sider what is the most appropriate method for that purpose. But however that may be, I agree that there is no evidence to justify our granting decree of declarator that the disposition was duly executed and delivered, that it has been lost in such circumstances as to justify a proving of the tenor, and that its terms were those set forth in the summons. The evidence as to the execution and delivery of the disposition is very imperfect, though I think it probable that it was so executed and delivered. But that would not be enough to support a decree of proving the tenor. Even assuming the execution of a deed in some terms suitable for the conveyance of a property, there is no evidence of the particular terms of the deed, and no sufficient ground for a decree in terms of the conclusions of the summons.

The LORD PRESIDENT concurred.

The Court dismissed the action.

Counsel for the Pursuers — Rankine — Irvine. Agents—Auld & Macdonald, W.S.

Thursday, March 18.

FIRST DIVISION.

[Lord Pearson, Ordinary.

M'KINLAY *v.* CAMPBELL.

Accounting — Joint-Adventure — Profits — Construction.

B was the tenant of certain slate quarries for which he agreed to pay either a fixed rent or a royalty of half the free profits he might make on his works, manufacture, or trade under the lease, after deducting interest on capital advanced by him and generally all expenditure which he might be put to in carrying out the fair and reasonable purposes of his lease.

A entered into an agreement with B, by which B bound himself to pay to A "one-half of the tenant's share of profits under the lease," under deduction of a fixed annual salary to B for management.

B kept a store at the quarry, in premises falling within the lease, at which he sold to his workmen at retail prices coal and fodder which he had purchased at wholesale prices. He did the same with dynamite, and also made a charge for sharpening the men's tools, it being a term of their contract of service with him that they were to defray these charges out of their own pockets. The amount due by each workman for these articles was in practice deducted from his wages.

During the currency of the lease B sent A yearly states of the working of the quarry, together with his half-share of the profits of the quarry (but not of the store), and A granted receipts therefor.

In an action raised by A against B for an account of his intromissions with the profits of the store, the proof disclosed that A had been aware that B was carrying on the store and making a profit, and that B had more than once pointedly called A's attention to the fact that the store was purely a private concern of his own, and that A had nothing to do with it.

Held (*aff.* judgment of Lord Pearson) that there was nothing either in the terms of the agreement or in the acting of parties to entitle A to a share in the profits of the store, and that B must consequently be assoilzied.

By lease dated 28th October and 2nd and 9th November 1878, the testamentary trustees of Sir George Beresford let to Donald Campbell, M.D., Ballachulish, for a period of fifteen years from Whitsunday 1878—"All and whole the slate quarries of Ballachulish . . . . with power to the said Donald Campbell at his own charges and expenses to search for, quarry, and dig out slates from the said quarries . . . . and generally to carry on the quarrying and manufacture of slates at the said quarries, and also to use the roads, tramways, inclines, and drum-sheds and machines . . . . and also to use the pier or quay for the purpose of loading and unloading vessels." The rent was fixed at £1000 a-year, or, in the landlord's option, a lordship or royalty of one-half the clear profits which the tenant "may make on his works, manufacture, or trade under the lease, after deducting from the gross proceeds of the sales and other income, interest on the capital which he has advanced for carrying on the works at the rate of five per cent. . . . . and generally all and every expenditure which he may be put to in carrying out the fair and reasonable purposes of this lease, and all losses he may sustain by accidents or bad debts." The tenant bound himself to keep regular books and accounts showing his whole income and expenditure under the lease, "which books and accounts with vouchers shall be at all times open to the inspection of" the landlord, and was further bound to submit monthly, quarterly, and annual statements to the landlord showing the income and receipts from the quarries, the stock of slates on hand, the quantity sold, the prices, &c.

On the 21st and 27th of November 1878 Alexander M'Kinlay, Glasgow, entered into an agreement with the said Donald Campbell, which contained the following stipulations, *inter alia*: — "*Second.* The second party being now in possession of Ballachulish Slate Quarries under a lease from Sir George Beresford's trustees for fifteen years as from Whitsunday 1878, he hereby binds and obliges himself to pay the first party one-half of the tenant's share of profits under the lease, but under deduction of £300 sterling yearly to the second party for management, and that at 1st June in each year, commencing first payment as at 1st June 1879."

After certain provisions by which the first party was to provide one-half of the

tenant's share or half of the quarry plant, and to receive interest at 4½ per cent. on the sum advanced by him to meet the second party's half thereof, the agreement proceeded:—"*Fifth.* The second party shall be bound, and he hereby binds and obliges himself, to furnish to the first party duplicates of the statements or abstracts of accounts, and of the annual balance-sheet, the same as he is required in terms of the lease to do to the proprietors; and further, the first party shall at all reasonable times be entitled to inspect and examine the quarry books and accounts, and to make excerpts therefrom, and to see any awards, reports, or valuations which may be made as provided for in the lease."

The lease terminated at Whitsunday 1893.

On 2nd April 1896 M'Kinlay raised an action against Campbell to have it declared that the defender was bound to produce an account of his whole intromissions as tenant of Ballachulish Slate Quarries under the lease of 1878, including therein the whole profits made by the defender under his said lease, whether by his works, manufacture or trade in slates, or in the purchase and sale of materials used by him in said quarries, as well as materials sold and work done by him to and for the workmen and others engaged in said quarries, and to have the defender ordained to pay to the pursuer a sum of £3000.

The pursuer founded on the agreement set forth above, and averred *inter alia*:—"(Cond. 6) The said quarries were always, both before and after they were leased to defender, wrought on the piece system, whereby the workmen provide their own tools, powder, dynamite, oils, grease, coal, and other materials required. In working the quarries the parties had to provide large quantities of coal, grease, oils, and powder, and in connection therewith part of the subjects leased was used as a store, through which such supplies were passed, and it has always been the practice for the tenants to supply from said stores such materials to the workmen as they required, and to make profit by the sale thereof. The defender, as the manager for the copartnery or joint-adventure, continued this practice, and kept on the premises let a stock of the different materials for the use of the quarries, which materials he sold to the workmen as required. The sales and the work involved thereby were carried on by servants of the tenants, and the cartage by the lorries and horses of the tenants, and the expense thus involved formed deductions in ascertaining the profits for division. In the smiths', joiners', and other shops, the men's tools were repaired, and the workmen were charged therefor. The defender did not carry on a separate business. He was tried and convicted of a contravention of the Truck Act, and it is believed and averred that he regularly deducted the amount of the men's purchases from their wages. (Cond. 7) The revenue and profits thereby derived, including the percentage added to the material, etc., supplied to the quarries, fall in terms of the said agreements to be divided equally between the pursuer and defender. They were partners in carrying on the quarries and others, the management of the whole being entrusted to defender, and they are entitled to an equal division of the profits thereby derived, whether made directly through the excavation of slate, or indirectly, by supplying material to the quarries and to the workmen. During the currency of the lease the pursuer received from the defender payments to account from time to time, but no regular settlements took place, and no final settlement has taken place. Although the lease terminated in 1893, no settlement with the proprietors took place till a few months ago, and on the proprietors being settled with, the pursuer called on the defender for an account of his whole intromissions, that the amount due to him, including the revenue and profits, made as aforesaid in the working of the quarries, and through the said stores and transactions with the workmen, might be ascertained and recovered. The defender, however, declines to submit to an accounting, or to allow the pursuer to examine the books and papers of the concern, or to pay him any portion of the said revenue and profits. In these circumstances the present action has been rendered necessary. The pursuer has all along maintained that there was a partnership between defender and himself."

The defender averred in answer—"(Ans. 6) There was no partnership or joint-adventure between the pursuer and the defender, and the pursuer advanced no claim thereto till the termination of the lease. In carrying on the business of quarrying and manufacture of slates under the lease, the defender had to provide coals, oil, and grease for the works, and the cost of such formed a charge on the business. All coals, oil, and grease so provided were charged at cost price, and were used for engines and waggons, and for no other purpose, and were neither sold nor disposed of to workmen or others. None of those articles were required by the quarrymen for their piecework. Powder and workmen's quarrying materials were not provided at the expense of or out of any funds of the quarry business. The workmen were bound to provide themselves with powder, tools, and other requisites, and were free to supply themselves with the same where and when they chose. Their tools were repaired and sharpened by the quarry smiths, and a weekly charge was made therefor, and all sums so charged were placed to the credit of the quarry business. In addition to the trade carried on under the lease, the defender carried on a general business in the district with his own capital, and at his own expense and risk. Coals were thus purchased and supplied directly out of steamers to the workmen for private use and general public. In delivering said coals the defender hired horses and carts from farmers and others in the neighbourhood at his own expense. He also kept a special horse and cart for

this purpose. To provide against irregularity of supply by steamers, a small quantity of coals was kept outside the works, and apart from the coals provided for the quarries. The defender likewise kept a supply of powder, steel, iron, rope, and some other quarrying requisites, and the workmen supplied themselves therefrom, but were under no obligation to do so, nor was the defender under any obligation to supply them. The defender also kept a steamer which carried coals and slates for the defender or anyone who chartered her. In carrying on this separate business the defender kept separate books and accounts and paid for the services of those employed in connection therewith out of his own capital. He made use of some buildings which were included in his lease, but they were such as were not required for the slate works, and he could have made provision elsewhere if necessary. (Ans. 7) Denied. The defender has regularly throughout the lease furnished the pursuer with duplicates of the balance-sheets, trading accounts, and statements sent to the landlord, as provided by said lease and agreement. The books and accounts of the business were audited some time after Whitsunday in each year, on behalf of the landlord and the results of such audits were made known to the pursuer, and he acquiesced therein. The balance-sheets as approved showed the total nett profits which the defender had made on his works, manufacture, or trade under the lease during the year immediately preceding. The tenant's share of said nett profits, after deducting £300, was equally divided between the pursuer and the defender, and all that was due to him has been paid. The lease stipulates for a distinct and full accounting and settlement each year, and the pursuer was settled with on that footing. The present demand is for an account of the profits of a business in which the pursuer had no capital or risk, and with which he had no concern. It was carried on by the defender outwith the terms and purposes of the lease, and entirely with his own capital. The said business was openly carried on by the defender, and it was well known to the pursuer that such was the case.

The pursuer pleaded, *inter alia*—"(1) The defender, under and in virtue of the agreements libelled, is bound to count and reckon with the pursuer, and to pay him one-half of the tenant's profits, in so far as not already paid. (3) In accounting with the pursuer, the defender is bound to take into account the profits made on the supplies through the stores to the quarries, and from the sale of the material to the workmen. (4) There having been a partnership between the pursuer and the defender, the pursuer is entitled to a share, viz., one-half of the entire profits made by defender."

The defender pleaded, *inter alia*—"(7) On a sound construction of said lease and agreement, the defender is not bound to account to the pursuer for any portion of the profits of the separate business condescended on.'

A proof was allowed, the import of which appears from the opinions of the Lord Ordinary and the Lord President.

The following is a specimen of the states rendered by the defender to the landlord and to the pursuer:—

"BALLACHULISH SLATE QUARRIES—TRADING ACCOUNT 1891–92.

Cr. Slates a/c			£22,558 6 6		
Insurance			4 10 8		
					£22,562 17 2
Dr. Charges a/c. ..	£696 16 8				
Quarry expense a/c	342 3 10				
Coal a/c	444 8 6				
Horses a/c ..	116 6 9				
Taxes a/c ..	130 1 11				
		£ 1,729 17 8			
Extra discount a/c ..		966 19 9			
Wages a/c		17,097 12 6			
Bad debts		164 17 10			
		£19,957 7 9			
Balance,		2,605 9 5			
					22,562 17 2

"BALANCE-SHEET of the BALLACHULISH SLATE QUARRIES 1891–92.

LIABILITIES.

Ac/s due by business			£ 21 0 2
Medical Fund			0 11 7
Dr Campbell's drawing a/c			95 8 4
Capital a/cs—Sir G. Beresford's Trustees	£4,016 17 11		
Dr Campbell's	4,016 17 11		
		8,033 15 10	
Bank of Scotland		3,198 7 9	
Profit and loss		2,605 9 5	
			£13,954 13 1

ASSETS.

Ac/s due to business	£2,224 1 1		
Sir Geo. Beresford's Trustees' drawing a/c	500 0 0		
Plant a/c	8,033 15 11		
Stock a/c (stock of slates on hand)	3,128 15 0		
Cash on hand	63 1 1		
			£13,954 13 1"

The evidence given before the Crofters Commission referred to by the Lord President had reference to the supplying of coals by Dr Campbell to his workpeople, it being asserted by one witness and denied by Dr Campbell that the workmen were compelled to buy their coal at Dr Campbell's store at an exorbitant price.

On 2nd December 1896 the Lord Ordinary (PEARSON) assoilzied the defender from the conclusions of the summons.

Opinion.—. . . "In conformity with the practice of the estate the quarry was wrought by piecework. The men worked in squads of six, and to each squad was assigned a certain breadth of rock, which they quarried and worked into slates. The haulage of these slates from the quarry to the quay was provided by the tenant, who stored them in separate sheds belonging to the respective squads, and each squad looked after the loading and stowing of its own slates on board the ships chartered for the purpose.

"The men had to provide their own quarrying materials, including gunpowder, iron tools, hammer handles, and rope. They were at liberty to supply themselves with these materials as they pleased; but practically, in pursuance of a custom which had prevailed before the defender became tenant, they bought them at a store carried on by the defender as a separate business, with separate books, and to a certain ex-

tent separate clerks. These materials were sold to the men, not at cost price, but at a profit. This business was, however, carried on, and the materials kept in stock, within the subjects let—with this exception, that the powder was stored in a magazine which was outside the premises, and which does not appear to have been expressly taken on lease by the defender.

"Besides the materials required by the men who were on piecework, the quarry itself required supplies of material for its general working. These were chiefly (1) coals for the locomotive and stationary engines, (2) forage for the horses, and (3) tools for making or repairing the quarry roads and the like. These also were provided by the defender through the medium of his general business, but they were (subject to a trifling exception) charged to the quarry at cost price.

"The general business further extended to supplying household coal at a profit to the quarry workers at their homes as well as to the general public, and also (to a small extent) supplying the forage. The pursuer arranged for these supplies being brought to Ballachulish by sea. This was sometimes done by chartering vessels, and sometimes by a steamer belonging to himself, which brought coal and took away slates. This steamer was run as part of the general business, and yielded a considerable profit, but the pursuer does not claim to share in it.

"The quarrymen were paid eight times in the year—every six or seven weeks. At each pay-day those who got supplies of household coal in the interval were debited with it at market prices (and not at cost price), and received the balance of their wages in cash. A considerable profit resulted to the defender upon the coals so supplied during the currency of the lease.

"The pursuer now brings this action, in which he demands an accounting from the defender for the whole profits made under the lease. The action, however, has been treated by both parties as raising and as intended to raise only the questions relating to the profits made on the general business, and not as opening up the accounts which were rendered yearly to the pursuer as statements of the profits earned upon the quarry output. The pursuer's case is based upon certain agreements between him and the defender, and the actings of parties thereunder. I must now advert to the circumstances under which these agreements were made.

"The defender's predecessor as tenant of the quarries was Mr James Gardner. He had given financial aid to the proprietors, Beresford's Trustees, and had obtained from them an *ex facie* absolute disposition of the estate of Ballachulish, qualified by an agreement of even date therewith. The circumstances are fully narrated in the report of the case of *Lucas* v. *Gardner*, 1876, 4 R. 191. Gardner threatened to sell the property, and it became necessary for the trustees to obtain command of a sum of £10,000 to enable them to get rid of Gardner. The defender Dr Campbell was then in practice as a medical man in Ballachulish. He became aware of the position of the trustees, and in September 1876 he arranged with the pursuer that the latter should advance to the trustees the sum required on the security of Ballachulish.

"The pursuer and defender had had previous business relations. For some years previously the defender had had a large coaching business in certain parts of the West Highlands, and there had been dealing to a considerable amount between them in the purchase and sale of horses in connection with that business. I think it may be taken that both the pursuer and the defender are shrewd business men, and certainly their appearance as witnesses suggested nothing to the contrary.

"On 30th November 1876 the defender agreed with the trustees to provide them with the required loan of £10,000 on the security of the estate, the trustees undertaking to give him a fifteen years' lease of the quarries if and when the lease to Gardner was got rid of, and if it was not, then a preference as lessee in succession to Gardner. The lease was to be of the same subjects and in the same terms as the previous lease to Pitcairn (Gardner's predecessor), with this exception, that the defender was to take over the whole plant at a valuation.

"Four days later, on 4th December 1876, the first of the two agreements between the pursuer and defender was executed. It was not seen by the pursuer in draft, but in sending him the extended document as prepared for signature, which was done some days before it was signed, the defender told him that he should look over it carefully and that anything added or omitted could be put right on the margin. By this agreement the pursuer undertook to lend £10,000 on a bond over the estate, with interest at 5 per cent. It was further agreed that in the event of the defender obtaining a lease of the quarries, the pursuer should be entitled to receive 'one half of the tenant's share of profits' after deduction of rent or lordship, and of an allowance of £300 yearly to the defender for management, 'in terms of the lease agreed upon between the proprietors of said estate and' the defender. The pursuer further undertook to provide money to pay for the whole plant, the defender undertaking to pay interest at 4½ per cent. on one-half thereof. It was further agreed that the pursuer should at all times be entitled by himself or others to inspect and examine the books and accounts to be kept for the quarries by the defender.

"The disputes with Gardner led to protracted litigation—*Gardner* v. *Lucas*, 1878, 5 R. (H.L.) 105—and it was not until April 1878 that he was finally got rid of by the trustees. It then became the right of the defender, in virtue of the agreements of 30th November 1876, to enter as lessee of the quarries; and he did so in May 1878, although the lease in his favour was not executed until 28th October and 2nd and 9th November 1878.

"The lease was arranged to be granted, and was granted, in favour of the defender as sole tenant. That this was to be the arrangement was known to the pursuer in May 1878. Both then and in the witness-box he so expressed himself on the subject as to lead to the belief that he thought himself wronged by not being in the lease as tenant along with Dr Campbell. The defender so interpreted a complaint made to him by the pursuer in a memorandum of 3rd May 1878 (which is not extant), and at once negatived the suggestion in a letter dated 6th May, in which he says—'I distinctly told you from the first that I would not go into a joint-lease, as it would control my actions in a manner that would not be bearable to me.' It turned out that the pursuer's complaint was something different, viz., that as the lease was to be in favour of Dr Campbell personally, excluding heirs and assignees, unless consented to by the landlords in writing, he would be left out in the cold in the event of Dr Campbell's death. The defender at once proceeded to obviate this complaint by arranging with the landlords that he should have power to assign the lease to the pursuer during its currency, and that in the event of the defender dying during the lease, the pursuer should be entitled to carry it on; and this received effect in a minute signed of even date with the lease.

"By the time the lease was signed, two changes had taken place which rendered it proper for the pursuer and defender to make a new agreement. The Beresford trustees had repaid the £10,000 to the pursuer; and on the other hand, in place of the tenant taking over the whole quarry plant at a valuation, it had been arranged that the landlord was to pay for half of it, and the tenant for the other half. The matter was worked out thus:—The total valuation of the plant was £7584, 16s. In order to put the landlords in funds to take up their half of it, the pursuer arranged to allow half of his original loan of £10,000 to remain, and obtained a new bond over the estate for £5000. The tenant's half of the plant (value £3792, 8s.) was to belong to the pursuer and defender in equal shares, but the money to take it up was all provided by the pursuer, the defender agreeing to allow interest at 4½ per cent. on his share (£1896, 4s.)

"Accordingly, by the second minute of agreement between pursuer and defender, dated 21st and 27th November 1878, it was agreed that the bond for £10,000 having been discharged, nothing remained in respect thereof as between the pursuer and the defender. Further, the defender agreed to pay the pursuer 'one-half of the tenant's share of profits under the lease,' less £300 yearly to the defender for management, and that at 1st June each year. Then followed the stipulations as to the plant, and an undertaking by the defender to furnish to the pursuer 'duplicates of the statements or abstracts of accounts and of the annual balance-sheet, the same as he is required in terms of the lease to do to the proprietors,' with liberty to the pursuer to inspect the books, accounts, and papers.

"The pursuer contends that the agreements themselves, read in the light of the surrounding circumstances, infer a liability on the part of the defender to account for the profits of the general business; and he further contends that even if this conclusion cannot be reached on the agreements themselves, yet when taken in connection with the correspondence and the actings of parties, they instruct a partnership, which involves the same liability to account.

"Any inference drawn from the terms of the agreements appears to me too uncertain to furnish a safe ground of judgment. *Prima facie* they rather tell against the pursuer; for the expression 'tenant's share of profits under the lease' suggests the landlord's share as its complement; and it is common ground that the landlords have no right to participate in the profits now in dispute. That, however, is not conclusive, and I entertain no doubt that as between the two parties interested in the 'tenant's share,' the words are capable of meaning the profits derived from the sale of slates, or the profits of and connected with the working of the quarries, or the profits earned by the use made of the leased premises and plant. If the question had arisen at the outset, it might have been difficult to choose between these alternatives. But it is only raised now, after the lease and the agreements have run their course, and after the parties have dealt with each other under them for fifteen years. To this course of dealing each party appeals as favouring his contention (1) as to true construction of the agreements, and (2) as to the existence of a partnership or joint-adventure.

"It must be kept in view that it is the pursuer's case that he knew all along of the existence of the general or 'store' business as a source of profit. He says—'If I had thought that I was not getting a share of the profits from the stores, I would certainly have applied for that. There was nothing in the statements sent to me to show that the profits I was getting did not include the profits from the stores.' And again—(Q) 'Did you consider that all the store profit, all the general business profit, was in these accounts?' (A) 'I understood that all the stores were in those statements he sent to me.' If it were necessary to decide whether there was a partnership—whether the parties had incurred the liabilities of partners—the pursuer makes a case for it, under the second agreement and the correspondence, which deserves careful consideration, though in my opinion he fails to make it out as matter of law. His case is, that the relationship between them began and ended with the lease, that he allowed the defender £300 a-year as manager, that it was he and not the defender who furnished the capital of the concern, and that more than once during the currency the defender applied to him for more, and beyond all, that he was to share not only profits but losses—a circumstance

always significant in questions of partnership. As to providing the capital, I think the pursuer fails to make out in fact that this was done exclusively by him. Certainly in important matters falling within the scope of the partnership, if there was a partnership, the credit of the defender was pledged, and not the credit of the pursuer; and the requests for additional advances, as made, and as explained by the defender, do not I think, bear the construction which the pursuer seeks to put upon them. As to sharing losses, the question whether the pursuer was bound to share them to any other effect than the landlords were bound to share them under the lease, is just another form of the question whether he was a partner. The pursuer founds specially in this connection upon the fact that he was debited with the loss on Brecklet quarry, a neighbouring quarry which the defender took at a fixed rent, to hold, and not to work, with a view to prevent competition in prices and wages. But that was plainly a defensive step, incidental to the proper working of Ballachulish quarries to the best advantage, and the landlords assented to it, and were settled with upon that footing.

"In my opinion, however, this is one of those cases (of which *Walker* v. *Hirsch*, 27 Ch. D. 460, is an example) where it is not necessary, in order to a just decision between the parties, to determine whether the relation of partnership was fully constituted between them. Fortunately there is here no question with third parties, no question as to liability to customers or to the public for obligations incurred. The parties are contending *de lucro captando*, and the question whether the pursuer might not have had the liabilities of a partner imposed on him in relation to outsiders is not necessarily involved in the decision of this case.

"There are, indeed, two particulars in which, according to the pursuer's contention, the affirmance of a partnership would involve a larger obligation on the defender to account. The one relates to the practice of deducting from the men's wages the market price of household coal supplied since the last pay-day. The other relates to the use made by the general business of various assets which are assumed to be partnership assets.

"As to the deductions from wages, the pursuer, who is fixed with knowledge of the practice, contends that in a question with him the coal should be stated at cost price, and he relies on the English case of *Burton* v. *Wookey*, 6 Madd. 367, and subsequent cases referred to in Lindley on Partnership, 5th ed. pp. 309, 310. I am not satisfied that these cases apply to the present. In the first place, it cannot be held as demonstrated that but for his connection with the lease the defender would not have been in a position to carry on the general business of coal dealer. And again, it is not as if he bought labour for the quarry business at so much money and so much coal in constant proportions. Had that been so, the case of *Burton* might have applied, for that was a case of barter. Here the men were assumed to have earned various amounts in wages. It is obvious that when part of it was being paid (or accounted for) in coal to some of them, the coal had to be valued over to those men at some price, and that if it had been valued over to them at cost price, that would, *pro tanto*, have increased their money claim. I do not see that the pursuer is entitled to have it both ways, or to insist upon the defender accounting to him on a purely artificial basis.

"As regards the use made by the general business of various parts of the premises let, and of the quarry plant, the pursuer's case is, in my opinion, sufficiently met by the counter case made by the defender, namely, that there was throughout a give-and-take in this matter. I have considered this with some care, and while it is not possible to state it in figures, I am satisfied that Dr Campbell and his general business gave to the quarry business full value for all the use they made of its assets.

"But whatever legal name be given to the relationship of the parties, I think there is enough in their actings, and in particular in the yearly settlement of profits between them, to exclude the pursuer's claim. The pursuer must be credited with having known the fact that the general business was being carried on, and that it was a profitable business. The states rendered to him yearly at Whitsunday did not include any profit from the general business or any of its branches, nor any general heading under which it could be supposed that such profits were included. The pursuer said, and said repeatedly, in his evidence, that he did not understand these states. But when he was pressed upon the point, he took refuge in an explanation which did not seem to me to be pertinent to the matter in hand, namely, that he had no means of checking them, meaning, as I understand, that he had no means of checking the figures. The point is not how much profit of the general business ought to have gone in, but whether any was in. I cannot take it off his hands that he did not understand the states in that particular. They seem to me simple and plain, and the pursuer's own accountant is against him on this point.

"Further, he had opportunities, of which he availed himself, of asking and receiving explanations from Dr Campbell as to the contents of these states. It is true the pursuer asserts that he told the defender at their meetings that he was not satisfied with the states, and reserved his right to get an accountant to go into the whole thing at the close of the lease. I do not hold it proved that any such conversation took place. Dr Campbell denies that it ever happened, and it appears to me that if the pursuer wanted to make such a reservation, he ought to have made it distinctly and in writing. Especially was this so in a case where the profits were settled up year by year for fifteen years, on the basis of the states as rendered. The practice was for the defender to send

two or three payments to account, as the produced was realised, and then to send a cheque for the balance as representing the balance of his share of profit for the preceding year. Taking the pursuer's receipts in connection with the letters sending them for signature with the cheque, I think it is demonstrated that the pursuer was content to be settled with finally from year to year on the basis of states which excluded the profits of the general business. Certainly the defender in the correspondence gave him no reason to suppose that any questions were reserved between them, and in the letter of 8th August 1885 he distinctly warns the pursuer that there ought to be nothing unsettled between them for a day. Dr Campbell goes further, and says he has a clear recollection of a meeting in the back parlour of the pursuer's house at Pollokshields about the year 1884, at which his position as to the profits of the general business was made clear, and was accepted by the pursuer. I fully believe that this happened, but I do not proceed upon it, because I think there is enough without it to show that the parties have so dealt with one another over a course of years as to exclude the pursuer's claim for profits on the general business. As I have already said, this was the only claim argued before me although the conclusions for accounting are expressed in general terms. I therefore think the defender is entitled to absolvitor."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. The pursuer was entitled to an accounting on the footing that the store in question was part of the quarry, which in truth it was. The store was indispensable for supplying the quarrymen with necessaries; while but for the quarrymen the store would have had no customers. Store and quarry were absolutely inter-dependent. It was not disputed that the store was within the leasehold. The accounts rendered by Dr Campbell could not be accepted as an accurate statement of the working expenses of the quarry, for he had every inducement to set down the wages too high. He could then raise the price of articles sold at the store and put the extra profit in his pocket. The wages set down were not actually paid, and were overstated in the accounts by the amount of difference between the cost price of the materials sold at the store and the actual price charged to the workmen. This was at all events the case with regard to the sale of dynamite to the quarrymen and the charge made for sharpening tools. These were items intimately connected with the working of the quarry, and Dr Campbell had no right to exclusive profit out of them. If the contract here were not strictly one of partnership, Dr Campbell was at anyrate in a position of trust towards the pursuer, and the principle of *Burton* v. *Wookey*, 1822, 23 R. R. 249, applied; Lindley on Partnership, 6th ed., pp. 316, 322, and cases there cited.

The argument of the defender is sufficiently indicated by the opinion of the Lord President — *Walker* v. *Hirsch*, 1884, 24 Ch. D. referred to.

At advising—

LORD PRESIDENT — The rights of the pursuer arise out of the agreement of November 1878. By that agreement the defender, being then in possession of Ballachulish Slate Quarries under a fifteen years' lease, bound himself to pay to the pursuer one-half of the tenants' share of profits under the lease (under deduction of a specified salary). These words naturally suggest that the profits, a share of which is so to be divided, must be the same profits of which the landlord receives another share; and this is confirmed, and in my opinion put beyond doubt, when it is seen that under the fifth head of the agreement the accounts and balance-sheets which the pursuer was to be furnished with were the same as those rendered to the landlord, and that the books which he was to have right to inspect were the quarry books. Now, the landlord's royalty under the lease was one-half of the profits of the business of working and manufacturing slates; I put this shortly, for the actual words of the lease, which are much more numerous, come clearly to this result.

The sum of the contract on this head seems to me to be, that what the pursuer is entitled to is a share of the profits of the quarry, pure and simple.

The demand of the pursuer is that there shall be brought into the account the profits made by the defender on a store kept by him at Ballachulish in premises falling within the lease. At this store there were sold, among other things which I shall presently mention, coals and fodder, and among the customers at the stores were many of the quarriers. There were other customers, but the quarriers formed apparently a considerable proportion of the customers, as they do of the whole population of the place.

The quarriers were paid for piece-work, and were paid fortnightly on a pay-sheet. When the fortnightly pay came, the defender was in use to set against the wages, as brought out in the pay-sheets, what was due to him for articles purchased at the store.

It is no part of the pursuer's case that it was a term of the contract with each workman that he should go to the store, and that he should accept remuneration partly in money and partly in goods. On the contrary, as the evidence stands, the contract was that the men should be paid in full the piece-work rates. They went to the store for coal and fodder because it was convenient for them to do so.

Well now, if the payment of wages had taken place at different times from the payment of the store accounts—if the men had been paid their wages in full and then had paid their accounts at their convenience—it is difficult to see how the pursuer's claim could be supported. And the fact that the defender deducts his claim as storekeeper from his liability for the full wages does not seem to present a substantial difference. There was nothing in the contract between the pursuer and defender precluding the defender from carrying on

any business he liked on his own account, so long as he did his duties as quarry manager; and the circumstance that the business of the store was so far collateral to the business of the quarry that the employees in the quarry were customers of the store, does not seem to impose any liability on the defender to account to the pursuer for his profits as a retail dealer.

I have hitherto considered the case of sales to quarriers of coals and fodder,—articles supplied for their private and family consumption—because it is the less complicated. The stronger case for the pursuer is, undoubtedly, the sale to the quarriers of dynamite for use in the quarry, and the charge made for sharpening their tools. The solution of the difficulty which at first sight arises on this head is to be found in the question,—what was the contract of service? Now, it is proved that the men worked on the footing that each supplied his own materials and kept his tools in order at his own expense. This being so, it seems to me that the purchase of those articles, and the payment of those repairs are at once relegated to the same category as the purchase of the coal and fodder,—they are personal debts and requirements of the quarriers. The reason is thus made apparent why the defender, with perfect consistency, charges the quarry only with cost price for articles supplied for the work, while he charges retail prices to the quarriers.

The conclusion to which I come at this stage of the argument is, that judging in the meantime by the terms of the agreement with the pursuer, the defender is not bound either to bring the profits of the store into the accounts of the quarry, or to re-state his wages account by crediting himself only with the moneys paid to the quarriers plus the wholesale price of the stores supplied.

When we proceed from the contract to the actings of the parties during the long course of years which ensued, this view received strong corroboration. I shall very briefly state the more salient points.

Payments were made on the states rendered to the landlord; those states were very clear and simple, and showed unambiguously that the profits were quarry profits pure and simple.

This is the more significant because it is proved by the pursuer's own evidence that he knew the defender was carrying on the store, supplying goods to the quarriers, and making profit thereby. He himself ordered for the defender a cargo of household coal for the very purpose.

His attention was called to the curious evidence given before the Crofters Commission about the relations of the quarriers to the defender's store; and the fact that the newspaper report was sent him by the defender shows that the matter was, as between them, entirely above board.

This incident corroborates the defender's account of an occasion, so long ago as 1884, when the defender, according to his testimony, in so many words explained to the pursuer that the store was a purely private adventure of his own, and that the pursuer had no share in its profits. The Lord Ordinary believes that this took place; it is quite consistent with the rest of the facts; and if it did take place, it is a fact of the highest importance, although, like the Lord Ordinary, I think that the defender's case is made out without it. I am for adhering.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Guthrie — A. S. D. Thomson. Agent — J. Stewart Gellatly, S.S.C.

Counsel for the Defender—H. Johnston—C. K. Mackenzie. Agents—Murray, Beith, & Murray, W.S.

Thursday, March 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CLARK *v.* SUTHERLAND.

(*Ante*, p. 153, December 23, 1896; *ante*, p. 349, February 4, 1897).

Election Law—Return respecting Election Expenses—Petition for Authorised Excuse — Inadvertence — Corrupt Practices Act 1883 (46 *and* 47 *Vict. c.* 51), *sec.* 34.

A candidate who had acted as his own agent at an election presented a petition under sec. 34 of the Corrupt Practices Act 1883 for an authorised excuse for certain errors and omissions made by him in his return and declaration respecting election expenses. These consisted, as regards the return, in omitting to enclose certain vouchers, to insert the date of the election, to give the correct Christian name of a person to whom he had paid a bill for hiring and, as regards the declaration, in omitting to insert the date of the election and the total sum paid for election expenses.

Circumstances in which the Court, after a proof, found that the errors and omissions arose by reason of inadvertence, and not by reason of any want of good faith on the part of the petitioner, and *granted* the prayer of the petition.

Observations as to what constitutes "inadvertence" in the sense of the above section.

Election Law — Petition for Authorised Excuse — Amendment — Notice to Constituency—Corrupt Practices Act 1883 (46 *and* 47 *Vict. c.* 51), *sec.* 34.

Section 34 of the Corrupt Practices Act 1883 provides that in a petition by a candidate under that section "the Court may, after such notice of the application in the said county or burgh, and on the production of such evidence