that the securities were moveable succession of the deceased, and that adjudication is the only way of completing the title where the executor of the deceased will give no assistance; but in that case I should think the representative *in mobilibus* of the deceased must be called as a party against whom the decree should be obtained. At all events, it appears to me that a title obtained by the executor of the deceased, followed by a recorded assignation, or at least an assignation and recorded notarial instrument would effectually complete the title.

LORD YOUNG—I agree with your Lordship in the chair, and concur in everything which your Lordship has said. The question, as it appears to me, is simply this, Whether the present petitioners, who claim to be served as "nearest and lawful heirs of provision in general" to Lord Alfred Paget, are entitled to succeed to an estate in land in which he died infeft. They must have their names entered upon the Register of Sasines—the estate being an estate in land—and accordingly the whole matter resolves itself into one of formal procedure in making up a title.

The mode in which such a title is to be made up cannot involve any serious principle of law, seeing that the right of the petitioners to the succession is not disputed, and no one has any interest in the present question except the person who has to pay the costs, and who naturally desires to have what is necessary done as cheaply as possible.

In regard to the interpretation to be put upon the 117th section of the Conveyancing Act of 1868, I desire to say that in my opinion it does not deal with the question of the making up of titles, but solely and entirely with beneficial interests, and the rights of the heir and executor respectively, in a case of intestate succession. Here the persons who are to succeed Lord Alfred Paget as trustees are to be determined not by the law of succession, but by the terms of the deed, and by these alone. If a failure occurred under the deed, the defect would be remedied, not by an appeal to the law of succession, but by an application to the Court for the appointment of a judicial factor.

Accordingly, I think that the petitioners' title should be made up by service, by which course it will be formally established that the persons served are the persons named by the deed, and being of this opinion, I can see nothing to support the view adopted by the Sheriff of Chancery.

LORD ADAM—I also entirely concur in the opinion expressed by your Lordship in the chair. I concur with Lord Young that section 117 of the Conveyancing Act of 1878 does not deal with questions of title, but with questions of right. But the form of the title necessarily depends upon the nature of the right, and therefore that section necessarily involves the question of the proper form of title.

LORD LEE concurred.

LORD M'LAREN—I concur in your Lordship's opinion entirely, and I only add in a single sentence that I should desire to emphasise the proposition that the Act of Parliament makes no change in the law of heritable securities except in relation to intestate succession. It introduces a different class of heirs from those which the common law recognises in relation to heritable securities, but in my view it makes no change in the quality of the creditor's right in these securities. Of course if the quality of the right were changed the right could no longer be taken up by service; but it is equally clear that if the estate of the creditor is to remain heritable in quality, then for all purposes of the transmission or extinction of the right the mode of the conveyance must be the same as it was before, except in so far as the statute authorises a different form. The statute has given a form of transmission to meet the special case of intestate succession with which it is dealing. This is not a case of intestate succession, but a case of transmission from a deceased trustee to a *nominatim* substitute. It is to my mind strictly analogous to the making up of a title by a *nominatim* substitute in an entail, and the proper mode of making up such a title in my opinion is by service as heir of provision.

The Court accordingly recalled the interlocutor appealed against, and remitted to the Sheriff of Chancery to proceed.

Counsel for the Petitioners—Sir C. Pearson—Guthrie. Agents—John C. Brodie & Sons, W.S.

Saturday February 8, 1890.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PEEBLES AND ANOTHER *v.* KINNELL.

Partnership—Proof by Facts and Circumstances—Business Carried on by Two Sisters.

Two sisters began business in 1880 on borrowed capital which the lender deponed had been advanced to them jointly.

In an action of declarator of partnership at the instance of the younger against the elder sister, *held*, especially in view of the real evidence, that in spite of the source of the business, it had been conducted in such a way as to show that it belonged to the defender, and that the pursuer had only occupied the position of assistant.

Diss. Lord M'Laren, who regarded the case as a conflict of testimony on a question of fact, in which the opinion of the Lord Ordinary, who was in favour of the pursuer, ought to prevail.

Observations (*per* the Lord President and Lord Shand) on the position in which the Court is placed in reviewing questions of evidence led in the Outer House.

In this action Miss Euphemia Kinnell, of 93 Salisbury Place, Dundee, sought to have it declared that she was a partner with her sister Mrs Eliza Kinnell or Peebles in the business of a fine art needlework establishment in Dundee which was carried on under the name of "Miss Kinnell;" and that she was entitled to one-half of the profits of the said business, and also to take part in its management. The defender denied that the pursuer was or had ever been a partner with her in the said business, and averred that her sister's position from the commencement of the business down to the date of the present action had been merely that of an assistant at a salary.

There was no contract of partnership, and the case fell to be decided upon the facts and circumstances.

At the proof allowed by the Lord Ordinary, the pursuer attempted to establish (1) that the capital on which the business was begun was advanced to the sisters jointly; (2) that they had acted as partners from the beginning; (3) that they were so regarded by the public and by customers.

Mr Gentle, an uncle of the parties, who advanced the money by means of which the undertaking was commenced, deponed—"I remember being in London in 1880. The pursuer lived with my wife and me the whole of that summer. In July or August we were in Exeter, where we remained for about a couple of months, and while we were there my wife spoke to me about the desirability of starting the pursuer and her eldest sister Eliza in business in Dundee. We spoke about it to the pursuer, who seemed quite eager to go into the project. I have no doubt she communicated with her sister. The project was talked over and discussed with the pursuer before it was brought under the notice of her elder sister in Dundee at all. . . . I had no communication with the defender so far as I remember. After hearing that the defender was agreeable to go into the matter I agreed to advance them some money. The proposal was, that in order to enable the two girls to start, I should advance £25 for three years without charging any interest. . . . . At that time the pursuer was still living with us in London. After we left she went to live with her uncle Mr Robert Jobson, who was my business agent and Mrs Kinnell's brother. I mentioned to him what had been proposed, and asked him to take the pursuer to some of the wholesale warehouses in London with whom we ourselves did business, to introduce her to them, so that she might purchase stock for starting the business, and he did so. In addition to that, although I was to advance £25 in cash, I also instructed Mr Jobson, if he considered it desirable, to increase the purchases, say to double the amount, upon the usual credit terms. He, on my behalf, was to become guarantee for the payment of whatever amount the purchases might come to over and above the £25, and that was done. I have the counterfoils of the cheques which were paid. The £25 which I advanced never went into the hands of the defender Mrs Peebles at all. £20 of the money was expended in payment of stock purchased by the pursuer, and there was a cheque sent to Dundee for £5, which I was told was to pay for the fittings of the shop. I know that the money was applied in buying stock in London by the pursuer. I understand the stock was taken to Dundee by her. My object in advancing the £25 was to enable the two sisters to begin a little business of their own to earn their livelihood. I made the advance to the two sisters for their joint benefit. I subsequently lent them another sum of £50 when they went to their new shop, 102 Nethergate, in 1886. . . . *By the Court*—(Q) Were the advances made to enable the two sisters to commence business in partnership?—(A) Yes, distinctly so. . . . *Examination continued*—With regard to the second advance of £50 which I made, it was given nominally to Eliza, for the reason that she was the partner in whose name the business was; but the money was given really for business purposes. . . . I granted the cheque in Eliza's name because the business was being conducted in her name." In cross-examination he deponed—"(Q) Was it perfectly understood by the pursuer in 1880, when she was in London, that she was to be a partner in the business?—(A) I presume so; it was my understanding. (Q) And did you make it clear to her?—(A) The whole thing was talked over and understood; it was gone into upon the assumption that she was to go with her sister. (Q) If in October 1880 the pursuer wrote to her sister 'I think the shop you think of taking is in a very good locality, but the rent is far too high. You would never make it'—I presume you must have failed to convey your intention to her?—(A) I can only state what my intention was in making the advance to her. My object was to set them up in business together. I don't know anything about the conduct of the business in Dundee, nor as regards anything that may have taken place between the two sisters themselves."

Mrs Gentle deponed—"At that time, 1880, I said I would like to place her and her sister in a small Berlin wool shop in Dundee, if it would be agreeable to them. The pursuer was staying with us for some months at the time. She was highly pleased with my suggestion, and said she thought nothing would please her sister better. I have no recollection of writing to Mrs Kinnell or the defender Mrs Peebles on the subject; the pursuer was to communicate with them both. I presume she did so. . . . I asked my husband if he would give the loan to my nieces, and he agreed with me on the subject. I asked my husband to give the loan to the pursuer and her sister, but as the pursuer was living with us, she was the one who was principally spoken to. . . . I remember the pursuer paying us a visit in 1884. She brought needlework with her then, which I afterwards purchased from her. I paid it afterwards in an account which was sent to me. She visited me again in 1885, and stayed with me from February to May. When

the pursuer left London in 1885 I gave her a present of £9. I asked if she would not like to buy a dress with the money, and she said, 'No, she would put it in the business.' I was in Dundee in 1886, and went to the shop. I observed the name above the door was 'Miss Kinnell,' and I said to the pursuer it ought to have been the 'Misses Kinnell.' She said—'Oh, that's all right, aunt.'"

Mrs Kinnell, the parties' mother, deponed—"I took the shop for them at 59 Nethergate, Dundee, from Mr Smith at a rent of £24, 10s. per year. Eliza and I went to the landlord and took the shop, the pursuer being in London at the time. When the shop was taken, word was sent to Euphemia in London by Eliza. (Shown No. 114)—That is a letter dated 18th October 1880 by Euphemia to her sister Eliza. A passage in that letter referring to the shop applies to the shop I have mentioned. The rent asked was £30, but I got it reduced to £24, 10s. as it was not in very good condition. (Q) For whom did you take that shop?—(A) My two girls. It was I who was liable for the rent. The shop was only taken from year to year. I signed in connection with the taking of the shop. Eliza did not sign. (Q) You were the tenant?—(A) Yes. I was liable for the rent. The stock that was put into the shop at the beginning came from London. Some of it came by rail, and Euphemia brought the rest herself. The shop was opened in November 1880. The night before it was opened my husband and I, Euphemia, Eliza, my daughter Kate, and her intended husband, were all there. Next day the two girls started business in the shop. . . . Neither of the girls had any money of their own when they started, just £25 which they got on loan. I had to be their security for everything, and after they commenced I said they had just their year's rent to pay, and I would give them their board for nothing. I had a business of my own at that time. The drawings from their business were put into my bank account. I received money from them perhaps once a week or once a fortnight. It was brought sometimes by the one and sometimes by the other. It was handed to me in my house and I put it into the bank. When they required money I gave them a cheque on my account. I would give them a cheque for £20 or £5, or whatever they wanted when they required to meet their bills. The name above the shop door was Miss Kinnell. Eliza was Miss Kinnell, being the eldest. That did not indicate to my mind whose business it was; they were just both together. They very often overdrew their account. They often had to pay accounts when they had no money in my hands, and I let them have money on loan. When I did so I understood that I was lending to both. I charged Eliza 7s. 6d. a week during the second year after the business started, and I made arrangements that Eliza should give Euphemia 5s. a week for dress. I did not charge Euphemia anything for board as I wished to make her do a little work for me in the morning before she went down into the shop. Euphemia drew the 5s. for dress out of the business. The arangement as to the drawings being handed to me, as to the bank account being kept by me, and my being liable for the rent, and as to my advancing other money from my account, and as to the board and dress, continued for the first three years."

In 1886 a larger shop, 102 Nethergate, was taken, and Mrs Kinnell deponed that she arranged the lease, under which she considered herself liable for the rent—"That is the lease. It is signed by me and by Eliza J. Kinnell. (Q) How does it come to be in Eliza's name when you took it for the two girls?—(A) That was the firm name. The first shop was taken in the same way. (Q) You looked upon Eliza J. Kinnell as being the name of the firm?—(A) Yes."

The pursuer deponed that she had always considered herself a partner of the business; that she had never occupied the position of an assistant. She had never received wages, but had drawn 5s. a week as dress money. She had taken an equal share in the management—"There was no distinct arrangement made between us as to our shares in the business or partnership, because I understood my sister knew Aunt Kate lent the money for both of us. I understood that distinctly. That continued to be my understanding during the whole time we were in the first shop. (Q) Why was the name put up as Miss Kinnell?—(A) I suppose my sister got a little preference at that time. I don't know on whose orders it was done. I did not make any objection to it. I understand Miss Kinnell above the door represented us both. I don't think that ever was a subject of conversation between us. When the business was first started I served in the shop and cleaned it out, and filled up my time with sewing. At this time I did some work for my mother in the morning before going to the shop. I did not assist in the opening of my mother's shop, though I have seen me going down in the morning. . . . My sister did the most of the sewing at that time. She did not teach me sewing; I taught myself. It would be two or three years before I could do everything. During the second year of the business my mother charged Eliza 7s. or 7s. 6d. a week for board, but as I did a little work for her in the morning she did not charge for me. She did not charge for me because it would be an assistance to build up the business. I think these were the words she used to me and my sister. She did not charge anything for my board during the third year either. She only made a charge just before we went into the new shop. During this period I had been drawing at the rate of 5s. a week for dress. I was not paid every week. I did not need money and never got it. The money was just allowed to accumulate, and when I got dress it was taken out of what had been gathered. My sister's dress was just bought in the same way as mine. . . . There was a proposal after my sister's marriage to come to some arrangements. The day after her marriage she

came to the shop and offered me £70. I said—'What, Eliza, £70! I have done as much for the shop as you have, and I consider myself as much the mistress of it." She offered me that salary if I would manage the business for her. (Shown No. 151 of process, dated 5th June 1888, and signed Eliza J. Kinnell) — I never saw that letter until the present moment. My mother told me that such a letter was in Mr Haggart's office. . . . I went to London in the end of 1884 for a few weeks' holiday. I suppose my sister continued to give me the 5s. a week during that time."

Several commercial travellers who transacted business with the sisters deponed that they sold goods to both, and that they consulted together before buying from the witnesses. These witnesses knew nothing of the business arrangements of the parties. Of the witnesses examined by the defender, George Haggart, solicitor, Dundee, deponed —"I was private agent for Mrs Kinnell. I recollect of her calling upon me in the year 1888 about a contract of copartnery between her two daughters. It was on the 4th of June that she called. She had not mentioned the matter to me on any previous occasion. I knew the fact that Miss Kinnell, now Mrs Peebles, had started business, and that her sister assisted her. I knew that as a private individual, not from themselves or any other body, merely common report. Mrs Kinnell was alone the first time she called for me on the 4th of June. Her business was specially about the contract of copartnery. She was in a very excited state, and commenced by saying that her daughter Eliza was to get married the next day, and her other daughter Euphemia, who had assisted her in the business, had had no arrangement made in the way of getting an interest in it, and she was afraid that after the marriage her sister would turn her to the door. Mrs Kinnell said she wanted a written agreement made out under which the two daughters would have a share, not an equal share, but be in partnership. (Q) Did she give you distinctly to understand that they were not yet in partnership?—(A) She did. I inquired if any missive had passed between them. (Q) But in addition to that did she give you distinctly to understand that the one was the assistant of the other?—(A) Yes, most distinctly. The terms of the proposed contract were talked over between me and Mrs Kinnell, and she gave me instructions for the preparation of it. She was very urgent about the matter, and I remonstrated with her wanting it done in such a hurry. She was urgent that the contract should be drawn out and engrossed for signature that afternoon. In consequence of her instructions I wrote out the draft contract which I have here. (Shown No. 33)—That is the contract which was prepared from the draft. The draft was prepared in terms of Mrs Kinnell's instructions. . . . The deed was prepared on 4th June, and Mrs Kinnell called with her daughter Eliza in the afternoon. I read it over to them. Miss Eliza was in a state of excitement also consequent, as she explained, upon this coming as a surprise upon her. She said her mother and her sister had, for a few days back, been urging her to do some such thing as this, but that, with the preparations for her marriage and other things, she had not been able to thoroughly make up her mind about it. She declined to sign it. I said I would not have allowed her to sign after hearing her explanation, and told her to take the deed with her and consider it. (Q) Did you also say anything about its not being a proper thing for her to be asked to sign such a deed on the eve of the day of her marriage?—(A) I said it was not a usual thing. She put the document in her bag and took it away. She did not say anything, so far as I recollect, about taking it away to show to her sister Euphemia. It was taken away with the view of her considering it with the assistance of her future husband. (Q) You thought it was right such a deed should not be signed without consideration by her husband?—(A) That was the object, I thought, for which she was taking it away to consider it. She came back alone next morning. I do not think she brought the deed with her. She said she had arranged with her mother, that instead of the deed being signed at present she was to sign a missive acknowledging her sister as assistant in the shop at a salary of £70 a year, with a prospective share of any profits that might be made. I am sure the sum she mentioned was £70. She then left me and came back again afterwards with her mother. They had not the deed with them when they came on the second occasion. There was nothing said about Miss Kinnell not signing the deed; when they came back together the missive was written out by me and signed by Miss Kinnell. The missive was in the terms I have mentioned. (Shown No. 151)—That is it."

Mrs Kinnell denied that the deed of copartnery had been drawn on her instructions, and averred that Mr Haggart was entirely responsible for its terms.

James Walker deponed that on two occasions he had lent sums to the defender for the purpose of the business, and that the acknowledgments were in her name.

The defender deponed—"I began business in 1888 in the shop 59 Nethergate, Dundee. Prior to that I was a governess, and took in fancy work. I was then about 23 years of age. I had worked at fancy work a good deal prior to taking the shop. The suggestion that I should commence business came from my aunt, but I had had the idea in my own head, and mentioned it to Mr Peebles before he left for London. I was engaged to Mr Peebles for a considerable time, and at the time I started in the shop he was employed in London. I had no communication from my uncle on the subject of starting. At this time my sister had no education in needlework or in business. My father had met with an accident, which disabled him from work, and I was anxious to do something for my own support. My sister, the pursuer, was staying with my aunt in London in 1880. I did not receive any letters from her about starting

in business; it was from my aunt Mrs Gentle. She asked how I would like to start a shop for myself, and offered to lend me £25. The offer was addressed to me, not to my mother. . . . I saw a shop in the Nethergate which I thought would be suitable, and I asked my mother if she would come down and see it, and she did so, and did not think it suitable, but I persisted. I refer to the shop 59 Nethergate. I went to the proprietor, Mr Smith, first myself. He asked £30 for it at first, and when I said that was too high, he said he would make it a little cheaper if I would take it. I said I would think about it, and I went home and consulted my mother and father. My mother did not see the shop until after that. She did not accompany me when I went to make the final bargain. I went and got the paper from Mr Smith, and signed it, and I took it to my mother, and she signed it. The shop was not taken on lease; it was a yearly let. I signed as tenant, and my mother as security. My mother was not the tenant. I have not the document that I signed. Mr Smith kept it, and I have been out of the shop four or five years. (Shown No. 36)—That is one of the receipts for rent which I received under that arrangement. It is addressed to Miss Kinnell. (Shown. No. 37) —That is another of the same. The signboard was painted when the rest of the shop was done up, before the shop was really opened, as far as I remember. There was no consultation between me and my sister as to the name that was to be put up; it was painted before she came from London. . . . My sister, the pursuer, assisted in the shop from the beginning. My mother had a public-house at this time, and my sister helped her in her house and shop in the morning until forenoon. Sometimes my sister came to my shop before dinner, and sometimes she brought my dinner with her. She did not know anything about needlework then, but she learned in the course of her service in the shop. She was the only assistant I had in the shop at that time. I had no message girl. My sister went any messages that were required. She also cleaned out the shop, and I did the work in the morning myself. She gradually learned to conduct the business of the shop, and in the course of time she became quite fit to be left to manage it. A good deal of our business, particularly at first, consisted of work done by myself, and it has been so all through. I used to be occupied a good deal with that fancy needlework in the back shop. My sister served the counter, but if anyone particular came in I was called out. That has been the method of conducting the business until my recent absence from it. There never was any arrangement made as to my sister and I being equally responsible for the rent, neither in 1880 nor at any subsequent period. There was nothing said when the business began about its being for our joint interest. A few months after starting the business I began to give my sister 6s. a-week. My mother did not charge either of us board during the first year. It was when my sister began to kick at cleaning out the shop and doing menial work that I arranged to pay her. In the second year I think she was still assisting my mother in the morning. I began to pay mother board that year at the rate of 10s. a-week. There was nothing paid for my sister's board, as she still continued to help my mother part of the day. In the third year I think I came to have my sister's whole services, and at the same time I began to pay board for her. I think I paid 12s. a-week—8s. to my sister, and 4s. to my mother for her. That arrangement continued down to the date of my marriage, according to the time she gave me. . . . The pursuer continued throughout to receive 5s. a-week for dress and pocket money. A careful account was kept of that in such books as I had, and when she got dress or money it was placed to her debit in the account. The entries in the account to which my sister spoke, such as 'E. paid up to date,' mean that I had paid her what I was due up to the date of the entry. During those early years there was no restriction upon what I drew out of the business; I drew what I required. There was no exact account kept, and it would be impossible to tell now what I drew. . . . In a letter from my sister from London in 1885 she says—'Aunt asked me how much I got from you, and I said 11s.' That is the money she received for dress and what I paid to my mother for her. During my sister's stay in London she did not receive anything from me. When she came back she brought £9 with her. It was put into the Savings Bank as my aunt suggested. . . When I opened the new shop I got an offer of a loan of £50 from my uncle Mr Gentle, but I did not require it at the time. I required money in the month of November of the year following, and I asked for the loan then. It was by letter that my uncle offered the money. The letter was addressed to me. He did not say anything to me about my sister, and he offered it to me alone. I gave him an acknowledgment of the loan, and paid interest upon it. . . . I never entrusted my sister with the management of the business until last year. During the eight years previous to that I managed it, and my sister was my assistant. I did not take her with me for the first two or three years when I purchased stock, but I took her with me after she became acquainted with the business and skilled in it. In purchasing I asked her opinion. I did not consult her when I was dealing with customers, but she might help to bring things forward. I did a great deal of the selling, but my sister attended to that also after she was trained. . . . When I went into the new shop I started a bank account of my own. I went to the bank and opened the account. I opened it in my own name as an individual. I signed cheques Eliza J. Kinnell, and receipts I signed the same way, and sometimes E. J. Kinnell. I signed Eliza Jobson Kinnell to the lease of 102 Nethergate, because I was told to sign my full name. No one signed cheques upon the bank but me. There was

no arrangement under which my sister could have done so. (Shown No. 144)—All these cheques are signed by me. My sister occasionally granted receipts to customers when they paid their accounts. I was aware that she signed the receipts E. J. Kinnell, but if it was anything special I always came forward and signed. When she signed E. J. Kinnell she did so for me, and not as signing a firm name. I know that accounts discharged by one person for another should be signed *pro* or *p.p.*, but I suppose I did not know that that was necessary when I started business, and my sister got into the custom of writing E. J. Kinnell, and I did not tell her to change it. I was not aware that she ever endorsed cheques. (Shown cheque in favour of Eliza J. Kinnell)—That cheque is endorsed by my sister. The cheque was passed into the bank. That may have been a loan that my mother gave me. Both my mother and I dealt with the Union Bank. (Shown bundle of cheques)—These cheques bear my sister's endorsation on the back. The one No. 166 of process was endorsed when I was not going regularly to business. It was paid into bank. These cheques were all paid into the bank. My sister never went with cheques to the bank unless during the past year. I always went to the bank myself."

The defender corroborated the witness Haggart as to her actings at his office with respect to the proposed deed and offer of £70.

The defender produced the following documentary evidence:—

Excerpts from Letters from the Pursuer to the Defender.

"*London, October* 18, 1880.

"My dear Eliza,— . . . I think the shop you think of taking is in a very good locality, but the rent is far too high, you would never make it; be careful what you do. . . —Your affectionate S—, "PHEMIE."

"*Hampstead, March* 16/85.

"My dearest Sister,— . . . I mean, dear, whatever I get for being here to give it to you for a marriage present; if it is not much I will add something to it, but not a word of this to anyone. I should not like it to be known that I am to be paid; but of course you understand this, I know, dear. . .

Aunt asked me how much I got from you. I said 11/, but Ma got 6/ of it. I will just leave it to herself, as I thought it best to be very plain. I hope she will give me the 11/, but this is in confidence, but it is perhaps too much to expect for all I am doing. You seem to have plenty of work on hand, for which I am very glad, as I know that is what you like. . . . —Your affectionate Sister, "PHEMIE."

"*London, April* 8/85.

"My dear Eliza,— . . . I was glad to see from your letter that your sales are keeping up in the shop, and that you had a good one on Saturday in spite of dull trade. . . . —Your affectionate Sister, "PHEMIE."

"*London, April* 13, 1885.

"My dearest Sister,— . . . I am so glad you are keeping so busy; it is quite a comfort to you, for I know you like to be busy, and I can fancy you going home quite tired out. Do you know I have been thinking all day yesterday that Bob might try to start on by himself in Dundee; it might be in a small way at first, but he would be beside you, and surely he would get a share of what is going; besides, he has a good head and has had a good deal of push in himself. Of course, dear, this is only a suggestion of mine, but I think with your shop and his business you might be very well off. Of course, dear, this is a matter for you and him to decide; he might have to be in business six months to see how he would get on before you thought of anything. . . . —Your affectionate Sister,

"PHEMIE."

Letter from the Defender to Mr John Gentle.

"102 *Nethergate, Dundee,* 15*th Nov.* /87.

"My dear Uncle,—I enclose cheque for £2, 10s., being amount due for interest on the £50 you so kindly lent me last year. I am not able to pay you back yet, as our stock is always increasing, but hope to do so by-and-bye. I am glad to say we do not regret the change we made last year, as we get a much readier sale for our goods on this side of the street. We have had our window lighted with fairy lamps for a few nights instead of gas, just to make a little attraction, as we have bought some very pretty things for Christmas. Mama is feeling a great deal better and stronger since she retired from business, and it is also a great comfort to us, as we get all our time devoted to our own business. Hoping Aunt and you are quite well, as we are at present. Excuse this short letter. We are busy today." . . .

Excerpt from Letter, Mrs Gentle to the Defender.

"*Hampstead,* 22*nd Dec.* 1887.

"My dear Eliza,— . . . Your uncle bids me acknowledge the cheque you sent him, but he says you should send me my account first, and then subtract it from the interest." . . .

The business circulars were in the defender's name alone, as was also the bank book begun in 1883. The shops were entered in the valuation roll and the rates and taxes were paid in the defender's name. The invoices were addressed to Miss Kinnell with the exception of a few which were addressed to "Misses Kinnell."

Receipt by Mr A. W. Smith for Half-year's Rent of Shop No. 59 *Nethergate.*

"15*th May* 1881.

"Received from Miss Kinnell the sum of twelve pounds five shillings stg." . . .

The proposed contract of copartnery bore, *inter alia*:—"Memorandum of Agreement for Contract of Copartnery between Eliza Jobson Kinnell, Berlin wool and art needlework furnisher, Nethergate, Dundee, and Euphemia Beverley Kinnell, presently assistant to the said Eliza Jobson Kinnell, in manner following—That is to say, the said parties have agreed to become copartners in carrying on a joint trade or business as dealers and furnishers of Berlin wool and

art needlework as presently carried on by the said Eliza Jobson Kinnell under the firm name or designation of Misses Kinnell, and that for the period and upon the terms and conditions after written, viz. :—*First,* The copartnery shall, notwithstanding the date of these presents, be held to have commenced as on the 1st day of June 1888. . . . *Second,* The capital stock of the said copartnership shall be held to consist of the present stock-in-trade and outstanding book debts after deduction of the trade and other debts due to creditors belonging to the said Eliza Jobson Kinnell, and which is to be valued by the parties hereto, and entered in a book to be kept by them as the capital stock account, which shall be held to have been contributed in the proportion of two-thirds by the said Eliza Jobson Kinnell, and one-third by the said Euphemia Beverley Kinnell; but till the said one-third so to be contributed by her shall have been paid by the said Euphemia Beverley Kinnell to the said Eliza Jobson Kinnell, she shall pay interest thereon and on the balance that may remain thereof till the whole has been liquidated to the said Eliza Jobson Kinnell, who shall be deemed a creditor to such amount." . . .

The missive offer was in these terms:—

"*Dundee, 5th June* 1888.

"Dear Sister,—I hereby agree that you shall be engaged as my assistant in my business, presently carried on by me at Nethergate, Dundee, at a yearly salary of seventy pounds sterling, and if at the yearly stocktaking it is found that after deduction of all liabilities and expense during the year there is a surplus profit on the business, you will be entitled to receive a share such surplus.—I am, yours truly,

"ELIZA J. KINNELL."

Excerpt from Business Ledger of George Haggart.

"*Mrs Kinnell, Constitution Road, Dundee.*

"June 4, 1888.—Attendance as to partnership you desire should be gone into between your daughters in regard to the business carried on in Nethergate, and arranging terms. . . . Attendance on you and Miss Kinnell going over terms of contract which she was to sign. June 5.—Attendance when, as Miss Kinnell wished longer time to consider terms of contract before entering into it, arranged that Miss Euphemia be meantime engaged as assistant on yearly salary, &c." . . .

Letter, Mrs Kinnell to the Defender.

"93 *Salisbury Place,*
Dundee, 16*th May* 1889.

"My dear Daughter,—I felt very much hurt last night at your making no reference to the arrangements you made with me last June, before your marriage, to give Phemia a share of the profits of the business, as you have all along promised 'to make her right.' You know quite well that I and my relatives put you into the business, kept you at a very small board, advised you in difficulties, and arranged with Mrs Speedie for your getting the present shop, and had to become security for you in everything. Also that Phemia has done quite as much as you have to build up the business, and that in all justice to her she is entitled for her past services, in return for which she has received little or no remuneration, to get an equal share with you in the business. You will not be allowed to part with her and give her nothing but her present salary, as, if you attempt to do so, she and I are determined to get her full legal rights from you by making you pay her all the arrears of just salary due to her, which she only agreed to forego on your representations that you 'would make her all right.' I feel your ingratitude very deeply, as you know I have given you far more than any of the other children, and this is to be my reward! I understand you are going to have a meeting to-night to balance your books, but I have to inform you that all your books and papers must be put into the hands of a neutral accountant, say Mr Tosh, who will make up a statement of profit and loss, and until that is properly done, Phemia cannot treat with you, and you will then give her a written offer of partnership. Unless, therefore, you do the right thing by her, and accede to her reasonable request, I have to inform you I shall disinherit you, and have no farther communications with you, as I have previously warned you.—I remain, my dear daughter, your affectionate mother. "E."

The cash-book of the business had been irregularly kept, but on four or five occasions this or a similar entry appeared, "Phemie paid up to this date." There was no corresponding entry in regard to the defender.

On 30th July 1889 the Lord Ordinary (M'LAREN) pronounced an interlocutor in terms of the declaratory conclusions of the summons.

"*Opinion.*—This is an action, at the instance of one of two sisters to have it found and declared that the business carried on by them in Dundee, described as a Fine Art Needle-work Establishment, was carried on in partnership by the two sisters. The defender, who is now married, has put in defences which amount to a general denial of the ground of action, and a statement of circumstances on which she contends that she was the sole proprietor of the business. There is no contract of copartnership or writing of any kind defining the respective interests of the sisters in the business which was actually conducted by them, and in the practical part of which they seem to have taken equal shares and responsibilities. The case, accordingly, presents itself very much in the manner of a jury question, and as such I shall consider it, merely indicating my view upon the principal topics of argument and proof.

"The business was commenced in November 1880, and it is the fact,—indeed, one of the few undisputed facts,—that it originated in a suggestion made by Mr and Mrs Gentle, the uncle and aunt of the parties. The ladies, up to that time, had been maintained in family with their father, but in consequence of an accident, which disabled the father from attending to business, it

was considered desirable that the daughters should do something to earn a living for themselves. The defender, who is the elder daughter, had been earning something for herself as a teacher. The younger sister, the pursuer, had just left school, and it was while she was on a visit to her uncle and aunt in London that the suggestion referred to was made. Mrs Gentle is the sister of Mrs Kinnell, and both she and her husband were interested in the welfare of the Kinnell family. Their evidence is to the effect that they were more interested in the younger sister, because they had seen more of her; but their proposal was that the sisters should jointly start a shop for the sale of ladies' work, and Mr Gentle was to advance the sum necessary for the first purchase of goods, sufficient to enable the young ladies to begin business on a small scale. The defender was then in Dundee, and she was communicated with by letter. Mr Gentle states in his evidence—'My impression is that my wife communicated with Mrs Kinnell, her own sister, the defender's mother. But I have no doubt the pursuer herself wrote to her sister on the subject. I had no communication with the defender so far as I remember. After hearing that the defender was agreeable to go into the matter, I agreed to advance them some money. The proposal was that, in order to enable the two girls to start, I should advance £25 for three years without charging any interest.' He afterwards states that he had subsequently agreed to guarantee the price of goods to a further extent, and I think the sum originally advanced was £50. Mr and Mrs Gentle are quite distinct that their proposal was that the Misses Kinnell should jointly engage in the business, and that the loan was to the two sisters jointly for that purpose. The pursuer, the only other person present at these interviews, confirms their statement. None of them are distinct as to the terms in which the defender was communicated with; but whatever the proposal was, she agreed to it, and with the advice and assistance of her mother a small shop was taken in Dundee, and was ready for occupation on the pursuer's return from London. The goods with which the shop was originally stocked were all purchased by the pursuer in London, she being assisted in the selection by friends who accompanied her to the wholesale warehouses. As soon as the pursuer returned to Dundee the business was commenced. The name over the door was 'Miss Kinnell.' This had been painted up before the pursuer's return, and it is not said that she made any objection to it. During the continuance of the business the name printed on shop cards, accounts, and other commercial documents, was always 'Miss Kinnell.' This circumstance was strongly relied on by the defender as an indication that the property of the business belonged to her individually, while it is contended by the pursuer that 'Miss Kinnell' was merely a trade name, used for business purposes, and indifferently applicable to either of the sisters. It appears to be common ground, that from the commencement of the business, and throughout its continuance in the premises originally taken, and in the higher rented shop which was afterwards taken, and, indeed, until after the defender's marriage, nothing passed between the sisters regarding the terms on which the business was carried on or their respective interests in it. Whatever the real arrangement or relation was, it was taken for granted on either side. I can hardly doubt that there was some understanding on the subject, and that the understanding of the two sisters was the same; and just because it was perfectly clear from the beginning what was the nature of their mutual relation, there was no occasion for anything being said about it. Further, although such simple books were kept as were necessary for the purposes of a small retail business, there was nothing in the nature of a private ledger, or statement of profit and loss, which could throw light on the question to whom the profits of the business rightfully belonged. It was agreed from the beginning, apparently by the desire of Mrs Kinnell, who naturally exercised a mother's influence over her daughters, that only such sums should be drawn from the business as were fairly necessary to defray the board and clothing of the two daughters on the most economical scale. The proceeds of sales were at first entrusted to Mrs Kinnell, and after the business increased they were deposited in a separate bank account, on which cheques were drawn for the payment of the wholesale dealers. All profit in excess of subsistence money was allowed to accumulate in the bank account, and was applied, as I gather, in the extension of the business.

"The facts which I have stated regarding the inception and early history of this small commercial business embrace everything which I can find to be substantiated by legal evidence, and in these circumstances the question arises, Who were the proprietors of the business in its inception? I shall afterwards consider whether any variation in the relations of the sisters was introduced, either as the result of express agreement, or as a consequence of a course of dealing different from that which was originally proposed. On these facts I can come to no other conclusion than that the business was one in which the parties were jointly interested. It was certainly founded by the joint contributions of the two sisters, because the evidence of Mr Gentle is clear and uncontradicted, that the capital which he advanced was advanced to the sisters jointly. The sum in question—£50—is no doubt a small sum; but there cannot be one law applicable to small capitals and another applicable to large capitals. Supposing that these ladies had through the kindness of a relative obtained the loan of £5000 for the commencement of some larger commercial venture, I think such a business would be justly described as being founded by the joint contributions of the two sisters, because whether the capital be the property of the partners or be money obtained through credit cannot make any difference in the inferences to be drawn from the fact

of joint contribution. Now, in every question as to the constitution of a partnership there are the two elements to be considered —the element of joint contribution and the element of authority or institorial power. Of these the element of contribution to capital is the more important, because it is perfectly possible for a person to be a partner, although it is part of the arrangement between himself and his copartner that he should not exercise the institorial power, and should not, in fact, interfere in the management of the business at all. In the present case the same two individuals whose joint contributions founded the business each took an active part in the conduct of the business, each devoted her whole time to its interests, although not precisely in the same way. There is no evidence that the defender engaged the pursuer as her assistant. She says, no doubt, that such was the pursuer's position, but she says so merely as the view which she puts forward of the relation between them, because she does not pretend that she had ever in so many words engaged her sister as her assistant, or had even in the most indirect manner given her to understand that such was her position. In the absence of any evidence in support of the defender's theory of exclusive property, I have no difficulty in coming to the conclusion that the sales of goods purchased with the joint capital of the two sisters were sales on the account of both, and that the right to the profits was the joint right of the two parties.

"I must now refer to a paper, No. 123 of process, on which the defender founds in argument. It is a sheet of notepaper, containing, in the defender's handwriting, what purports to be drafts or copies of three different letters, not addressed to anyone by name, and bearing no date. One of these drafts, written in pencil, begins, 'My dear Aunt,' and is apparently addressed to Mrs Gentle. In this communication, after referring to some fancy work which the writer was engaged in making, she thanks her uncle for his kind offer (presumably the offer of the £25, afterwards increased to £50), and concludes, 'Would you be kind enough to tell Uncle Robert' (through whom the money was to be advanced), 'as I might need the money at any time.' The use of the first personal pronoun is founded on as an indication that the writer regarded the business as her individual property. I should not in any case attach much weight to the communication, as the letter does not appear to be addressed to the uncle, but to the aunt, and does not profess to allude otherwise than in general terms to the offer of pecuniary assistance. But on a more general ground I am prepared to reject this evidence altogether. I cannot hold it proved that a letter in these terms was ever sent by the defender to Mrs Gentle. It is not proved that the defender was in the habit of keeping drafts or copies of her letters, and it is somewhat singular that the only such draft or copy which she professes to have found among her papers should be one containing expressions which have been thought to be helpful to the present case.

"Passing to the second topic of consideration, whether the business relations between the pursuer and the defender had changed during the lapse of time, the following points may be noticed. When it became necessary to move into larger or more commodious premises, a shop thought suitable was found, which belonged to Mrs Speedie, a lady who lived in Perth. Mrs Kinnell and the defender went to Perth and negotiated the lease with Mrs Speedie. The lease prepared by Mrs Speedie's agent bears to be a lease to Miss Kinnell, and is signed by the defender, with her mother as cautioner, the pursuer not having been asked to sign, and not having, in fact, signed the deed. Against this circumstance it is stated by the pursuer and her mother that it had been arranged that the two sisters should go together to Mrs Speedie, but Mrs Kinnell being acquainted with the lady, and thinking that she might have some influence with her, proposed to accompany the defender to Perth, and it then became necessary that the pursuer should remain in Dundee to take charge of the shop. This partly explains how Mrs Speedie and her agent should have prepared the lease in the name of the defender alone, but it does not explain why the pursuer should have acquiesced in the lease being taken in her sister's name. The answer made is, that with her limited experience of business it had not occurred to her that there was any objection to the form of the lease; it answered the purpose, and she not being aware of her sister's intention to claim the business as her exclusive property, had not had her intention called to the use which might be made of this document in support of such a claim. Whatever weight may be due to this element of evidence, it is, of course, a circumstance in favour of the defender's argument. Another circumstance in favour of the defender's contention is, that she alone drew upon the bank account for the necessary payments to wholesale dealers. I think these are the only circumstances which can be suggested as leading to the conclusion that the younger sister had renounced her interest in the concern or acquiesced in its assumption by the defender. But the circumstances appear to me to be much too weak to support the conclusion founded on them. It is not altogether unknown in concerns of greater importance, that one partner only is allowed to operate on the bank account. At the time when the business was commenced the pursuer was in minority, and it was not unnatural in such circumstances that the business done at the bank should be transacted by the senior partner.

"I have still to allude to another feature of the case. I mean the unsuccessful attempt on the part of Mrs Kinnell to obtain from her daughter, the defender, a contract of copartnery admitting the pursuer to a share in the business. Mrs Kinnell is now supporting the pursuer, and I can have no doubt that her attempt to obtain a contract was made with the intention of benefiting her younger daughter and in her interest. The fact that she should have thought it necessary to use persuasion to obtain this

deed from the defender is evidence that the mother looked upon the defender as the proprietor of the business, or, at least, as having obtained such a position in it as would make it difficult for the pursuer to establish a right to participation in the profits of the business. It is, however, perfectly clear on the evidence that the pursuer never was informed of these negotiations, which were made on the eve of her sister's marriage. After her sister's marriage the subject was mentioned to her, and she was informed that the defender would not agree to a deed of partnership, but was willing to engage her at a salary. This proposal the pursuer at once repudiated, and she has since maintained her right to an equal share in the business. The fact that the mother thought it necessary to have a written agreement is no doubt good evidence of her impression and belief as to the rights of the parties; but I do not think that this question can be decided by evidence of the belief or impressions in the minds of other parties. I think it must be decided with reference to the actings of the parties themselves, and mainly in accordance with their rights as fixed by their original contributions.

"In the case of *Aitchison* it was held that one of a family of brothers who had put his money into the business along with the others did not lose his rights as a partner because he had been put by his brothers into a dependent position, and had acquiesced in their taking upon them the exclusive conduct of the business. The decision seems to me to be very pertinent to the present case.

"Some expressions contained in letters written by the pursuer to her sister were the subject of comment in the argument. I have duly considered these, but they appear to me to be susceptible of explanation consistent with the view which I have taken. I shall accordingly find in terms of the declaratory conclusion, and continue the cause for the purpose of disposing of the conclusions for accounting."

The defender reclaimed, and argued—*Prima facie* the defender was in possession of the business. All the documentary evidence was in her favour. So far, therefore, she apparently not only had the control of the business, but was responsible for debts. If unsuccessful she must have met the loss. Besides, she had in her favour the disinterested evidence of Haggart. The defender attempted to discharge the *onus* upon her in three ways—(1) She founded on the intention of the Gentles. This was not enough. They were not the contracting parties and therefore their evidence was only secondary. The question of the case was —Was their intention carried out? The answer from the pursuer's actings and from the facts of the case was that the pursuer had consented not to be a partner, and was content to get her living from the business. (2) Mrs Kinnell deponed that the sisters had been partners from the beginning. But in June 1888 she defined their positions differently to Haggart, and on that occasion she spoke the truth. (3) The travellers had seen the sisters acting together, but they were ignorant of all the business arrangements. The case of *Aitchison* was not an authority for the pursuer, for there the true position of parties was apparent from the documentary evidence.

Argued for the respondent—The evidence of Mr Gentle made it clear that he gave the money by which the business was started to the two sisters equally, and the evidence of Mrs Kinnell showed the footing upon which the parties all along had stood to each other in the carrying on of the business. No doubt the name over the door of the shop and in the circular was "Miss Kinnell," but that was only a trade name, and the right of the pursuer could not be interpreted or restricted by this. The reason why the pursuer's name was not in the lease of the larger shop was fully explained by Mrs Kinnell, who knew well the respective rights of the parties from the beginning. The business was managed from the outset as a family one, and was financed largely by Mrs Kinnell, and this explained the absence of any bank books by which the respective interests of the sisters in the business might have been disclosed. The true position of the pursuer and defender as regarded their interest in this business could not be gathered from the writings only, but these required to be interpreted by the evidence of those who knew the origin of the business and the manner in which it was carried on; and the true position of the pursuer when thus looked at was that of a partner in this concern—*Aitchison* v. *Aitchison*, June 16, 1877, 4 R. 899—*Gordon* v. *Grant*, November 12, 1850, 13 D. 1; *Dysart Peerage* case, L.R., 6 App. Cas. 490; *Lauderdale Peerage* case, L.R., 10 App. Cas. 692; Bell's Prin. sec. 361; 2 Bell's Comm. p. 622; Dickson on Evidence, sec. 566; Lindley on Partnership (5th ed.), p. 84.

At advising—

LORD SHAND—I have listened to the arguments in this case with the greatest interest, and have carefully examined the various documents which were referred to, with a view, if I possibly could, of concurring in the opinion of the Lord Ordinary, and my desire to reach the result arrived at by Lord M'Laren has largely arisen from the circumstance that the perusal of this evidence has satisfied me that the pursuer has contributed in no small degree to the prosperity which seems from the first to have attended this small business. With most people it would have weighed considerably that the party claiming to be viewed as a partner had materially contributed to the formation of the business, and especially should such a claim have been liberally dealt with in the case of a sister. I may just observe in passing that I do not consider that the pursuer in this case has received anything like fair treatment from her sister, nor have her efforts in advancing the interests of the business, especially during the last year or two, received anything like the recompense which they deserved.

In spite, however, of all this I much regret that I cannot concur in the result arrived at by the Lord Ordinary. Had the case been one which depended mainly upon the credibility of witnesses, and upon the balancing of evidence, then I should have been prepared to have adopted the view taken by the Judge who saw the witnesses and heard them give their evidence. But there are mixed up with the evidence of the witnesses certain legal elements which arise out of the various writings which have been produced, extending over the whole period of this alleged copartnery, and which writings I am not prepared to treat as lightly as the Lord Ordinary has done, and these legal elements seem to me completely to outweigh the parole evidence. In the first place, the pursuer has a considerable *onus* thrown upon her of overcoming the presumption against any partnership between her and the defender in consequence of the following facts—that the business was all along carried on in the name of "Miss Kinnell," that the leases of the shops, the insurance of the stock, the loans by Mr Walker, and the bank-account were all in the defender's name. The cheques also which were drawn on this account were signed by her, and the invoices of goods supplied for the carrying on of the business were for the most part in the name of the defender. Now all these various circumstances point pretty clearly to the business being really the defender's, and the *onus* of overcoming this strong presumption falls upon the pursuer, who, in my judgment, has failed to discharge that *onus*.

The pursuer rests her case, in the first place, upon the circumstances connected with the inception of the business. The Lord Ordinary in his note has dealt with this at considerable length, but it appears to me that his Lordship has attached too much importance to the inception of the business, and too little to the evidence of the manner in which it was conducted. No doubt we have the evidence of Mr Gentle, who advanced the money by means of which the business was first started, and he very distinctly says that the money was given to both sisters to enable them to set up in business. This is certainly an element in support of the pursuer's contention, but it is only one circumstance, and too much importance must not be attached to it. Upon the other hand, the documents in process go, almost if not entirely, to support the defender's contention, and the actings of Mrs Kinnell both in regard to the leasing of the second shop, and also at the date of the defender's marriage, show that at that time at least she did not consider the pursuer to be in the position of a partner. As to the circumstances under which the business was commenced, it was in consequence of an accident having happened to the father of the pursuer and defender which disabled him from attending to his work, and rendered it desirable that they should do something to earn a living for themselves. The pursuer was at that time on a visit to her uncle and aunt in London, and it was while she was there that the suggestion was made that the sisters should open a small shop for the sale of ladies' work. The Gentles had all along taken an interest in the family, and it was they who offered to supply the funds necessary for starting the business. I am willing to take it that the money was given for the purpose of benefiting both the girls, but it does not follow as a matter of necessity that it was given to start the girls in a copartnery. As against the idea of a copartnery at the outset one has only to keep in mind the respective ages of the two girls, and their special qualifications for the work they were undertaking. The defender was twenty-two years of age; she had been a governess, and had some considerable experience in ladies' fancy-work, besides having both skill and taste in the selection of materials. The pursuer, on the other hand, was only seventeen years of age; she had just left school, and had no proficiency either in sewing or in fine work. Her duties seem to have been to clean the shop, to go messages, and generally to act as a sort of subordinate assistant to her sister—a very different state of matters from what would have prevailed if a copartnery had existed between the sisters.

It therefore appears to me that in judging whether or not the pursuer and defender began business as partners something more must be looked at than the mere circumstance that the sum of money by means of which this business was commenced was given by Mr Gentle for behoof of both the sisters. I cannot see that this small sum of money is to be held to regulate the relations of the parties when there are so many circumstances which point in an entirely opposite direction.

There are many considerations which point in favour of the defender taking up this business for behoof of the family, and it is more than probable that the money was given for that purpose, rather than with the object merely of starting the girls in business. It has been urged that the name "Miss Kinnell" was merely a trade name; it was nevertheless the defender's name, and it would require strong actings to take from this circumstance its natural import, and that in signing the various documents which have been produced the defender was signing a trade designation and not her own name. The mode in which the pursuer was remunerated also points to her true position being that of an assistant and not that of a partner. No doubt certain travellers do say that when making their periodical calls they saw both sisters, and that they took orders from either or both, but that was within the last year or two, when the pursuer was older and was taking a more prominent part in the business.

So much, then, for the parole evidence in this case, but when we come to examine the writs they strongly confirm the contention of the defender. In a letter from the pursuer to the defender dated 18th October 1880, and written at the

time the pursuer was staying with the Gentles, she says—"I think the shop you think of taking is in a very good locality, but the rent is far too high; you would never make it . . ." And then again five years later, when the pursuer (who was again in London) was writing to the defender—"Aunt asked me how much I got from you. I said 11/, but Ma got 6/ of it. I will just leave it to herself, as I thought it best to be very plain. I hope she will give me the 11/, but this is in confidence, but it is perhaps too much to expect for all I am doing. You seem to have plenty of work on hand, for which I am very glad, as I know that is what you like." Now, here the pursuer is evidently speaking of a weekly allowance obtained by her from her sister, and not from the business, and the real state of matters is if possible made clearer by a third letter from the pursuer to the defender, relative to her sister's future husband setting up in business for himself—"I am so glad you are keeping so busy; it is quite a comfort to you, for I know you like to be busy, and I can fancy you going home quite tired out. Do you know I have been thinking all day yesterday that Bob might try to start on by himself in Dundee; it might be in a small way at first. but he would be beside you, and surely he would get a share of what is going; besides, he has a good head and has had a good deal of push in himself. Of course, dear, this is only a suggestion of mine, but I think with your shop and his business you might be very well off." Now surely it cannot be said that the language of these letters is that of one who had a proprietory right in this business. Upon the other hand, it is urged by the pursuer that the language of the defender's letter to Mr Gentle on the 15th November 1887 bears out her averments:—"My dear Uncle, —I enclose cheque for £2, 10s., being amount due for interest on the £50 you so kindly lent me last year. I am not able to pay you back yet, as our stock is always increasing, but hope to do so by-and-bye. I am glad to say we do not regret the change we made last year, as we get a much readier sale for our goods on this side of the street. We have had our window lighted with fairy lamps for a few nights instead of gas, just to make a little attraction, as we have bought some very pretty things for Christmas. Mama is feeling a great deal better and stronger since she retired from business, and it is also a great comfort to us, as we get all our time devoted to our own business. Hoping aunt and you are quite well, as we are at present. Excuse this short letter. We are busy to-day." I think, however, that the "we" is editorial, and at anyrate it has a very different signification from the "your" in the letters of the pursuer to the defender.

But when we turn to the actings of Mrs Kinnell the defender's contention receives strong corroboration.

It was she who along with the defender took the shop in the Nethergate and became security for the rent, and she, if anyone did, knew the true relation in which the sisters stood to each other. She was also their banker, and though she alleges they were partners she is absolutely contradicted by the writings. No doubt Mrs Kinnell entertained the idea that the pursuer ought to be a partner, but it is abundantly clear that she was well aware that she was not, and accordingly she went to her agent Mr Haggart in 1888 with a view to getting a deed of copartnery prepared. Now, we have that document, and in it the pursuer is called an assistant. If she had at that date been a partner Mrs Kinnell would undoubtedly have mentioned the circumstances to Mr Haggart. Mrs Kinnell's letter to the defender on 16th May 1889 also makes it clear that even at that date nothing had been done in the way of making the pursuer a partner, because she threatens legal proceedings, but it is only with a view to recovering the arrears of salary then due to the pursuer. Now, I must confess that these writings weigh much more heavily with me than they appear to have done with the Lord Ordinary, and the result at which I feel constrained to arrive is that the pursuer is not and never has been a partner in this business. At the same time the defender's treatment of the pursuer is far from what it ought to have been. The offer of £40 per annum sent by Mr Currie to the pursuer is totally inadequate, and I have no hesitation in saying that the pursuer has not received justice at the hands of her sister, when the part which she has taken in the building up of this business is kept in mind. The pursuer however has undertaken to prove that she was a partner of this business, but looking both to the parole evidence to which I have referred, and to the writings which have been produced, I have very reluctantly been compelled to reach the conclusion that she has failed to make out her claim.

LORD ADAM—I concur with Lord Shand in the view which he has taken both of the evidence and of the writings in this case.

LORD M'LAREN—I do not propose to review the evidence in this case, but I take the opportunity—I think it is a very fitting one—to make some observations on the principles which ought to regulate the disposal of cases which come here for review after a proof. I look upon this review as a valuable feature of our legal system, and I should be opposed to any proposal to substitute a system of absolute finality as to findings in fact such as prevails with reference to appeals to the House of Lords from cases originating in the Sheriff Courts. But I think it is possible to find some *via media* between absolute finality and the indiscriminating re-trial of cases of pure fact involving no question of law or of general principle.

It would be easy to give illustrations of evidence—cases in which the parties are at issue on a question of principle not involving legal elements—it might be a question of mercantile or professional usage, of engineering or applied science, or a question as to the mode of assessing damages or fix-

ing a price—in which the point in dispute, though not one of law, might be very fitting to be submitted to the decision of a Court of Appeal. I shall not attempt more precisely to define such cases. I do not think it is possible to give a definition, or to limit the exercise of the jurisdiction of review by definition without lessening its value. But this I will say, that in my apprehension it was not intended that this jurisdiction should be exercised in the manner of a re-trial of cases of pure fact raising no question except that of the weight to be given to conflicting elements of evidence.

As a matter of practice our jurisdiction of review has not in general been so exercised. I have heard it said by more than one Judge of eminence that he would not disturb the judgment of a Lord Ordinary on a mere question of the weight of evidence. I agree in that sentiment, and unless some such restriction of the freedom of individual opinion is recognised and acted on I should venture to doubt whether a general right of appeal on cases of evidence is a right which would be of benefit to the parties or of public advantage.

I make these observations because the present case appears to me to be a proper case of conflict of testimony. The parties are not at issue on any question of law or principle, or on anything whatever except the question whether the younger Miss Kinnell entered into business with her elder sister on equal terms, or whether she was engaged by her elder sister as a salaried assistant. The former view appeared to me to be not only consistent with the probabilities of the case, but to be supported by perfectly reliable neutral testimony, while the latter view depended mainly on the statement of the defender herself, which I did not accept as trustworthy, and on memoranda which are under the strongest suspicion of having been manufactured for the purposes of the case, and to which I should think one accustomed to deal with evidence would give the smallest weight. To the use of the name "Miss Kinnell" I have never attached any importance. It is applicable to either sister, and therefore to both, and it is a mere social convention under which the child of a family of daughters is designed as Miss without the Christian name. I do not enter on the other topics of evidence, because they are all referred to in my judgment, but I may just say that I do not think it fair to the pursuer that her case should be prejudiced by the proceedings of her mother, who acted with great indiscretion, as women generally do when they interfere in the affairs of others.

On such a question I prefer the opinion which I delivered as Lord Ordinary, after carefully reconsidering the evidence which I had heard in all its bearings, to the contrary opinion which I have heard to-day. I prefer it, not because it is mine, but because it is the opinion of a Judge who tried the case, and whose impressions of its results, formed at the time, are more likely to be correct than the impressions formed by himself at a later period, or by other Judges, however able and experienced.

Holding these opinions I cannot undertake to reconsider my decision on the facts of this case. It has not been made clear to me that there is any question to be reconsidered excepting that of the weight of the evidence. I think that in a case of fact the same weight ought to be given to the verdict of a Judge that is given to the verdict of a jury, which practically means finality where no general question is raised.

It is true that we do sometimes set aside the verdict of a jury as being against the weight of the evidence. But I decline to entertain the supposition that the decision of a Judge of the Supreme Court is impeachable on such grounds.

If we are to reverse the decisions of the Judges of this Court merely because in a balanced state of the evidence we think that the scale inclines the other way, it seems to me that that is a great waste of power in having a Judge to try the case at all, and that it would be much better to have the evidence in every case reported direct to the Inner House.

At all events, I am personally very glad that I am now relieved from a duty which I should feel the greatest difficulty in discharging under the conditions which result from the disposal of this case in the manner which your Lordships propose.

Lord President—If this was a case depending entirely upon parole evidence, and particularly upon conflicting parole evidence, I should not only attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence, but I should be very slow indeed to disturb his conclusion. But my reason for concurring in the opinion of Lord Shand in this case is that I think the case depends almost entirely upon real evidence. I mean by real evidence, letters and documents passing at the time, and facts and circumstances about which there is no dispute and no conflict of evidence tending to show that no copartnery existed between the two sisters. It is upon that ground and upon that ground alone that I am compelled in the state of the evidence to differ from the Lord Ordinary.

With regard to the principles which ought to regulate us in the exercise of our jurisdiction in reviewing the Lord Ordinary upon questions of fact I cannot help thinking that my brother Lord M'Laren is in some degree mistaken. An interlocutor of the Lord Ordinary disposing of evidence upon mere questions of fact is not so sacred as the verdict of a jury. We are not entitled to disturb the verdict of a jury as being against the evidence unless we become satisfied that it is a verdict which cannot in any point of view be reconciled with the weight of the evidence. In the case of a Lord Ordinary we are directed, and it is our duty, under the Act of Parliament regulating our procedure, to review the judgment of the Lord Ordinary upon matters of fact, just as if we were sitting as Judges in the first instance, and to take the evidence into consideration in determining whether the Lord Ordinary has arrived at a

right conclusion—not whether the judgment is opposed to the great weight of the evidence, but whether upon the whole balancing of the evidence the judgment is right or wrong. I must remind my brother Lord M'Laren also that such is the practice not only in this Court but also in the House of Lords in reviewing our judgments. There is no idea of giving more weight to a judgment of this Court in a question of fact than is justified by the evidence after examination by the Court of review, and the whole issue presented to the House of Lords in a case of that kind is whether the judgment of this Court is consistent with the evidence or whether it is not. It certainly would be a very strange result if in reviewing the judgment of the Lord Ordinary we should proceed upon any different principle, and try, as it were, a different issue from that which is in the next stage of the case to be tried in the House of Lords. I apprehend that we must just deal with the evidence in reviewing the Lord Ordinary as the House of Lords deals with the evidence in reviewing our judgment, and then simply say whether the judgment is consistent with and is supported by the evidence or not. I sympathise so far with Lord M'Laren that I should be very glad indeed to see a system established by which, at all events, in a certain class of cases the Lord Ordinary's findings should be final. Indeed, that was at one time proposed, and tried experimentally; but certainly it did not receive much favour from the public or from the profession, and we have heard no more of it since the experiment was tried under Lord Rutherfurd's Act of 1850.

I agree with the majority of your Lordships that we must recal this interlocutor and sustain the defences.

LORD SHAND—As Lord M'Laren has stated some general views upon that matter I desire to say that I entirely agree with what the Lord President has said as to the position in which the Court in reviewing a question of evidence led in the Outer House is placed. We have to deal with the evidence just as the Lord Ordinary dealt with it. He said that, subject to this qualification, which is given effect to here and in the House of Lords, that the very greatest weight is attached to the opinion of the Lord Ordinary in the first instance. If his Lordship expresses an opinion upon credibility, I have scarcely known a case in which that opinion has been disregarded. If, again, it is a question merely of balancing of evidence I say the same thing. I have not known a case where there is at all a balancing of the evidence in which the Lord Ordinary's opinion has been disturbed. But where, as here, the Court comes to the conclusion that the great preponderance of the evidence is against the view of the Lord Ordinary—when that evidence consists of writings which tell their own tale during the whole of the communings of the parties with a distinctness which is much more valuable than parole evidence—I have no hesitation in saying that it is the duty of the Court to disregard the decision of the Lord Ordinary and to give effect to their own views, as we propose to do in this case.

LORD ADAM concurred.

The Court recalled the interlocutor of the Lord Ordinary, and sustained the defences.

Counsel for the Pursuer—Lorimer—Hay. Agent—W. H. Mill, S.S.C.

Counsel for the Defender—H. Johnston—Boyd. Agents—Henry & Scott, S.S.C.

Friday, February 21.

FIRST DIVISION.

[Dean of Guild of Edinburgh.

TURNER *v.* HAMILTON AND OTHERS.

Superior and Vassal—Property—Building Restriction—Right of Superior to Dispense with Restriction.

A proprietor feued out three acres of ground to a building company, who bound themselves to erect on the ground disponed, within a fixed time, buildings of a certain value and kind, conform to a plan annexed to the feu-contract. It was a special condition of the grant that the company, their assignees or disponees, should not be entitled to use the dwelling-houses as shops or taverns without the written consent of the superior, and this provision was to be inserted in all future deeds of transmission.

In accordance with the stipulations in the contract, houses were erected by the company and were sold to various purchasers. The buildings consisted of upper and lower dwelling-houses with separate entrances. The proprietor of certain of the lower dwelling-houses petitioned the Dean of Guild for warrant to alter the same into shops. The petition was opposed by the proprietors of the upper dwelling-houses, but was granted by the Dean of Guild.

On appeal, *held* that one sub-feuar had no right or title to enforce the restriction in the feu-contract against another, in respect that that restriction was personal to the superior alone, and that he had dispensed with it by allowing other dwelling-houses erected on the ground disponed to be converted into shops without objection.

Property—Pro indiviso Proprietor—Right of One Pro indiviso Proprietor to Object to Alterations on the Common Property by the Other.

A building company erected on ground feued to them buildings consisting each of two separate dwelling-houses, the one above the other, with separate entrances. In conveying the lower houses to purchasers, the company only conveyed to them a *pro indiviso* share of the ground on which the