stated in the motions above cited, and relied on the cases of *Hoey* v. *Hoey*, February 21, 1884, 11 R. 578, and *Robertson* v. *Stewart*, February 27, 1874, 1 R. 532, pointing out that he had made the motion before the Lord Ordinary exactly at the stage of proceedings at which it had been held to have been properly made in these two cases. The motion was of vital importance to his case, inasmuch as