

There was some reasonable apprehension that the first application might be withdrawn in the event the second petitioners were successful in securing the appointment of another liquidator.

In the special circumstances, I am disposed to think that that second petition was justifiable, particularly as the first petitioners were anxious, contrary to the wish of the general body of creditors, that the secretary of the company should be appointed liquidator. That appears to me a sufficient motive for the course taken by the other creditors.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for Official Liquidator — Pearson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Graham and Others—Mackintosh. Agents—Davidson & Syme, W.S.

Saturday, June 16.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

AITCHISON *v.* AITCHISON.

Partnership—Joint Adventure.

Circumstances in which the members of a family residing together and all engaged in various branches of one business without any deed of copartnership, were held to have carried on the business for their joint behoof, and to be entitled to divide the profits.

This was an action of count, reckoning and payment at the instance of Charles Andrew Aitchison, confectioner in Edinburgh, against his brother John Aitchison, also a confectioner in Edinburgh, in the following circumstances.

The pursuer and defender were sons of John Aitchison, baker in Edinburgh, who died in 1823. Besides the pursuer and defender, John Aitchison the father was survived by four sons and three daughters, viz., Alexander, James, George, William, Isabel, Margaret and Catherine. The defender was the third of the family, and the pursuer was the youngest son.

John Aitchison the father was also survived by his widow Jean Inderwick or Aitchison. By trust-disposition and settlement, John Aitchison the father conveyed his whole estate to trustees, for payment to his wife in life and to his children in fee, "in such manner and proportion as my said spouse shall determine."

The trust-estate consisted of shop and dwelling-house in Little King Street and East Register Street, and two small shops in Catherine Street, and a personal estate of £1333.

The trustees did not intrude with the estate, but, with the consent of Alexander and James, who were of age, allowed Mrs Aitchison to take possession of the whole trust-estate, in order that she might carry on the business for the benefit of her family. Mrs Aitchison accordingly, with her two sons Alexander and James, continued the business in the shops in Little King Street and East Register Street under the firm of Mrs Aitchison & Sons or Aitchison & Sons. "No written con-

tract of copartnership was entered into, but the business was unquestionably at first carried on by these three persons for the benefit of the whole family. In 1828, as the business was increasing, and as several of their customers resided in the west end of the town, Mrs Aitchison resolved to extend the business by opening a confectionery shop in Queen Street; and accordingly she took a lease of the shop No. 77 Queen Street, and of the house above it, from her brother Mr Paterson, and there she and her son James commenced and carried on the confectionery business on a small but gradually increasing scale, until it became one of the largest and most successful businesses of the kind in Edinburgh. The other sons as they grew up all came, in one capacity or another, to take part in the business. When the Queen Street shop was opened in 1828 George was put in charge of the Register Street shop, and Alexander took charge of the Little King Street shop. The name of the firm in Queen Street was the same as before, viz., 'Aitchison & Sons', or 'Jean Aitchison & Sons'; and there is no doubt whatever that, from 1828 at all events until 1832, the whole three shops and businesses in Little King Street, East Register Street, and Queen Street were one concern. The bread which was baked at Little King Street was carried daily to East Register and Queen Street, to supply the customers of these establishments, and the drawings of all three places were paid or accounted for regularly to Mrs Aitchison at Queen Street. In consequence of the increase of the business, more assistance was required, and the defender John Aitchison, who had been a clerk in a wine merchant's office in Leith at a salary of £80 a year, gave up his situation, at his mother's desire, and went to Queen Street. He was entirely ignorant either of baking or of confectionery, and he never took any part in the practical department of the business, which was then under the charge of his brother James, and afterwards of James and of the pursuer; and his principal duties were to assist his mother in keeping the books, and attending in the shop or saleroom. The defender admits that he never put any capital into the concern, that no contract of copartnership was entered into, and that he just went to Queen Street because his mother required him. And the business went on as before in all the three shops as parts of one and the same concern, carried on for behoof of the whole family.

"In 1832 George Aitchison left the Register Street shop and went to the shop at the corner of Albyn Place and Wemyss Place, nearly opposite No. 77 Queen Street. He there began the business of baker, ostensibly in his own name; but from that time bread ceased to be sent from Little King Street to the Queen Street shop, and whatever bread was required for the customers of the Queen Street shop was supplied from Wemyss Place."

George gave up the business in Wemyss Place in 1865 on account of his health, and upon the death of his brother James in 1866 he took the place which James had occupied in the Queen Street business, where he remained until his death in 1874.

In 1835 Alexander, the eldest son, was married, and the baking business carried on in Little King Street and East Register Street was handed over entirely to him, he paying a rent to his mother

for the premises. "Up to this time Charles, the pursuer, (who was now about twenty or twenty-one years of age) had been from his boyhood employed in assisting in one or other of the three shops, in Little King Street, East Register Street, and Queen Street, though after George's removal to Wemyss Place he seems to have confined his attention almost exclusively to the shop in East Register Street. After Alexander married, the pursuer remained in East Register Street only some months, until he had instructed Alexander's wife in the business, and he then entered the Queen Street establishment, where he remained, actively engaged in the business, until shortly before the institution of the present action. He was the member of the family who was skilled in the manufacture of confectionery.

About or soon after 1835, William, who had been in an architect's office, also joined the Queen Street Establishment, and he gave his whole time to the business till his death in 1874. His principal duties seem to have been to assist the defender in the shop and saleroom, and to pack and nail up the boxes of confectionery in hampers for transmission to the country.

About the same date, Isabell came in to the Queen Street shop, in which she ever afterwards continued. Margaret and Katherine never had anything to do with the shops. Margaret died young, and Katherine in 1848. Both were unmarried, Alexander being the only member of the family who did marry.

In 1847, Mrs Aitchison, being old and infirm, entered into a minute of agreement with her sons James and John in the following terms:—"The said parties having agreed to dissolve the said copartnership as at the term of Martinmas last 1847, the same is hereby held as dissolved as at that date accordingly, and it is also declared that the said Mrs Jane Inderwick or Aitchison retired from the said copartnership as at the said term of Martinmas last, and that her good-will and interest in the business now belongs to the said James and John Aitchison. In witness whereof," &c.

Mrs Aitchison died on 4th January 1848, leaving a general disposition and settlement dividing her property equally among her children. By a codicil to the settlement she recalled the disposition in so far as it included the pursuer, in consequence of his having in 1846 been sued for damages for breach of promise of marriage by a Miss Tucker. The action had libelled the defender (the pursuer in the present action) as a partner of the firm of Aitchison & Sons, but in defence he stated that he was not a partner of that firm.

On 25th November 1848 a meeting of the family was called together for the purpose, *inter alia*, of reading Mrs Aitchison's settlement. A minute of the meeting to the following effect was drawn out:—

"Mr Alex. Aitchison stated that the present meeting had been called for the purpose of reading the settlement of the late Mrs Aitchison, and taking the other steps which were necessary thereon.

"Mr Baillie then produced a disposition by Mrs Aitchison, dated 26th October 1830, in favour of her children, and codicil thereto annexed, dated 6th May 1847, and also a writing executed by her on the date last mentioned, in reference to her husband's trust-disposition. These deeds were then read.

"There was then also produced to the meeting and read a minute of agreement between the deceased and James and John Aitchison, her sons, in reference to the dissolution of the copartnership between them, dated 23d December 1847.

"The meeting, considering that the codicil before mentioned, which recalled the said disposition in so far as it included the said Charles Andrew Aitchison and the heirs of his body, had been executed by the deceased in consequence of special causes which had now ceased to exist, and that the deceased had also resolved, if she had been spared, to cancel the said codicil, agreed and hereby agree to hold the said codicil as cancelled, to renounce all benefit which they and each of them may or might derive under it, and to divide the estate of the deceased, heritable and moveable, in the same manner as if such codicil had never been executed, and also to execute all deeds which may be necessary for carrying this writing into full effect. The meeting also for the same causes agreed and hereby agree to hold the other writing before mentioned, dated the same day as said codicil, as cancelled, to renounce all benefit which they and each of them may or might derive under it, and to divide the estate of their deceased father, heritable and moveable, in the same manner as if such writing had never been executed, and also to execute all writings or deeds which may be necessary for carrying this minute into full effect. In witness whereof," &c.

Notwithstanding that Alexander had since his marriage managed as his own a separate business, he claimed a share in the interest of the business carried on by his mother, and this claim was finally settled upon 18th March 1851 by a minute of agreement entered into between Alexander Aitchison, on the one part, and John Aitchison, on the part of his other brothers and sisters, and taking burden for them on the other part. The minute of agreement was in the following terms:—

"1. The subjects in Little King Street, in Catherine Street, and shop in East Register Street, which severally belonged to the late Mr John Aitchison, or to his widow or family, and also one share of the Stockbridge Mill Company, are to be henceforth the property of Alexander Aitchison, and his brothers and sister are at their expense to concur in making them over to him, and he is to be infet therein at their expense.

"2. The remainder of the property of the late John Aitchison, or of his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all deeds which may be necessary for fully vesting them therein.

"3. On these objects being accomplished, Alexander Aitchison is to grant a full discharge of all claims that he may have against his brothers and sisters of any kind whatever, and they are to grant a similar discharge to him of all claims they may have against him of any kind whatever, which discharges shall be at the expense of the second party solely. In witness whereof," &c.

In the same year (1851) the whole family, with the exception of Alexander, executed deeds of

settlement of their whole estates in favour of the others and the survivor or survivors of them. These settlements were delivered to the defender to keep. At the date of this case the pursuer, the defender, and Isabel were the only members of the family surviving. All the profits of the business and the annual produce of the invested money of the family were banked in the name of Aitchison & Sons, the account being operated upon by James, John, George, and Isabel. When money was drawn from the bank for the purpose of being invested it was invested in the names of one or other of the members of the family without apparently any principle of selection.

The pursuer averred that the defender had taken possession of the whole estate of his deceased father and mother and brothers and sisters, and accordingly called upon him for an accounting.

The pursuer pleaded—" (1) The defender having managed and intromitted with the estate and funds belonging to the family, is bound to count and reckon with the pursuer in terms of the conclusions of the summons. (2) The pursuer, by virtue of his father's trust-deed, and of his brothers' settlements, is entitled to an accounting for his own and their respective shares of the proceeds of the business carried on for behoof of the family, and of the investments referred to. (3) The pursuer, by virtue of the minute of agreement relative to his mother's settlement, is entitled to an equal share of her estate, and he is also entitled to the shares thereof belonging to George and William in terms of their settlements. (4) The pursuer, and his brothers James, George, and William, being equally interested with the defender in the business mentioned in the condescendence, he is entitled, in his own right, and as representing them, to an accounting as concluded for, with expenses. (5) *Separatim* and alternatively, the pursuer is entitled to an accounting in respect the said business was carried on by the several members of the family in partnership."

The defender pleaded—" (1) The defender is not bound to hold count and reckoning with the pursuer with respect to the trust-estate of the deceased John Aitchison their father, in respect that the defender was not a trustee or executor of the said John Aitchison, and had no intromissions with his trust-estate. (2) The defender is not bound to hold count and reckoning with the pursuer in regard to the businesses carried on in Little King Street, Register Street, or Wemyss Place, in respect that the defender took no part in the said businesses, and had no intromissions with the funds or profits thereby realised. (3) The pursuer has no title to sue for an accounting relative to the confectionery business in Queen Street, and the defender is not bound to hold count and reckoning with the pursuer in regard to that business, in respect that the pursuer was not a partner, and had no right or interest in that business. (4) At all events, the defender is not bound to hold count and reckoning with the pursuer with respect to the said confectionery business on any other footing than that Mrs Aitchison, James Aitchison, and the defender, were partners thereof down to the year 1847; that the said James Aitchison and the defender were the sole partners from 1847 to 1866, and that the defender

has been the sole partner since that date. (5) The defender is not bound to hold count and reckoning with the pursuer with respect to the trust-estate of their mother Mrs Aitchison, in respect that he was only one of her executors, and that he had no separate intromissions with her estate or executry. (6) All parties not called. (7) The pursuer's claims to accounting with respect to the estates of Mr and Mrs Aitchison—father and mother of the pursuer and defender—are excluded by the family arrangements condescended on; and, in particular, by the said agreement of 17th March 1851, and the actings which followed thereupon. (8) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. (9) In respect of the arrangement under which the said mutual settlements of 1851 were executed, and of the said settlements having been executed, and the pursuer, and the brothers whom he represents, having taken benefit under the settlement of James Aitchison, the action cannot be maintained, and the survivor of the brothers and sister will be entitled to the whole property in terms of the said mutual deeds. (10) If the said arrangement shall not so receive effect, the defender is entitled to the whole properties purchased with monies belonging to him, in reliance and on the faith of the said arrangement and mutual settlements being acted upon and receiving effect."

A proof was taken, the result of which is fully set forth in the Lord Ordinary's note, and in the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 5th December 1876.*—The Lord Ordinary, &c., Finds that the defender is bound to hold count and reckoning with the pursuer for his various intromissions, in terms of the conclusions of the summons; but finds that in such count and reckoning the funds realised from or belonging to the business carried on under the name of George Aitchison in Wemyss Place, and the proceeds of the sale thereof in so far as received by the said George Aitchison, now deceased, by the late William Aitchison, and by the pursuer, or any of them, and not accounted for to the general fund managed by the defender, must be accounted for by the pursuer, and taken into the general account, &c.

"*Note.*—In this action the pursuer Charles Andrew Aitchison, confectioner in Edinburgh, calls upon his brother John Aitchison, also confectioner there, to count and reckon with him for his intromissions—(1) with the trust-estate of their father John Aitchison, baker in Edinburgh, who died on 16th January 1823, and with the funds realised from or belonging to the business carried on under the name of J. Aitchison & Sons in King Street, Register Street, and Queen Street, Edinburgh, and under the name of George Aitchison, in Wemyss Place, Edinburgh, and with the property, stocks, loans, and other investments in which the funds of the said trust-estate and business had been placed—and also with the trust-estate of their mother, the deceased Mrs Jean Inderwick or Aitchison, who died on 4th January 1848. The averments of the pursuer substantially are—(1) That from the time of his father's death in 1823 his business was continued and gradually extended by his widow, and was

carried on by her with the assistance of several of her sons, for behoof of herself in liferent and of her family, consisting of six sons and three daughters, in fee, to be paid to them on her death, but subject to a power on her part to exclude any of the family from participation; (2) that after the death of his mother, in 1848, Alexander Aitchison, the eldest son, was settled with and paid off, but that the business was carried on by the other surviving members of the family, either in partnership or for joint behoof, all being equally interested in the business; (3) that John Aitchison, the defender, began to assist his mother in 1830, and was from the first entrusted with the management of the books of the concern, and that he and his mother, during her life, received the drawings from the business; and (4) that after her death the defender alone received the drawings, and kept the bank account of the concern, which he manipulated at pleasure, and he is now called upon by his brother the pursuer, all the other brothers and two of the sisters being now dead, to account for his intrusions. The defender declines to account for his father's trust-estate, in respect he was not a trustee under his father's settlement, and had no intrusions therewith. He also declines to account for the business carried on in Little King Street, Register Street, and Wemyss Place, in respect he took no part in said business, and had no intrusions with the funds or profits thereof; and he declines to account for the confectionery business in Queen Street, in respect that the pursuer is not a partner, and had no right or interest in that business. He also in his defences declines to account for the estate of Mrs Aitchison, his mother, in respect that he was only one of her executors, and that he had no separate intrusions with her estate. But this plea is not, as I understand, now insisted on, as he admittedly did intrude to a considerable extent, and he has abandoned his sixth plea that all parties have not been called. The defender farther maintains that all claims by the pursuer with respect to the estates of their father and mother are excluded by family arrangements, and particularly by an agreement, dated 17th March 1851, and certain actings which are alleged to have followed thereon. Various other defences are stated, but it is unnecessary in the meantime to advert to these more particularly. An extensive diligence was granted to both parties for recovery of documents, and thereafter a proof was led which occupied three days, and was followed by a long and able debate.

"The evidence is somewhat conflicting, and is in many respects not very satisfactory, owing, probably, in some measure to the circumstance that for a period of nearly fifty years the family appears to have been a united and harmonious one, and that its members reposed unlimited confidence in each other, and particularly in the defender, who, as has been mentioned, had charge of the books of the business and the finance of the family. The books, however, seem to have been kept in a most imperfect and unbusiness-like way—they were never balanced, and many of the older books have been destroyed or mislaid. No assistance, therefore, can be derived from the books in answering the question, Who were the parties interested in the business to which the present action of count and reckoning chiefly relates?

"But, before considering the import of the evidence in detail, it may be useful to explain the position of the family at the death of John Aitchison the father, in 1823, and the subsequent history of its various members. The said John Aitchison was a baker in Edinburgh, and carried on business, in partnership with his brother Alexander, under the firm of John & Alexander Aitchison, in two shops—one in Little King Street, and the other in East Register Street—both of which belonged to himself individually. He was survived by his wife, Mrs Jean Inderwick or Aitchison, and by six sons and three daughters, whose names and ages, as at their father's death, were as follow:—Alexander, the eldest, was 24 years of age; James, 22; John (the defender), 20; Isabel, 18; George, 16; William, 13; Margaret, 10; Charles (the pursuer), 8; and Catherine, 4. John Aitchison left a settlement, dated 14th October 1819, with a codicil, dated 4th January 1823. By that deed he conveyed to certain persons, as trustees, his whole estate, heritable and moveable, including specially his stock-in-trade, but excepting his household furniture, which he bequeathed to his wife; and the trustees were empowered to sell and dispose of all or any part of the estate as they should think most conducive to the interest of the family; and they were directed to lend out the whole estate on good security, and to pay over to his wife, if the survivor, the whole interest or annual return half-yearly during her life, and after her death to divide the whole estate and capital remaining under their management among the children, with a declaration in the following terms, viz:—'The security of my said free estate to be conceived in favour of my said spouse in liferent, for her liferent use alienary, and to my children in such manner and proportion as my said spouse shall determine; and failing any division by the widow, the shares of the children were to be equal, except in the case of Margaret, who was to receive two shares, and of Alexander, who was to receive only half a share, although he was by the codicil placed on an equality with his brothers. But power was given to the widow, if she should see cause, 'to make a different arrangement among our said children by adding to or diminishing the shares of all or any one of them, or of depriving them, or any of them, of the whole or any part of their respective shares, as she may be satisfied they may deserve or merit.' Mrs Aitchison along with the trustees were nominated executors, and the provisions of the settlement were declared to be in full of all the legal claims of the widow and children. The personal estate, including the half of the stock-in-trade and book debts of the firm of John & Alexander Aitchison, amounted to £1333, 1s. 9d. The heritable estate consisted of the shop and dwelling-house in Little King Street and East Register Street, and two small shops in Catherine Street. The trustees are all now dead, and it does not appear whether they had any, or if so what, intrusions with the estate. One thing is certain, viz., that no part of the estate was ever paid by them to any of the children of John Aitchison; but they appear, with the consent of those members of the family who were then of age, to have handed over to Mrs Aitchison the entire trust-estate of her husband, including his stock-in-trade and the good-

will of the business, in order that she might carry on the business for the benefit of her family. This was a natural and reasonable arrangement, as Mrs Aitchison had plainly a great aptitude for business, and was not only entitled to the life interest of her husband's whole estate, but had power to fix the shares of the fee which each child should ultimately take, and even to exclude any child from participation in the estate. Mrs Aitchison seems to have paid off her brother-in-law Alexander, who had been her husband's partner, and to have herself, along with her two sons then of full age, Alexander and James, continued her husband's business, with his stock-in-trade, in the shops in Little King Street and East Register Street, under the firm of 'Mrs Aitchison & Sons,' or 'Aitchison & Sons,' being assisted also by George, then a lad of 16. No written contract of copartnership was entered into, but the business was unquestionably at first carried on by these three persons for the benefit of the whole family. In 1828, as the business was increasing, and as several of their customers resided in the west end of the town, Mrs Aitchison resolved to extend the business by opening a confectionery shop in Queen Street; and accordingly she took a lease of the shop No. 77 Queen Street, and of the house above it, from her brother-in-law Mr Paterson, and there she and her son James commenced and carried on the confectionery business on a small but gradually increasing sale until it became one of the largest and most successful businesses of the kind in Edinburgh. The other sons as they grew up all came, in one capacity or another, to take part in the business. When the Queen Street shop was opened in 1828, George was put in charge of the Register Street shop, and Alexander took charge of the Little King Street shop. The name of the firm in Queen Street was the same as before, viz., 'Aitchison & Sons,' or 'Jean Aitchison & Sons;' and there is no doubt whatever that, from 1828 at all events until 1832, the whole three shops and businesses in Little King Street, East Register Street, and Queen Street were one concern. The bread which was baked at Little King Street was carried daily to Register Street and Queen Street to supply the customers of these establishments, and the drawings of all the three places were paid or accounted for regularly to Mrs Aitchison at Queen Street. In consequence of the increase of the business more assistance was required, and the defender John Aitchison, who had been a clerk in a wine merchant's office in Leith, at a salary of £80 a-year, gave up his situation, at his mother's desire, and went to Queen Street. He was entirely ignorant either of baking or of confectionery, and he never took any part in the practical department of the business, which was then under the charge of his brother James, and afterwards of James and of the pursuer; and his principal duties were to assist his mother in keeping the books and attending in the shop or saleroom. The defender admits that he never put any capital into the concern, that no contract of copartnership was entered into, and that he just went to Queen Street because his mother required him. And the business went on as before in all the three shops, as parts of one and the same concern carried on for behoof of the whole family.

"In 1832 George Aitchison left the Register Street shop, and went to the shop at the corner

of Albyn Place and Wemyss Place, nearly opposite No. 77 Queen Street. He there began the business of baker, ostensibly in his own name; but from that time bread ceased to be sent from Little King Street to the Queen Street shop, and whatever bread was required for the customers of the Queen Street shop was supplied from Wemyss Place. It is one of the questions in this case, and a somewhat difficult question, viz., whether this Wemyss Place shop was a separate and independent concern in which George alone was interested? or whether it was truly another branch of the concern of Aitchison & Sons? And in this question another is involved, viz.,—whether George had any interest in the Queen Street business? I shall advert to these questions more fully hereafter; but at present it is important to notice, as a part of the family history, that after the Wemyss Place business was discontinued in 1865, George, after an interval of repose which the state of his health rendered necessary, took in 1866, on the death of James, the place which James had occupied in the Queen Street establishment—viz., the practical superintendence of the cooking department, and continued to fill that place till his own death in 1874. The defender chose to deny this in the witness box, but the fact is in my opinion clearly proved by the evidence.

"In 1834 or 1835, Alexander, the eldest son, was married, and an arrangement seems to have been come to by which the baking business carried on in Little King Street and East Register Street was made over entirely to Alexander, he paying a rent to his mother for the use of the premises, and I think there is no proof that any of the drawings from either of those places was ever handed over to Mrs Aitchison after Alexander's marriage. Up to this time Charles, the pursuer, (who was now about twenty or twenty-one years of age) had been from his boyhood employed in assisting in one or other of the three shops, in Little King Street, East Register Street, and Queen Street, though after George's removal to Wemyss Place he seems to have confined his attention almost exclusively to the shop in East Register Street. After Alexander married, the pursuer remained in East Register Street only some months, until he had instructed Alexander's wife in the business, and he then entered the Queen Street establishment, where he remained, actively engaged in the business, until shortly before the institution of the present action. And here I must notice what I am unwilling to characterise by a harsher term, but what is, I fear, due to something more than lapse of memory on the part of the defender, viz., his attempt both on the record and in the witness box to make out that the pursuer has throughout life been weak both in body and mind, and has never been able to engage constantly in any active employment, and that any services which he rendered were of trifling value, and not equivalent to the cost of his maintenance. Now, if anything has been proved in this case, it is, that from the very first the pursuer showed great aptitude for and energy in the manufacture of confectionery, in which department the defender was and is entirely unskilled. He from time to time went to London and Paris to study confectionery under skilful artists in those towns, and he acquired great proficiency in the art. The workmen who

were employed in the practical department in Queen Street speak of him as having from the first been a hard working man, and a very skilful compounder particularly of creams, jellies and ices, for which the establishment acquired a great reputation. Thus Mr John Dewar says, 'I knew Charles well. He was employed principally in the confectionery, and took a general management below in Queen Street. He was at the top of the tree as a workman, and in fact I reckoned him the bee that made the honey.' And even the defender himself, although he denied it in the witness box, is proved in the negotiations for a sale of the whole business to George Lawson in 1873 to have represented the pursuer as superintending the practical department, and as being in possession of invaluable recipes, about which, and the working of them, nobody knew anything except the pursuer. The pursuer may be, and I think probably is, a person not very well versed in the ways of the world, or in the management of business affairs; but I think the evidence clearly shows, that whatever his position in Queen Street may have been, he was for forty years a most useful member of the establishment, and that his steadiness and skill as a confectioner contributed in no small degree to the success of the concern.

"About or soon after 1835, William, who had been in an architect's office, also joined the Queen Street establishment, and he gave his whole time to the business till his death in 1874. His principal duties seem to have been to assist the defender in the shop and sale room, and to pack and nail up the boxes of confectionery in hampers for transmission to the country, which is a very delicate and important part of the business of a confectioner, as the safe transmission of such perishable articles depends mainly upon the care and skill with which they are packed; and the defender's attempt to depreciate William's usefulness has failed, as it did in the case of the pursuer. About the same time the eldest daughter, Isabel, came to the shop, where she assisted, and still continues to assist, in the sale department. The other two daughters, Margaret and Catherine, do not appear to have done anything in any of the shops. Margaret died young, and Catherine died, unmarried and intestate, soon after her mother, in 1848.

"In 1835, therefore, the state of the family and the occupations of the respective members were as follows:—Mrs Aitchison was at the head of the business in Queen Street, and was assisted there by her sons James, John (the defender), William, and Charles (the pursuer), and by her daughter Isabel,—John, William, and Isabel being engaged in the sale and book-keeping and packing departments in the shop, while James and Charles were engaged below, the former in the cooking department, the latter in the preparation of ices, jellies, creams, and cakes; George was engaged in the baking shop in Wemyss Place, and Alexander, as has been mentioned, had the exclusive charge of the business in Little King Street and East Register Street, apparently for his own behoof. And the principal question now for decision is, For whose behoof were the businesses in Queen Street and Wemyss Place carried on after 1835? The pursuer maintains that they were all one concern, and were carried on for behoof of the whole family; the defender, on the other hand, maintains that the business of

Wemyss Place was carried on by George solely for his own behoof, and that none of the other members of the family had any interest in that business, and that the business in Queen Street belonged entirely to Mrs Aitchison, James, and the defender, as the sole partners thereof, until shortly before Mrs Aitchison's death, when, in virtue of an agreement between her and her two alleged partners, the whole business was transferred to them, and was thereafter their exclusive property, and that neither George, William, Charles, nor Isabel had any interest in it whatever. After the best consideration which I have been able to give to the proof, both oral and documentary, I have come to be of opinion that it is not proved that there was any proper partnership entered into between Mrs Aitchison and her sons, or any of them; but that it is proved that until 1835 the business in Little King Street, East Register Street, Queen Street, and Wemyss Place, and after that date until Mrs Aitchison's death, the business in Queen Street and Wemyss Place, were all truly branches of one concern—that they had all derived their existence from the as yet undivided estate of old John Aitchison the father, and that they were carried on by the widow and her sons and a daughter for behoof of the whole family—the mother being interested in the liferent, and the sons and daughters in the fee in equal shares, but with power to the mother to diminish the share of any child, and even to exclude the child altogether; and that from Mrs Aitchison's death the Queen Street business, until now, and the Wemyss Place business until it was discontinued in 1865, were carried on by the surviving brothers and sister, other than Alexander, for their joint behoof. I shall now explain the grounds of this opinion.

"*In the first place*, It may not unreasonably be presumed that where a business in which the deceased father of a family had been engaged, and in which his funds had been almost wholly embarked, is, without any distribution of any part of his estate among his children, carried on after his death by his widow and the grown-up sons (the other children being in minority or pupillarity), the business, until a distribution takes place, is so carried on for behoof of the widow and all the children in proportion to their respective interests in the estate.

"*In the second place*, This presumption derives, in the present case, very great support from the circumstance that, without any distribution of the estate beyond paying off the eldest son, in manner to be afterwards noticed, the business was conducted from the date of the father's death, and for a period of half a century, on the footing of introducing into it from time to time as they grew up, and in one capacity or another, every member of the family, each giving his or her whole time to their respective departments, and all excepting the eldest son, who alone of the family ever married, living together during their joint lives.

"*In the third place*, From the death of the father in 1823 down to 1835, all the profits of the four establishments were regularly paid over to Mrs Aitchison, and applied by her for joint behoof; and after the latter date, and until her death, the profits of the Wemyss Place and Queen Street establishments were paid to Mrs Aitchison, and after her death to the defender,

and applied for behoof of all the family except Alexander. None of them ever received anything in the shape of wages, but whatever was required for clothing, or other necessaries, was paid to them by the defender as the financial manager for the family, either out of the till in Queen Street or by cheque upon the National Bank account, into which all the earnings of the several businesses were paid. And the defender has entirely failed to make out that any of the family occupied merely the position of servants.

“*In the fourth place*, Out of the accumulated drawings from the profits of the several establishments which I have enumerated, investments of various kinds, such as the purchase of heritable properties, and a great variety of stocks and loans on heritable security, were made by the defender as financial manager, sometimes with, and sometimes without, consultation with his brother and sister, the titles being in many cases taken in name of all the members of the family excepting Alexander, and almost all the rest in the name of at least two, and usually more, of the members of the family, very few being taken in the name of one individual. From the table printed in the Joint Print some idea may be formed of the nature and extent of these family investments, and it will be seen they are numerous and of large amount, but to this I shall advert more in detail hereafter. Suffice it for the present to say that it is clearly proved that the money which was employed in making these investments was all drawn from the National Bank account, which was kept in the name of ‘Aitchison & Sons,’ and which included not only the shop drawings of the several establishments, but the whole rents, dividends, and annual proceeds of all the family investments, irrespective altogether of the persons in whose name the investments stood.

“*In the fifth place*, The premises in Queen Street, in which the confectionery business was carried on, were purchased by Mrs Aitchison out of the profits of the business, and at her death became the property of James, John, Charles, George, William, and Isabel, but no rent was ever paid to them for the use of the premises. And in 1854 the same persons purchased the property of Mount Vernon, near Liberton, at the price of £5500, which, like other investments, was paid for out of the general bank account of ‘Aitchison & Sons.’ The whole family, except Alexander, when they were not residing in the house above the shop in Queen Street, seem to have resided in Mount Vernon, where there were gardens and vineries and a poultry-yard, the produce of which was all taken to Queen Street and employed in the business there. The defender, no doubt, tries to make out that this was a small affair. He says:—‘The grapes grown at Mount Vernon were a trifling affair. We did not grow them as a mercantile adjunct, but as a matter of pleasure, and when they were there we could not see them wasted.’ But William Frisy, who was gardener at Mount Vernon for three years before September 1874, gives a very different account, for he says:—‘There was a great deal of indoor fruit grown at Mount Vernon—grapes, peaches, and strawberries. The quantity increased every year, and during 1874, by a calculation I made,

there were about 2000 lbs. of grapes, 2000 peaches in number, and about 100 lbs. strawberries. That fruit was not consumed at Mount Vernon; it was taken away, and I did not know what was done with it. Charles Aitchison took the principal charge of the fruit-houses, and gave me instructions. None of the other brothers gave me instructions, but they always consulted me, as they took a great interest in the crops.’ Now, it is plain that this large quantity of valuable fruit, produced at Mount Vernon at the common expense (which must have been considerable, for the fruit was all raised under glass), was the joint property of the family; and it is absurd to suppose that the use of the premises in Queen Street, or of the Mount Vernon fruit and other produce, would have been given by the other members of the family for the purposes of the business in Queen Street without charge, unless that was a business in which they were all equally interested. I have mentioned this circumstance for another reason, viz., to point out, that through the whole of this case the defender has systematically endeavoured to depreciate and make light of everything which could be held to be of the nature of a contribution by the other members of the family to the common stock. Thus, as I have already shown, he tried to make out that the services of Charles the pursuer, and of his brother William, were hardly worth the expense of their maintenance, although in point of fact they are proved to have been of very great value to the firm; he denied that George ever took any part in the Queen Street business, although he is proved to have taken an active part in it during the last eight years of his life; and now the supplies of fruit and other produce from the common property at Mount Vernon are represented as trifling, whereas in point of fact they must have been of very considerable money value.

“From what has been said, I think it is plain—
(1) That until 1835 the business of all the four establishments were carried on as one concern, and for the joint behoof of the whole family; (2) That from 1835 till after Mrs Aitchison’s death in 1848, the business at Queen Street and Wemyss Place was carried on for behoof of all the family, except Alexander, who received for his own use the drawings of Little King Street and Register Street; (3) That ever since Mrs Aitchison’s death the Queen Street business has been carried on upon the same footing. The question remains, however, For whose behoof was the Wemyss Place business carried on after 1848? Now, I think it is proved that for many years after Mrs Aitchison’s death, and until about 1860 or 1861, George Aitchison continued to pay the drawings of the Wemyss Place shop to his brother the defender, for the purpose of being added to the common stock in the National Bank account. Moreover, the wheat from which the flour was made for the baking business at Wemyss Place and for the Queen Street business was all purchased by James Aitchison, and was stored in lofts in the mills, Water of Leith, and when required was gristed and carted, in the shape of flour, to Wemyss Place, where the greater part was retained, some bags being generally sent by George to Queen Street; but for the price of the wheat George himself never paid anything. All the payments for the wheat

were made by the defender at Queen Street, generally by cheque on the general account of 'Aitchison & Sons,' kept in the National Bank, and the price of the offals, after deducting the charge for gristing, was regularly paid by the millers to the defender. The defender, no doubt, denies this; but the evidence of the corn-factors and millers, the most important of whom (Williamson) was not cross-examined by the defender, appears to me to be conclusive on the matter. No doubt the defender says that George gave money to James for the purchase of the wheat, and that, although the price was sometimes paid by the defender himself at Queen Street, it was generally with money given by George to James for the purpose, and rarely by cheque on the National Bank. But this is not supported by, and is indeed disproved by, the evidence; and it is, I think, clear that there never was any balancing or adjusting of accounts between George and the defender in reference to this matter. And it is not unimportant to notice that these grain and flour transactions went on in the manner just described till the Wemyss Place business was given up, although George had for five or six years retained the drawings, instead of handing them over to the defender. Then it is also proved that many of the regular Queen Street customers ordered their bread there, and were supplied by bread being sent from Wemyss Place, and that many of the Wemyss Place customers ordered confectionery there, and were supplied from Queen Street; that the eggs, butter, and sugar required in Wemyss Place all came from Queen Street, and that the biscuits, cookies, and dinner-rolls required in Queen Street were all made in and sent from Wemyss Place, without any adjustment of accounts. Further, the apprentices and other employees in Queen Street, and the journeymen in Wemyss Place, frequently performed duties in both establishments; and it is a somewhat significant circumstance that from first to last it was the uniform repute among the persons so employed that all the members of the family were equally their masters. It is, no doubt, possible that such interchange of service may have been due to the good feeling which subsisted between such near relatives, and may not have been regarded as matter of business. But I do not think that the history of this case warrants such a supposition. It appears to me that the evidence on this branch of the case, when read in the light of the other circumstances already adverted to, leads to the conclusion that the two establishments were but one concern, carried on under different names, but truly for behoof of the same members of the family.

"It is necessary, however, now to notice the arguments maintained by the defender against that conclusion. In the first place, he maintains that it is proved by a written document, to which, however, his mother and his brother James were alone parties, that the Queen Street business belonged to them, and to them alone—to the exclusion of all the other members of the family. The circumstances under which that document was executed require some attention. It appears that for some time before his mother's death, Alexander, the eldest son, had been dissatisfied with the share of the family property which had been assigned to him by his mother in 1835, in the shape of the goodwill and profits of the shop

in Little King Street and Register Street—and had been claiming, or threatening to claim, to participate in the profits of Queen Street and Wemyss Place. Mrs Aitchison was at this time laid aside from business, and was in very infirm health, and a document bearing to be a minute of agreement was entered into between her and her sons James and John, in which they are designed as "all residing in Queen Street, Edinburgh, and the only partners of the company carrying on business as confectioners in No. 77 Queen Street, Edinburgh." The terms of the said agreement were as follows:—"The said parties having agreed to dissolve the said copartnership as at the term of Martinmas 1847, the same is hereby held as dissolved as at that date accordingly; and it is also declared that the said Mrs Jean Inderwick or Aitchison retired from the said copartnership as at the said term of Martinmas last, and that her good will and interest in the business now belonged to the said James and John Aitchison." This document, which is dated 23d December 1847, undoubtedly raises a presumption in favour of the defender's contention; but that is a presumption which may be overcome by the other facts in the case. In considering this part of the case, it is material to bear in mind that Mrs Aitchison had the power, under her husband's settlement, of excluding any of her children from participation in the father's estate, and it appears that about or shortly before the date of this document she had exercised this power by a codicil to her own will and by a separate writing relating to her husband's estate, whereby she excluded the pursuer from all share in either her own or her husband's estate, although she had previously intended the whole to be divided equally among all her children, all of whom appear to have regarded the property which their mother had accumulated, and the business in which she was engaged, as truly her husband's estate, enlarged no doubt by her good management and the aid of her children, but still her husband's estate. In this light, at all events, the pursuer regarded the matter—for shortly before this an event took place in his history which must not be lost sight of. He was in 1846 sued for damages for breach of promise of marriage by a certain Maria Eliza Tucker, and it was in consequence of the scrape into which he had thus got that his mother excluded him from all participation in his father's estate and her own. The case went to trial, and the jury returned a verdict for the pursuer (Miss Tucker) for £200—but she accepted a less sum, and assigned her decree on 31st December 1847 to his brother Alexander, who appears to have advanced the amount. The action had libelled the defender (the present pursuer) as a partner of the firm of Aitchison & Sons, but in the defence it was stated that he was not a partner of that firm, and upon this circumstance the present defender now founds, as proving his case that the pursuer was not then and never was a partner. Now, even if it were necessary for the pursuer's case now to make out that there was a proper partnership between him and the other members of the family, I do not think that the statement made for him in the defences against Miss Tucker's action can be so used against him. Technically, perhaps, the statement was perfectly true, inasmuch as no formal contract of copartnership had

ever been entered into by the pursuer or anybody else. But the defences seem to have been the composition, not so much of the pursuer, as of Mr Wotherspoon, S.S.C., his agent, with the assistance of James and John, who desired to get the pursuer out of the country pending the litigation, and the statement in question was made after the pursuer had explained to his agent the position which he held of being interested in the family property, including the business—but only in expectancy, as being subject to exclusion by his mother if she should see fit to exclude him.

“Thus, while I think the statement made for the present pursuer in that action was literally true at the time it was made, it cannot prevent him from now maintaining that he is, and has all along been, interested in the family property and business, and for that purpose it is not necessary for him to make out a contract of copartnership with his mother or his brothers and sister.

“After this, Mrs Aitchison died on 4th January 1848, and a meeting of the family was held on 27th November thereafter, called by Alexander for the purpose of, *inter alia*, reading the settlement of Mrs Aitchison. Mr W. R. Baillie, W.S., produced the settlement, dated in 1830, and the codicil thereto, dated 6th August 1847, and the relative writing of same date dealing with her husband's estate, all of which were read to the meeting. There was then also produced to the meeting the minute of agreement, dated 23d December 1847, in reference to the dissolution of the copartnership between Mrs Aitchison and her sons James and John. Thereafter, on the narrative that the codicil and other writing referred to, in so far as dealing with the pursuers and the heirs of his body, had “been executed by the deceased in consequence of special causes” (*i.e.* the pursuer's entanglement with Miss Tucker, and the proceedings against him at her instance), “which had now ceased to exist, and that the deceased had also resolved, if she had been spared, to cancel” the said codicil and other writing, the meeting agreed to hold the same as cancelled, and to renounce all benefit which they and each of them might derive under the same, and to divide the estate of the deceased, heritable and moveable, in the same manner as if such codicil had never been executed, and also to execute all deeds which might be necessary for carrying the minute into full effect. Now, this minute is signed by all the members of the family then alive, excepting Alexander, and neither he nor any of his brothers or sister stated any objections to the minute of dissolution on the ground that it incorrectly stated Mrs Aitchison and her sons James and John as having been the sole partners in the Queen Street business, and James and John as being now the sole partners. And so far the minute is in favour of the defender's views. But upon this point Charles gives an explanation, the import of which is, that Alexander had frequently complained that he was not satisfied with what had been done for him at his marriage, and that at the time of his mother's death he was making further claims, which John and James resisted; and that James told him (the pursuer) that the minute of dissolution had been got by them from their mother to stop Alexander's claims, and that it would never be used against the other

members of the family, and that it was read merely to frighten Alexander, who was then claiming to be a partner in the Queen Street business. Now, I am inclined to believe this story, as told by Charles, to be true, both because it is in itself not an improbable one, and because the defender, who was in Court during the whole of the examination of the pursuer, and was himself recalled and examined at great length after the pursuer's examination was concluded, although he denies that he himself said to the pursuer that the document was taken merely to keep Alexander out of the business, admits that Alexander was then making claims on the ground that he had not got his due share of the family profits, and the rest of the evidence shows that, although Alexander's claims were soon afterwards compromised, the so-called deed of dissolution and transference was never, in point of fact, acted on as regards the other members of the family. I am confirmed in this view by the equivocating way in which the defender explained the transaction between himself and his mother and his brother James which had resulted in the execution of this minute of dissolution. He at first said that there was no doubt that she got a payment for it,—that he was sure there had been a balance of the books to ascertain her share of the profits, and that a balance sheet had been made up—and yet in answer to the immediately succeeding questions he flatly contradicts himself. He is asked—‘(Q) During all your experience, as having charge of the financial department of that business, did you ever on cebalance your books?—(A) Never. (Q) Did you ever make out a balance sheet in your life?—(A) Never.’ And I am satisfied that there never was any balancing of accounts or any payment by John and James, or either of them, to Mrs Aitchison to account or in satisfaction of her interest in the business.

“But matters become still more clear when the family arrangement, made in 1851, is considered. Alexander had still been pressing his claims, and the result was that on 17th March 1851 an agreement was entered into between Alexander Aitchison, of the first part, and ‘John Aitchison, confectioner in Edinburgh, on the part of his other brothers and sisters, and taking burden for them, on the second part.’ By that agreement the claims of Alexander were compromised by his accepting as his share of the family property (or, as it is termed in the agreement, the property ‘of the late John Aitchison, or of his widow or family’), the subjects in Little King Street, Catherine Street, and Register Street, and agreeing to grant a full discharge of all his claims against the other members of the family, of any kind whatever, while the remainder of the said family property, *i.e.*, ‘the property of the late John Aitchison, or his widow and family,’ was thenceforth to be the property of the other members of the family, who were to be at the sole expense of all deeds necessary for carrying the agreement into effect. It is maintained by the defender that neither the business in Queen Street nor that in Wemyss Place was in contemplation of the parties to the agreement. But I cannot accept that interpretation of the document, because the property which was here divided between Alexander on the one hand, and the other members of the family on the other, was the whole estate which had be-

longed to their father John Aitchison, or to their mother Mrs Aitchison, and which then belonged to the family—*i.e.*, to the family individually and collectively. Now, of what did that property consist? So far as I can ascertain from the proof, it consisted of (1) The estate which had belonged to John Aitchison at his death, and which included the subjects in Little King Street and in Register Street, the stock-in-trade and book debts and cash and other personal property belonging to him, none of which had hitherto been divided amongst his family, except in so far as Alexander had since 1835 drawn the profits of Little King Street and Register Street for his own use: (2) The savings and accumulations which had been made by his widow out of the profits realised by trading with her husband's estate, and which included the subjects in Catherine Street and 76 and 77 Queen Street, which had been purchased by herself: and (3) The businesses which were then carried on in Queen Street and at Wemyss Place by several members of the family; certain subjects in Broughton Street, Broughton Place, and Cumberland Street, which had been purchased in 1845 in the name of the whole members of the family then alive, including Alexander and Catherine; the premises at Wemyss Place, which in the titles are denominated 'Albyn Place, Queen Street, second flat,' and three shops in eastmost tenement in 'Albyn Place,' which had been purchased in 1847 in the name of James, John, and George; and a house in Ann Street, which had been purchased at the same time in name of James, John, William, and George. It also included house property in India Street, purchased in name of George in 1842, and in Thistle Street in name of William in 1847, and a considerable amount of gas shares, purchased in name of several members of the family between 1842 and 1848. I think, therefore, that the fair meaning of this agreement was that Alexander, in consideration of his discharging all claim which he might have had for further participation with his brothers and sisters in the family property above enumerated, received, as his share of that property, in addition to the businesses in Little King Street and Register Street, of which he had been in the exclusive possession for sixteen years, the subjects in Little King Street, Catherine Street, and Register Street, and left the whole of the remainder, including the businesses at Wemyss Place and Queen Street, to be dealt with by them as their own property, in which all were equally interested. But, further, this deed was acted upon and implemented on the part of Alexander, who had made up titles as heir of his mother in the premises No. 77 Queen Street, where the confectionery business was carried on, and the house above No. 76, in which the family resided, by his conveying the same on 10th April 1852 to his brothers James, John, George, William, and Charles, and his sister Isabel, and their respective heirs and assignees. Now, what followed upon this agreement on the part of the other members of the family is most instructive. On 27th May 1851 the house No. 75 Queen Street was purchased in name of James, John, William, Charles, George, and Isabel, at the price of £1600; and on 9th June 1854 Mount Vernon was purchased in name of the same six persons, at the price of £5500, the price in both instances being paid out of the general bank account kept in name of Aitchison & Sons; and

the various other houses and stock enumerated were all from time to time purchased out of the same common fund, the titles being taken sometimes in name of the whole family other than Alexander, sometimes in the name of two or more members, a few small tenements only being occasionally purchased in the individual names of George, or of the pursuer, or of the defender. But in whatever names the titles to the property and stocks were taken, the rents and dividends were, as a rule, collected by John, who in financial matters acted for the whole family, and were by him paid into the general bank account as a common fund. I am therefore of opinion that, whatever weight might have been given to the minute of dissolution and transference of partnership in 1847, had it stood alone, it was never acted on, and was entirely superseded by the family agreement of 1851, interpreted as that has been by the subsequent actings of the defender himself and his brother and sister.

"But, in the second place, the defender maintains that the idea that the Wemyss Place business was a part of the common concern is negated by the actings of George Aitchison, in whose name alone that business was carried on. It appears that in 1860 or 1861, a few years before that business was given up, George discontinued taking over his drawings to Queen Street and throwing them into the common fund, and accumulated the cash in tin boxes, which he left in a cupboard in his shop in Wemyss Place until it amounted to at least £6000, or according to the defender to £10,000; and he would apparently have gone on hoarding the money in that fashion had he not been alarmed by an almost successful attempt at burglary, which induced him to deposit it in the bank. He did not, however, pay it in to the general account kept in the National Bank, but he seems to have divided it between himself and his brothers William and the pursuer, £2000 having been deposited in the Royal Bank in the name of each, and his subsequent drawings, and the sum which he obtained from Mr Neil, to whom he sold the business in 1865, appears to have been applied either in making investments in his own name or in payment to his brothers Charles and William. This, however, is explained by the pursuer in his evidence to have arisen from a suspicion which these three brothers had come to entertain, that the defender in his financial management of the common fund was taking too good care of himself, George having repeatedly asked the defender to exhibit a balance sheet, which however he could not obtain. The defender denies that a balance sheet had ever been asked, but I think it is in the circumstances highly probable that such a demand was made, and that George's reason for accumulating the Wemyss Place drawings in his shop instead of handing them to the defender was to prevent further funds going into the defender's hands until he had explained his past actings, but that he intended on receiving proper explanations to hand the amount to the defender. And it is not a little remarkable, that although George's proceedings appear all to have been known to the defender, he still continued, until the death of George in 1874, to invest the fund accumulating from time to time in the National Bank account, kept by him in name of Aitchison & Son, in purchasing property and stock in name of the different members of the

family, including George. This is admitted by him in the record, and is very clearly brought out by the list of investments, from which it appears that between the years 1863 and 1867 sums amounting in all to not less than £20,750 were applied in purchasing house property in the names of James, John, George, William, Charles, and Isabell, in equal proportions, the name of James being omitted in the purchases made after his death in 1866. Now, all this is quite inexplicable on the theory of the defender. If it had been the case that he and James, till the death of the latter in 1866, and the defender himself after that date, were the sole partners of and persons interested in the firm of Aitchison & Sons and the Queen Street business, and if George had no interest in that business, it is quite inconceivable that he would have gone on making these large investments in the way above described with funds in which, according to his theory, none of the other members of the family, and least of all George, had the slightest interest. On the other hand, all that was done is just what might have been expected to have been done if the pursuer's theory be, as I think it is, the correct one. I cannot doubt that the defender went on making these investments after George discontinued to pay the drawings into the common account simply because he knew that George had a right to demand the accounting for which he was pressing, and he therefore did not venture to insist upon George handing over his drawings while he himself was refusing to account for the past. He says that he made the investments 'to keep the family together,' which, I take it, is another way of saying that he did it 'to stop their mouths' by an occasional payment to account, and thus to defer the day of general reckoning.

"But it is here right to notice another explanation given by the defender of his reason for making these investments. It is this:—He says that when the rest of the family combined to get Alexander paid off, and his claims discharged, they agreed that each should execute a *mortis causa* settlement, by which everything of which he or she should die possessed should go to the other members of the family and the survivor excepting Alexander, and that shortly after the date of the agreement each of the family executed a will in those terms, and the whole were taken by the defender into his own custody. And he says that as the property of every member of the family would thus come to the survivor, it was immaterial how the funds of each were invested, and that he therefore, on the faith of these wills, invested the funds of Aitchison & Co., which he says belonged to himself and James alone, in the way already described. The only one of these wills which has been printed is that executed by James, who was the first decesser, and who died in 1866; and assuming the other wills to be similarly expressed, it appears that these were not mutual settlements. None of them refers to the settlements executed by the other members of the family, and each reserves full power to the grantor at any time to alter, innovate, revoke, or annul the settlement. I therefore can attach no weight whatever to the defender's argument, that James and he made the family investments referred to on the faith of his being in possession of these several wills.

"Before concluding, I should also notice that the defender, in support of his pleas that the

confectionery business of 'Aitchison & Sons' belonged exclusively to his mother and his brother James and himself, has produced two or three indentures between that firm and apprentices, in which partnerships are referred to. The first indenture is with Mr Ramsay, and is dated 19th November 1824, at which time the business was carried on exclusively in Little King Street and Register Street. The masters are there described as 'Mrs Jean Aitchison, widow of John Aitchison, lately baker there, Alexander Aitchison, and James Aitchison, bakers there, carrying on business under the firm of Mrs Aitchison & Sons.' The other two indentures are dated 29th May 1830 and 29th November 1833 respectively, after the Queen Street business was started. The masters are there described as Mrs Jean Aitchison, James Aitchison, and John Aitchison, carrying on business under the firm of Aitchison & Sons, confectioners in Edinburgh.' Now, it is remarkable that no indentures after 1833 have been produced. The defender says they had no apprentices after that time, but that must be a mistake, because the evidence shows that, at all events up to 1851, there were always several apprentices—certainly more than two. But this is really a matter of little moment, because until 1833, when the last indenture produced was entered into, Mrs Aitchison and her three eldest sons, Alexander, James, and John, were, excepting George, the only members of the family who were from their age qualified to carry on business or to undertake the teaching of apprentices. The other members of the family were either engaged in other occupations, or were as yet too young, and George was not a confectioner; and although the fact that Mrs Aitchison and certain of her sons held themselves out to their apprentices, and even to the public, as carrying on a confectionery business under a social firm, would have undoubtedly made them liable to the public as partners, it does not, as between the members of the family, create any presumption that such partnership was for their own behoof alone. At all events, any presumption so created must yield to the facts.

"Now, I think that the facts proved in this case abundantly establish that although Mrs Aitchison and her sons James and John may have chosen to call themselves partners, they carried on their business, not for their own behoof alone, but for behoof of all the other members of the family; and that as these members successively came into the business and devoted their time and attention to it, they were in reality, though not perhaps in form or in name, partners also. Indeed, I think it is clear that after 1835—at all events after 1851—if the concern of Aitchison & Sons had got into difficulties, every one of the sons and daughters would, when the facts came to be inquired into, have been held liable for the debts of the concern as partners, in respect of their interest in the capital and profits of the business.

"On the whole matter, therefore, I think that the defender is bound to hold count and reckoning with the pursuers in all the matters specified in the conclusions of the summons. The estate of John Aitchison, the father, formed undoubtedly the capital out of which the present business was created, and the defender, by joining his mother in managing that business, is liable to account for the original capital, none of which can be said to have been dissipated by the widow. Then, as a surviving executor of his mother, and as the

representative of James his brother, another executor, and as undoubtedly an intruder with her estate, and as indeed admittedly the general financial manager for the whole family, he is bound to account for his intrusions with her estate. And, finally, as the general financial manager of the business of Aitchison & Sons, in which his brothers and sister were equally interested, he is bound to account for all his intrusions therewith, including the drawings from Wemyss Place, in so far as received by him or accounted for to the general fund under his management. But as George Aitchison withheld some of these drawings for some years, and as the amount so withheld was either appropriated by George or given by him to his brother William and the pursuer, and as the pursuer represents both of his said brothers, it is necessary, in order to do justice to all concerned, that the drawings, in so far as not received by the defender, should now be accounted for by the pursuer and taken into account in the general count and reckoning."

At advising—

LORD JUSTICE-CLERK—I shall not attempt, in giving my opinion on this important and difficult case, to state in any detail the import of the voluminous proof which has been led, or the material facts which it discloses. They have been all gone over with great care and accuracy in the note of the Lord Ordinary, and we have had the advantage of a very able and exhaustive argument from the bar on their import. I shall content myself with simply referring to the more salient features of the history of this singular family, and then address myself to the not less singular questions which that history has raised for our decision. The outline of the career of the family is shortly as follows:—John Aitchison, the father of the family, was a baker in Edinburgh, in respectable but a humble enough position, having two shops, one in Little King Street, and the other in Register Street; he died in 1823, leaving a widow and nine children. Besides the goodwill of the business, he was possessed at his death of some house property, consisting of the shop and dwelling-house in Little King Street, and two other shops in Catherine Street, and personalty amounting to between £1300 and £1400. He left a trust-settlement under which the widow was to have the life interest of the whole estate, and the fee was to go to the children in such proportions as she might think fit. The widow, who was also executrix, seems to have been an energetic and enterprising woman. She carried on her husband's business from 1823 to 1828 in the old establishments, when she removed to a shop in Queen Street, in which, from that year to the present time, a trade in confectionery has been carried on by the family. The eldest of the sons was Alexander. He married early, and confined himself to the old baking business in his father's shops, for which he paid a rent to his mother. All the rest of the family continued to live together until the death of their mother in 1848, with the exception of one of the daughters, who died early. The Queen Street business flourished greatly, and it was carried on under the designation of Jean Aitchison & Sons. There seems no doubt that in 1831 Mrs Aitchison had assumed her two sons James and John formally as partners, and they are named as such in indentures dated in 1833.

George Aitchison, another of the sons, opened a business as a baker in Wemyss Place about 1832, which turned out a very profitable concern, and was given up in 1865 or 1866. It appears that although James and John were the only two ostensible partners, all the rest of the family assisted in the business in Queen Street. Charles, the pursuer of this action, was the youngest of the family. He became a skilful confectioner, and their seems little doubt that the prosperity of the Queen Street business was greatly indebted to him, but it does not appear that he had any specific allowance for his labours in the shop, nor any specific footing arranged in writing. He was eight years old at the date of his father's death, and at his mother's death, in 1848, was consequently thirty-two years of age.

There was but one bank account kept for the firm, and whoever were the persons entitled to operate on it, of which I shall afterwards speak, it seems sufficiently proved that from this account came all the funds by which the members of the Aitchison family were maintained, with the exception of Alexander, the eldest, and of George, who had his separate establishment. I rather gather as the result of the evidence that so close and intimate were the relations of the family to each other, and so complete the confidence which subsisted between them, that they obtained from John or James such money as they wanted for current use, and from time to time many investments were made, particularly in the purchase of house property, in the names of different members of the family, all the funds for which came out of the profits of the Queen Street business, aided by very large sums contributed by George from the business in Wemyss Place. This was the state of the family in 1848, when the mother died. Passing over for the present some important events which happened at that period, it is enough to say that the family continued to live together, the business to be conducted with great success on the same footing, and investments to be made in the same way, until 1873. Previous to this the family had made separate settlements in favour of each other. By the last-mentioned date they had all died excepting John, Charles, and Isabel, when for the first time disagreement arose between them, caused apparently by the fact that George and James had made separate wills in favour of Charles, the pursuer. The result was that Charles raised an action against John for the purpose of obtaining an account of the profits of the business, and claiming an equal share therein with his other brothers and sister excepting Alexander. This claim the Lord Ordinary has sustained, on grounds which he has fully explained in his note.

The claim substantially is rested on two alternative grounds—partnership and joint interest. It is said that Charles Aitchison was a partner from the first, and continued to be so throughout the whole currency of the Queen Street business, with all the rights and liabilities of a partner in a trading concern. But it is said, alternatively, that even if he was not a partner in any mercantile sense, the footing upon which the business was conducted from first to last was that all the family should have a joint-interest in its profits whoever the nominal or real partners were in a commercial and legal

sense. There is a third, and to my mind a very formidable view, whether the members of this family, conducting their affairs upon a principle of mutual and tacit confidence in each other, did not leave them in a position so abnormal and primitive as, whatever the moral obligation might be, to create no legal standing ground for such a claim as this. I have seldom found more difficulty in coming to a conclusion satisfactory to my own mind than on the problems thus presented.

First, After full consideration, I have come to a very clear opinion that the suggestion of a mercantile partnership on the part of the pursuer is one which cannot be maintained. The theory put forward by the pursuer on this head is, that from the first there was an arrangement or understanding that each of the children should become partners in the family business when they became of an age to accept and assume their share in it, and that although this was not evidenced by any writing at anytime, the whole conduct of the parties, and the facts and circumstances under which they continued to act, are sufficient to establish that such was the case. I do not doubt that such a partnership might have been established by a general arrangement of this nature. Neither do I doubt that without any written document it might be proved by facts and circumstances leading inevitably to that inference. But the difficulty I find in giving effect to this plea is, that I can find no trace whatever of such an arrangement having been made, or any facts or circumstances leading to such an inference. On the contrary, I think it clear that no such arrangement was ever made, and that the facts and circumstances established by the proof are wholly inconsistent with it. If there were any arrangement and understanding which could receive any legal effect, it was, I apprehend, of a nature entirely different.

The proposition to be proved is that Charles Aitchison became a partner of the trading firm of Jean Aitchison & Sons, and that he became, by contract between him and some one entitled so to contract, liable for the debts as well as entitled to a share of the profits of the concern. Whoever made the contract originally, and however it may be established, that must be the legal result.

Now, no one but his mother, old Mrs Aitchison, could have made this arrangement originally, and no one but the existing partners could have assumed him afterwards. But it is quite certain that old Mrs Aitchison never made such arrangement. It is proved beyond all doubt that from first to last she kept, and intended to keep, the business in her own hand, and subject entirely to her own will, excepting as regarded the two recognised partners. She thought as regarded Charles that she had complete control over him, and actually, on his engagement to be married, excluded him from any share in her own or her husband's estate, which she believed and Charles believed included the business, and which Charles never doubted she had power to do. I should not have laid much stress on the conveyance of his share in the partnership to her sons James and John, excepting that it seems to have been read, without any circumstance or remark, at the meeting of the family after the mother's death. But that fact proves the knowledge of the whole

circle that the imaginary arrangement never existed. But what to my mind is quite conclusive on this head is, that Charles never imagined for a moment that he was a partner. During the whole period from 1837, when he became of age, to 1848, when his mother died, he never did an act or made a statement implying that he was a partner. He never drew on the firm's account. He never signed the company firm. He never in any way held himself out to the public as a partner, or, as far as I see, did any act which could have made him liable, or indicated any intention of making himself liable, for the company's debts. I cannot regard the investments which were made from time to time as participation in the profits of the company, because these were manifestly not distributed on any such footing. But the most conclusive of the facts and circumstances in the case are the acts and statements of the pursuer himself, because from first to last, down to the date of his mother's death, he never thought that he was a partner or said he was, but said and thought the reverse.

The circumstances connected with his engagement to be married, and the action which was brought against him for breach of promise, throw a significant light on this part of the case. He was at that time twenty-nine years of age, and if the plea I am now considering had been true, had been a partner for eight years. I am not disposed to say that the statements made by a counsel in a judicial pleading are necessarily the statements of the party for any purpose but that of the law suit itself. But the fact that the statements in the defence lodged for him to the action were made, and made unquestionably with his knowledge and sanction, is a fact of very considerable importance. He does indeed say that he may or may not have seen this paper, and that his brothers James and John managed it for him; but if he had never seen it he could hardly be ignorant of that fact. It is there stated on his behalf, not merely that he never was a partner of the firm of Aitchison & Sons, but that the lady who sued him had tried to entrap him on the mistaken idea that he was a partner. I cannot believe that any man could authorise such a statement knowing it to be false, and if his brothers John and James authorised it, it only shows the more clearly that they knew it to be true. It is indeed suggested that these statements were made for a purpose, to prevent the lady from arresting funds in the hands of the copartners. But truth as well as falsehood may be stated for a purpose, as I have no doubt these statements were. And lastly, on this head, when Charles in the witness-box is confronted with these statements he cannot deny their truth. He says—"Did you instruct Mr Wotherspoon to say in your defences that you were not a partner of the business of Aitchison & Sons? No; I was in the sense that by the two wills I expected to get it, but there had nothing come. I always expected it to come to me, but I had never got it. It was to come from the will of my mother, and I understood she had the power of excluding me." In other words, Charles knew that he was not a partner at that time, but only hoped he might become so. The mother executed two deeds for the purpose of excluding him from any share in the succession, and thus it seems to me clear that all the persons with

whom this supposed contract was made, the mother, the two brothers, and Charles himself, knew quite well that no such contract had been made.

Some isolated facts were thrown in as make weights to help this theory, but they have no bearing on the case. I do not detain your Lordships by reference to them. They were much later in date, and were of no materiality as proving partnership. But I have sketched the principal grounds on which I think that this part of the case must fail. There was no partnership in 1848 at the mother's death, and therefore the imaginary contract never was made.

I pass on, however, to the second and, in my mind, much more important feature of this case. The relation between the different members of the family was not, and never was supposed to be, one of mercantile partnership. It was rather one of domestic community. The whole family lived together, worked together, and had to a certain extent everything in common. They present a very remarkable and very pleasant picture of family concord and confidence, which was unbroken for nearly fifty years. They never thought of putting their interests in the legal light of a commercial partnership, but they evidently did consider the wonderful prosperity which had descended upon them as a joint-concern, and that concern the estate of their father, out of which it had all grown. Old Mrs Aitchison never ceased to think that she and her children were administering the father's estate, and that her power of division extended to the large increment which the business yielded, just as it would have done to the £1300 which he left in 1823.

As regards the mother's impression, it is easy to see on what it rested. She had taken the capital of her husband's estate and had invested it for her children, and she considered herself bound to deal with its fruits as if it had been the estate of which she was the administratrix. There was some reason in that—the business had no other capital than what she furnished, and although that fact might not have been sufficient of itself to render these profits the property of the children, it very reasonably accounts for the light in which she regarded them. By her will she divided her husband's estate among her children equally, and in my opinion the whole of this case turns on what she and the children understood that their father's estate consisted of.

This brings me to refer to what appears to me to be the most important element in this singular history—I mean the minute of the meeting of the family of the late Mrs Jean Aitchison, held on the 27th of November 1848. There was produced at that meeting two writings—A disposition dated—[*quotes the minute*].

This minute is signed by all the surviving children, and it contains an agreement to divide the estate of the mother and the estate of the father as if the cancellation of Charles' interest had never been made. Then this is followed by a minute of agreement in the year 1851, between Alexander Aitchison, the eldest son, on the one part, and John Aitchison, on the part of his other brothers and sister, taking burden for them, on the second part.

The claim which Alexander had made, and which was adjusted by this minute, was made on precisely the same grounds as that of the pur-

suer. He wanted a division of the partnership property as one of the family entitled to participate in his father's estate. The minute of agreement makes over certain heritable subjects to Alexander, which it is said are to be henceforth the property of Alexander Aitchison, and his brothers and his sister are at their expense to concur in making them over to him, and he is to be infest therein at their expense. On the other hand, it is stipulated that the remainder of the property of the late John Aitchison, or of his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all deeds which may be necessary for fully vesting them therein. Then follows an obligation of a mutual discharge between Alexander and the rest of the family.

Now, that which Alexander Aitchison had claimed, and which he hereby discharged, was a claim on the company stock. It appears clearly from the evidence that that was the substance of his contention with the family. He wanted the company wound up and the estate divided, from which it appears quite clearly that the property of the widow and family, which was henceforth to be the property of the other members of the family, and the claims against which were to be discharged, were truly the profits of the business. It cannot be concealed that even in these writings there is a certain amount of ambiguity involved, but their importance consists in this, that if, as I am inclined to hold, the other circumstances of the case indicate throughout a community of interest from first to last, then this last-mentioned document, read in the light of these circumstances, amounts to a written acknowledgment of that common interest under the hand of John Aitchison as acting for all the members of the family. I cannot believe that the restitution of Charles under the first minute, or the discharge by Alexander under the second, only referred to the two sums of £1300 which had been left by their father and mother. If I am right in this view of this transaction, it relieves the case of all technical difficulty as regards the proof of trust, and amounts to an acknowledgment in writing of, what all the evidence seems to me to indicate, a common interest in the whole family in the realised fortune.

The Lord Ordinary has so fully explained the import of the general evidence on this subject that I forebear to enlarge on it. If I am right in my reading of these writings, the case rests, as I think, on a sufficiently solid foundation, and one much more consistent with the proved facts of the case than the theory of a commercial partnership in law. If a family of brothers and sisters, each engaged in their own avocations, agree to live together, and throw their separate earnings into a common fund, they will not thereby become partners in the separate trades or callings in which each might be engaged; but still, if they choose, by writing under their hand, to indicate the nature of their arrangement, the joint purse might be equally divisible. Such, I think, is the case here; nor do I think that the technical rule of the law in regard to the proof of trust will avail to prevent us from giving effect to what we think was the true intention of the parties.

If, however, I am wrong in my view of these writings, it may be that, with the most friendly and affectionate intentions towards each other, the members of this family have failed to put their intentions in a form which the law will enforce. It is impossible to disguise that this alternative is capable of being supported by considerations not without weight. But with the best attention I have been able to give to a case which has perplexed me more than any I ever had occasion to consider, I am of opinion, on the grounds which I have shortly illustrated, that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD ORMDALE—This is a very important case, not only as regards the large pecuniary interests involved, but also the nicety and difficulty in some respects of the legal principles upon which it depends.

In considering the case the Court has not only had all the aid which a full and exhaustive argument from the bar could afford, but also the further advantage of the very able and elaborate judgment of the Lord Ordinary.

The original defender, John Aitchison, having died since the Lord Ordinary's judgment was pronounced, his sister has been sisted in his place as his executrix and representative. It will be understood, however, that when I refer to the defender I mean the late John Aitchison. In dealing with the case I think it will be found of much importance, and conduce greatly to a sound result, to begin by endeavouring to ascertain what is the nature of the contract or other ground upon which the liability of the defender to the pursuer rests, for that there is some measure and description of liability is not disputed. Is it the contract of service, as maintained by the defender, or the contract of partnership, as maintained by the pursuer, or does the liability of the defender to account arise simply from the position of trustee, which, in one view of the case, it may be supposed he occupied in relation to the pursuer during the greater part of their lives?

That the pursuer was merely a servant in the Queen Street establishment of Aitchison & Sons from the time he went there in 1835 till the raising of this action in 1875, a period of forty years, and that he can have no claim upon the defender on any other footing, is, I think, a wholly inadmissible view of the case. And yet, according to the defender's statement in the record, and when examined as a witness in the case, not only was the pursuer's position in the Queen Street business that of a mere servant, but his services as such were so trifling as not to be "equivalent to the cost of his maintenance." This is *in terminis* the statement he makes in the third article of his statement of facts; and accordingly he admits in the course of his evidence that he never paid him or any of his brothers any salary; and afterwards he says—"There was never any arrangement with Charles as to what wages he should get. He came and got money from me occasionally." And so, upon such evidence as this, wholly unsupported by any entries in the books of the concern—books admittedly kept by or under the charge of the pursuer himself—and in opposition to all the other evidence in the case, which, whether sufficient or not to establish the ground of action maintained

by the pursuer, is at anyrate conclusive to the effect that the pursuer's position in the business was not that of a servant merely. In regard then to that view of the matter, I consider it quite unnecessary to say more, except to remark that the circumstance of the defender having put it forward, and in connection with it attempted to disparage without sufficient cause, I think, the position and capacity of the pursuer, is calculated to detract very much from his credibility in other respects.

If, then, the defender's view of his own and the pursuer's position in the business in question, viz., that of master and servant, be correct, and an accounting on that footing may be dismissed as altogether untenable, the only other grounds of liability and accounting as between the pursuer and defender which I think were suggested were those of trust and partnership—that is to say, either that the defender must be held to have stood in the relation of a trustee to the pursuer, or that he and the pursuer, with other members of the family, had carried on the business in question in partnership, and that the defender having taken possession of the partnership funds and property in whole or in part is bound to account to the pursuer for his share thereof.

Now, in regard to holding that the defender's position was merely that of a trustee, and that he is subject to liability to account in that character alone, I have been unable to satisfy myself that this is the true ground of action, or that it can be sustained in the circumstances. It is certainly not the ground upon which the pursuer's counsel maintained his case at the bar. On the contrary, they distinctly stated, in answer to the direct inquiry of the Court, that it was partnership upon which they relied; and for myself I do not see how they could well have given any other answer, having regard not only to the whole circumstances of the case, but especially to the passage in the evidence of the pursuer when examined as a witness, in these terms—" (Q) What have you understood all along to be your position in this business?—(A) Just a partner. (Q) Equally with the rest?—(A) Yes; equally. (Q) With all your brothers and your sister?—(A) All the same. (Q) Can you say from anything which was stated to you by George and William what they understood to be their position?—(A) Just the same." It would be difficult therefore, I think, for the pursuer, in the face of such evidence as this, given by himself, to maintain his action on any other ground than that of partnership. Besides, it is very obvious that if it was purely trust and not partnership that the pursuer desired to make out, a great part of the proof must be held to be incompetent; for it is a rule of the law of Scotland, about which there can be no question, that a trust can only be established against a party by his writ or oath, as required by the Act 1696, cap. 25. But in this case the proof has not been governed by any such rule. On the contrary, a great deal of parole testimony has been adduced quite inconsistent with it, although very valuable in the constitution of a partnership. I do not, indeed, see how the indispensable foundation of a trust can be found in this case. There is no doubt the family agreement embodied in the minute No. 20 of process, dated 27th November 1848, which being subscribed by both the pursuer and defender, must

be held to be the writ of each. But after careful consideration of that writ I have been unable to hold that it can be taken as constituting a trust—such a trust as would be necessary to support the present action against the defender. It bears as its sole object to set aside a codicil to her will by old Mrs Aitchison, and to declare that the estate of her husband, the father of all the parties to the minute, should be divided as if no such codicil existed. But beyond this there is nothing in the minute, and it certainly contains no express reference to a trust or to trustees. And if parole evidence were admissible at all in a question as to the constitution of a trust, in order to explain the true meaning of the minute of 27th November 1848, I do not see how the parole evidence in the present case can aid that object. No witness is asked anything, I think, in relation to the minute except the pursuer and defender. The former is not, however, asked a single question as to what he understood to be the meaning and effect of the minute. He is merely asked some questions as to its bearing on another minute of agreement between old Mrs Aitchison and her sons John and James, in which they describe themselves as the “only partners of the company carrying on business in No. 77 Queen Street, Edinburgh.” How far that agreement may be a piece of evidence in the question whether the pursuer was or was not a partner in the Queen Street business will be afterwards considered with the rest of the evidence bearing on that matter, but as to its establishing a trust, or being any evidence to that effect, I fail to understand. As to the defender’s parole testimony, again, he is merely asked in regard to the minute of agreement, No. 7 of process, about his mother’s signature to it, and as to its meaning or effect; and so, as to the minute of 27th November 1848, No. 20 of process, he is merely asked a few questions to show that all the family were present at the meeting, and that the minute sets out what really occurred.

In my opinion, therefore, the ground of the defender’s liability to account to the pursuer must, if it is to be established at all, be made out on the footing of there having been a partnership between them and their brothers and sisters. There can be no doubt, I think, that such a ground of action has been averred and pleaded by the pursuer with sufficient relevancy and specification, and this I did not understand to be disputed.

It only remains, then, in any admissible view that I can take of the case, to consider whether the pursuer has established his claim against the defender for accounting on the ground of partnership. But, before examining the evidence as applicable to such a ground of liability, it is necessary to keep in view the mode by which partnership may be legally constituted, and the nature of the evidence by which it may be competently established. Professor Bell—and no higher authority could be appealed to on the subject—says, section 351 of his Principles, that “Partnership may be described as a mutual contract and voluntary association of two or more for the acquisition of gain or profit, with a contribution for that end of stipulated shares of goods, money, skill, and industry—the stock of the society being held in trust for creditors.” And in section 353 he explains that “The stock of the company, as increased or diminished, by the dealings of the

company, is not only common and held *pro indiviso* by all the partners, but it is vested in them in trust for the creditors of the company in the first place, and afterwards for division among the partners, according to the shares of each.” I do not suppose that exception can be taken to this definition of partnership, and I think it was incumbent upon the pursuer to make out that there was a partnership, as so defined, between him and the defender and the other members of their family.

But in order to do this it was not necessary for the pursuer to shew that there was any written contract of copartnership specifically setting out the kind of business which was to form its object, the date of its commencement, the number of its partners, the capital or stock contributed by each, or any other particulars. As to this Professor Bell says in section 360 of his Principles, in reference to partnership as between the partners themselves—and that is the question which presents itself for consideration in the present case—that “Partnership as between the partners themselves is a consensual contract, and on such evidence as the law of Scotland admits in proof of consent, the partners will be entitled to their rights as such, or bound to the public. This may be either, 1st, a solemn written contract of copartnership duly authenticated; 2d, a less formal writing—letters exchanged, minutes, articles subscribed by initials and afterwards acted upon, or articles written in the ledger; 3d, circumstantial proof; or 4th, parole evidence of clerks, agents, or persons dealing with the company.” That the law of England is to the same effect is obvious from the statement in Mr Justice Lindsay’s work on Partnership (vol. 1 of last ed. p. 94), where he says that—“As partnerships, even for long terms of years, very often exist in this country without any written agreement at all, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves, the evidence relied on where no written agreement is forthcoming is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes in which facts can be established.”

When the true nature of partnership is considered, and the various modes in which it may be established as a consensual contract, as now explained, are kept in view, much of the difficulty which might otherwise be experienced in arriving at a determination in this case will, I think, disappear. It must also be recollected that the alleged partnership, if it existed at all, continued over a very long period of time; that the acts and conduct of the parties, as well as the other circumstances occurring during all that time, must be considered as a whole, and not taken and disposed of in reference to separate and detached periods, or separate and detached events.

The only question, then, that remains is the jury one, for it is essentially a jury question, although tried by the Court as in place of a jury—Whether the pursuer has sufficiently established that the alleged partnership existed? And this

leads me to a consideration of the evidence in the case. It is not, however, my intention to enter with much detail or minuteness into an examination of the evidence; nor is it necessary that I should do so after the thorough manner in which this has been done by the Lord Ordinary. There are, however, some points arising on the proof in regard to which it may be right that I should say a few words.

There is, first, the peculiar state of matters for the time between the death of old Mr Aitchison, the father of the parties, in 1823, and the death of the widow, their mother, in 1848. If the question of partnership had arisen in reference to and been limited to that period of time alone, the pursuer might have had more difficulty to encounter than he has in the case as it stands, for undoubtedly the relative position of parties was peculiar, and in certain views scarcely consistent with partnership. But when the acts and conduct of the parties, and all the circumstances which subsequently occurred, are also taken into consideration in connection with and in continuation of these of the more limited period I have referred to, a flood of reflected light is let in which enables the Court to determine what the true position of the parties has been throughout, and what are their respective rights and liabilities. For example, as the pursuer was in pupillarity for some part of the limited period between the deaths of his father and mother, he could neither have discharged the duties, nor subjected himself to the responsibilities of a partner.

But it is also indisputable that his mother and brothers, including the defender, who had attained majority long before him, might, if they pleased, have so acted towards him, and so dealt with his patrimony, as to entitle him after he came of age to assume the position of a partner, and warrant him in insisting, as he now does, for an accounting with the defender. This very point is dealt with by Professor Bell in his Commentaries (vol. ii. p. 624 of 5th ed.), where he says—"One who is incapable of consent—a pupil, an idiot, or a lunatic—cannot enter into a partnership; but they may continue to enjoy the benefit of a share in a partnership which has pre-existed or has descended to them." Mr Lindley, again (vol. i. p. 82), says—"An infant may be a partner; but, speaking generally, while he is an infant he incurs no liability, and is not responsible for the debts of the firm; and when he comes of age, or even before it, he may, if he chooses disaffirm past transactions." But, as Mr Justice Lindley also shows (ib. p. 84), the infant may after he comes of age affirm and ratify what has been done for him, and continue the partnership which had previously commenced. I cannot, therefore, see that any insuperable difficulty arises from the age of the pursuer during some part of the time between the deaths of his father and mother, or from the apparent assumption, on one occasion at least, by his mother of power to disinherit him and cut him off from all connection with the alleged partnership business. The conduct of the pursuer's mother in this respect appears, as has been satisfactorily explained by the Lord Ordinary, to have been simulated for a temporary purpose, and was very soon departed from.

Nor do I think that the written documents, very few in number, founded on by the defender as proving that he and his brother James were

the only partners of Aitchison & Sons, create any great difficulty, when all the circumstances connected with them are kept in view. The pursuer was not a party to any of these documents, and it is not proved that he had ever seen any of them till they were produced in the present action, except the minute of agreement of 23d December 1847, No. 7 of process, to which I have had occasion already to allude. But the pursuer was not a party to that minute of agreement, and of course he was not in any way committed or bound by it, at least directly. It was argued, however, that as it was referred to in the minute of meeting of 27th November 1848, No. 20 of process, and as the pursuer was present at that meeting and took no objection to the statement in it, to the effect that the defender and James Aitchison were the only partners of the company carrying on business in Queen Street, he must be held to have admitted that as a fact, and is now barred from maintaining the contrary. I cannot think so, having regard to the pursuer's explanations when examined as a witness, and the mass of evidence in the case inconsistent with and contradictory of any such theory.

Another piece of written evidence on which the defender seemed greatly to rely, but with which, I must own, I have not been much impressed, is the statement made in name of the pursuer in his defences to Miss Tucker's action against him, to the effect that he was not a partner of the Queen Street company. But, besides the reasons assigned by the Lord Ordinary for laying that statement aside as of little moment, I must remark that I greatly doubt whether it is admissible or competent evidence at all in the present suit. It was a statement made in a different suit with a different party and in reference to a different matter altogether; and it has not, I think, been sufficiently proved that the pleading in which the statement appears had been seen by or approved of by the pursuer, although made for him by his solicitor or counsel. In the case of *Marianski v. Cairns* it appears to have been held in the House of Lords (1 Macqueen, p. 212) that, as a general rule, pleadings for a party in one suit cannot be used in another by way of admission against him unless the pleadings were signed by himself. Now, as the pleadings for the pursuer in the suit with Tucker were not signed by him, the statements contained in these pleadings cannot legitimately be used or founded on against him in the present case.

But while there are some written documents of more or less importance which the defender has founded on as furnishing evidence in his favour, there are other writings which appear to me to furnish evidence equally strong, if not stronger, against him. Take, for example, the minute of agreement of 17th March 1851, No. 9 of process, between the defender and his eldest brother Alexander Aitchison, when the latter went out of the business and separated his interests from the rest of the family. John, the defender, entered into that agreement, as it bears, for himself and "on the part of his other brothers (including the present pursuer) and sister." By the second head of that agreement it is stipulated that, with the exception of what is specially assigned to Alexander, "the remainder of the property of the late John Aitchison, or of

his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family." It rather appears to me that the defender was here dealing with the whole property and interests which had accrued to him and all the family from both father and mother, and if so, the whole property and interests--and the company business of Aitchison & Sons was and is a very valuable property--which he maintains in the present action to have then belonged to him after settling with Alexander, must have comprehended the very partnership property and interests now in dispute. And if I am right in this, it is all but conclusive against the defender, especially when taken in connection with what appears to be the relative explanatory statement of Alexander Aitchison, in his own handwriting, No. 173 of process, and the formal disposition, No. 144 of process, which was shortly afterwards executed by Alexander of the Queen Street shop, where the business was carried on in favour, not of the defender only, but of him and also of the pursuer and all the brothers and sisters then alive.

Independently of and in addition to the written documents, there is a great deal of what appears to me to be very valuable oral testimony, which, indeed, was indispensable in explanation of the acts and conduct of parties. Now, I cannot help thinking that the preponderance of the parole testimony is favourable to the pursuer and against the defender. After very careful consideration, I think it establishes amongst others the following important points--(1) That there was throughout a common purse or fund into which, on the one hand, all the drawings from the Queen Street business and its branches, and the rents of the houses, and interest of the other investments made by them from time to time were put; and, on the other hand, all the personal expenses of the parties were drawn as they required; (2) that it is also established that the pursuer, from the time he joined the business in 1835 till the present action was raised, was as constantly in attendance and charge of his own department of the business as the defender was of his; (3) that it is also established that in or for such attendance and charge there is no indication whatever of the pursuer having ever acted, or been paid or treated as a servant or employee merely in the business any more than the defender himself; (4) that it has, on the contrary, been proved by distinct and uncontradicted testimony that the defender acted, and was looked upon and considered by others, as a partner of the company just as the defender was; and (5) that no rent was ever paid by the company or by the defender and James, assuming that they were the only partners of it, as the defender says, for the Queen Street premises, although according to the title, and indeed admittedly, these premises belonged to all the family alike, and not to the defender and James or either of them alone.

It only remains for me to notice the Wemyss Place baking business, and to say, that although this part of the case appears to be attended with some difficulty, not attached to the Queen Street business proper, yet, for the reasons stated by the Lord Ordinary, I think it must be held to have been very much of the nature of an adjunct to or branch of the Queen Street business. This is,

I think, the only view of the matter that can fairly be taken in a question with the defender.

On the grounds, therefore, which I have now explained, and for the reasons I have stated, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be adhered to.

LORD GIFFORD--This is in some respects a difficult and perplexing case, but I have felt its difficulty to be rather in the application of legal principle to a case so singular, and perhaps unprecedented, than in any doubt as to the fair import and meaning of the evidence which has been adduced.

The legal rights of the parties, the rights of the pursuer and of the original defender, who is now represented by the sole surviving sister, are to be determined on a consideration of their whole actings and conduct, and of the actings and conduct of the other members of the family during the whole period of their respective lives, at least from the year 1823, when old John Aitchison, baker in Edinburgh, the father of the whole family, died, down to 1875, when the present dispute arose. The family history thus extends over a period of upwards of fifty years. During that period the whole actings and conduct of the pursuer and defender, and indeed of all the members of the family, must be carefully considered, for it is upon a just estimate of the legal effect of these actings and of that conduct that the rights of the individual members of this family must be determined.

The history of this family is almost unique. Perhaps in earlier and simpler times, when manners were more patriarchal, the occurrence of such a history might be more frequent. In modern times, at least, and with modern manners, its occurrence is and must be very rare.

Old John Aitchison died in 1823, leaving a widow and a family of nine. None of the children excepting Alexander were ever married. The widow and the whole family, excepting Alexander, who was married in 1834, always occupied the same dwelling-house. They lived as one family under the same roof. From time to time each of them, as they attained, I may almost say, puberty or early youth, contributed their services and efforts for behoof of the common and undivided family. At first the widow and the elder children took up and carried on the baking business which the father had left at his death in 1823. From time to time, as the other members of the family came in, they extended that business, took additional shops in different localities, improving and extending the business by adding to it a large and what ultimately became its most important branch, that of confectionery, skilled cooking, and the preparation of ices and desserts. In the conduct of this business in its various branches, and at the different shops, each member of the family devoted himself or herself to the department or work for which each was best suited. The original defender John, who had received a mercantile education, became bookkeeper and cashier. The pursuer ultimately became the practical confectioner, and seems to have had very high skill in the preparation of the delicacies of the table. Other brothers superintended the bread and biscuit baking, or bought and dealt in wheat and flour, while the daughters, or such of them as were not needed to super-

intend the domestic arrangements of the common dwelling-house, served in the shops and attended to the customers at the counters. There never was any written contract of copartnery, or any written deed of agreement of any kind—the family had so much confidence in each other that they never thought of defining their rights in or reducing their agreement to writing. Their cordiality was so great, their confidence in each other so exuberant, that they never seem to have thought of asking even in their own minds what their rights were. They were brothers and sisters, and that was enough, and as morning and evening they met round the common table, or as they separated daily each to his appropriate work, but all contributing to one common end, and as they rejoined at evening—one unbroken circle—no question of legal right seems ever to have shadowed their primeval life, for no one ever called anything that he had his own.

From the first this united family had to all intents and purposes a common purse. The old father, John Aitchison, who died in 1823, had left, besides some heritable property, a sum of about £1300. The widow—the mother—seems to have taken possession of her husband's estate, and the whole went into the common stock, and was applied in carrying on the common business. None of the children ever dreamed of asking a division of patrimony either before or after the widow's death, which occurred in 1848, nor did any of them ever ask or obtain any count and reckoning with each other either in reference to their father's succession or their mother's succession, or in reference to the money made in the different shops and businesses which from time to time they carried on. The only exception is the case of the eldest son Alexander, who, having married in 1834 (and he was the only married member of the family), came to have interests which were or at least might be separate from, if not adverse to, those of his brothers and sisters. Alexander, from his marriage in 1834, seems to have managed as his own a separate business, but he still retained, at least he claimed to have retained, his share and interest in what may be termed the family or community stock and estate held in common by all the other members of the family, and this claim was not finally settled and Alexander Aitchison finally paid out till 17th March 1851. Of that date a minute of agreement was entered into, No. 9 of process, between Alexander Aitchison, on the one part, for himself, and John Aitchison, on the other part, acting not for himself only, but for all the other members of the family. By that agreement Alexander Aitchison agreed to take, and did take, in full of all his claims certain heritable subjects specially agreed upon, and a share in the Stockbridge Mill Company, and in respect thereof he discharged his brothers and sisters of all further claim; and, on the other hand (and this is very material, for the deed is the deed of the late John Aitchison, the original defender, acting for himself and for all his brothers and sisters except Alexander), it is expressly stipulated that the remainder of the property—first, of the late John Aitchison, that is, the common father; second, of his widow, that is, old Mrs Aitchison, who had died three years before; and third, of the family, that is, the whole children, most of them then getting to be elderly persons—I take the words of the

deeds—"is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all deeds which may be necessary for fully vesting them therein." In this way every article or item of property belonging to the family, except what was specially handed over to Alexander in 1851, is declared to be and plainly was the property—that is, the common property—of the other members of the family—that is, of the whole children excepting Alexander.

It appears to me that this incident in the family history—I mean the final paying out or paying off the eldest son Alexander in 1851—throws great light upon the footing on which the rest stood at that date. *Exceptio firmat regulam.* Alexander is no longer to be a member of this family community, but all the rest are to continue to be so. The discharge of Alexander and the deed executed between him and John really amounts to an express declaration that everything that is left is in point of fact the joint and *pro indiviso* property of John and his whole remaining brothers and sister. The perfect community and equality of the interests of the remaining brothers and sister are thus made all the clearer by the exceptional exclusion of one brother, Alexander.

This conclusion—I mean the conclusion that all the property of the brothers and sister except Alexander was held in common—is confirmed, if confirmation were necessary, by the mutual wills which a couple of months afterwards all the other brothers and the sister made in favour of each other. These wills are Nos. 10, 11, 12, 13, 14, and 15 of process, and thereby each member of the family constituted all the others—excepting always Alexander—to be in equal shares their respective universal heirs, and thus the family all living in the common domicile in Queen Street were united both in life and in case of death as one community, each having equal shares in one undivided common fund.

Practically this family had only one bank account, for although individual members seem on one or two occasions to have set apart sometimes in bank what may be called his or her *peculium* or pocket-money, there was really only one common bank account for their common earnings. Into this account went all the profits which arose from the various businesses and transactions in which the family were engaged. Out of it came from time to time the sums required for the investments which were made from time to time, chiefly in the purchase of heritable subjects, in loans, and in shares in public companies. The bank account was in name of "Jane Aitchison & Sons," Jane Aitchison being the widow's name, and it was operated upon by James Aitchison, by John Aitchison, by George Aitchison, and by Isabel Aitchison, all of whom had power to sign cheques and draw whatever sums were required for common purposes. The fact that others of the family, and in particular the pursuer, did not draw and had no right to draw on the bank account is immaterial, for it often happens even in strict mercantile partnerships that only some of the partners are allowed to operate on the bank account.

The mode in which and the persons in whose favour the various investments were taken occasion some difficulty, but I think, on the whole,

the history of these investments points to continued community of interest. Large sums seem to have been saved almost every year, for the businesses were all prosperous, and these sums were invested from time to time as the balance accumulated in bank. At first the investments were taken in the names of all the children, including Alexander before he was paid out, but afterwards they were taken, so far as I can judge, almost arbitrarily, sometimes in name of one member of the family, sometimes of another, and sometimes of several different members of the family, the names being selected arbitrarily or at least without any apparent reason. It is not possible to state any principle upon which the various investments are allocated among the different members of the family. It is not pretended that there was any attempt at equality, and it is certain that there never was in any one single case any assignment of special value given, such as wages for service rendered or salary or remuneration for work done by any particular member of the family.

And then after the investments were made what followed points still more strongly to the continuing community in the whole and in each of the investments, for the rents, dividends, and interests accruing on the investments were not uplifted, drawn, and retained by those particular members of the family in whose names the investments were made, but they all came back to the common stock, helped to swell the annual surplus of each year, which again went to the purchase of new investments made in the same way, and the profits of which accruing from time to time were deposited and accumulated as before.

The adoption of special names for the investments seems to have arisen from the advice which the family had received that the titles to heritable subjects could not be taken to a company or community, but must be taken in the names of specified individuals. In the fullness of the confidence which subsisted between those brothers and sister it seems to have been thought of no consequence whatever in whose names any of the investments were taken.

I gather, then, from the evidence regarding the investments additional corroboration of what appears in the whole history, besides, that the whole property of this family, excepting Alexander after 1851, was the common property of all and of every member thereof.

I need not go further into the details of the evidence which has been laid before us. These details all point one way. Even the seeming exceptions when carefully examined really make for the same result. For example, when George Aitchison, instead of carrying the daily drawings of the Wemyss Place shop to his brother John in Queen Street, as he used to do, to be banked in common form in the common bank account, began to accumulate these drawings in tin boxes in his back shop till they amounted to a great many thousand pounds, he did so not because he thought or held that these drawings were his own, but as a means of inducing his brother John, who was common cashier, to tell him the state of the common affairs, which he thought John was concealing or withholding, and with whom George did not want to come to open rupture, and accordingly these very tin-box accumulations and the bank account, which after the attempted

burglary superseded the tin boxes, were not kept by George to himself, but were applied just like the ordinary investments of surplus profits between himself and his brothers William and Charles. From first to last not a shilling was ever paid in wages to any one member of the family, although they all contributed their work and labour and skill; and yet, except upon the footing of community and common interest, the defender's theory must be that some of the brothers and sister were merely the servants or employees of the others, though who were masters and who were servants it is impossible to say. When the country residence of Mount Vernon was purchased in 1854, the title of it was taken to all the brothers and sisters then surviving except Alexander, and its fruit and produce—grapes, peaches, and strawberries, very large apparently in amount—all came to the common Queen Street business. The very attempt to exclude the present pursuer, or to attempt or pretend to exclude him when in 1845 he got into a scrape by promising to marry Miss Tucker, and was cast in damages, really confirms his equal interest in the whole, for when Miss Tucker's diligence was got rid of, and she had been induced to accept a compromise sum in full of her claims, the pretended exclusion was done away with, and the pursuer was recognised as an equal member of this fraternal community.

Without going further into the evidence, the result is, that I have ultimately come, and really without much difficulty, to the conclusion that all the members of this family, including old Mrs Aitchison while she survived, agreed that their whole property should be held in common as one individual family; that the business which they carried on, at first in one, and afterwards in several shops and departments, should belong to them all, and be carried on for their common benefit and behoof; that the whole profits and produce both of the property and of the business should form one common fund, in which all the members of the family should share in equal proportions. It is also proved that when Alexander Aitchison left this community in 1851 the whole other members of the family agreed to continue joint proprietors in equal shares of the businesses and properties which remained after Alexander was paid out. I have no difficulty in coming to this conclusion in point of fact. The conduct and actings of the parties admit, I think, of no other interpretation, and the equitable claim of each member of the family to one just and equal share of the whole accumulated stock and property, is, I think, clearly established.

It only remains to consider whether the law can give effect to an agreement of family community, as I may call it, established by facts and circumstances, as I think has been done in the present case, and if so, what is the legal character and the legal position of the parties to such an agreement, and what is the legal category under which such agreement falls.

Now, I am of opinion that it is quite legal and competent for the members of a family, or indeed for any person whatever, whether related by blood or not, to enter into such an agreement as that made between the members of this Aitchison family, and I think such agreement (I have called it provisionally an agreement

of community) may be legally and competently proved, as has been done in the present case by facts and circumstances.

But I think the compact between the members of this family is really a case of partnership, and falls under that category of the law. No doubt it is much wider and broader than mercantile partnerships usually are. It embraced the whole property of all the partners, at least all the property to which they had right by succession from their father and mother, with all its increments, and all which each of them had earned or contributed to earn from their early youth upwards. This may be a very uncommon kind of partnership, but there is nothing illegal in it, and all the incidents of partnership are equally applicable to it as to the ordinary case where each partner only contributes a specified portion of the special capital upon which the trade is to be carried on. Indeed, community is just a name for a wide and universal partnership, which includes the whole lives and the whole property and earnings of all the *socii*.

Again, it may be difficult or impossible to say at what precise date each member of this family partnership acquired the rights or incurred the liabilities of a partner, but this may often happen even in strict mercantile partnerships, when such are constituted not by formal agreement but by long actings of the partners *inter se*. When once sufficient proof by actings and circumstances has accumulated, the law may affirm the partnership, though it may not be possible to fix the precise date of its commencement. It is quite established law that a pupil or a lunatic who is adopted as a partner, and whose funds are employed in a partnership business, will be held as a partner to the effect of sharing in the whole profits, although from his inability to consent he will not be liable as a partner to third parties, and will not be answerable if the concern proves unsuccessful and results in loss.

It may also be quite true that if any question had arisen with third parties, such third parties might have been quite unable to establish this partnership so as to bring home personal liability to the pursuer or to his sister or to some others of the less prominent members of the family. But this would be simply from the difficulty of the proof as undertaken by third parties in the case supposed. It would be an accident, not of the contract, but of the difficulty of proving it, and this often happens even in strict mercantile partnerships. There are often sleeping partners who lie so quiet and are so concealed that the public creditors of the firm cannot discover them so as to bring home liability to them, and yet in questions *inter socios* their rights as partners may be made perfectly clear.

In short, I am prepared to hold, although at first I had great difficulty in doing so, that the present is a proper case of universal partnership between all the members of the Aitchison family, Alexander of course being excepted after 1851—that the stock of the partnership consisted of the whole patrimony or succession of all the members of the family, with the whole increment and accumulations which resulted either from the employment of that patrimony in the various businesses in which the members of the family engaged or from the investments in the acquisi-

tion of which from time to time parts of the common stock were expended.

But after all I am not sure whether there is any necessity for defining with logical accuracy the precise legal category under which the present case falls. The Lord Ordinary has not done so, and I think it will be sufficient if we adhere to the interlocutor which he has pronounced.

The Court adhered.

Counsel for the Pursuer—Muirhead—Asher—Keir. Agent—L. Thomson, S.S.C.

Counsel for the Defender—Balfour—Mackintosh. Agents—Wotherspoon & Mack, S.S.C.

Tuesday, July 24.

FIRST DIVISION.

[Lord Curriehill, Ordinary

GIBSON'S TRUSTEES *v.* ROSS AND OTHERS.

Succession—Fee and Liferent—Alimentary and Inalienable Provision—Protected Right against Gratuitous Alienation.

A testator left his whole means, heritable and moveable, to trustees, directing them, when his only daughter should marry, to pay to her "for her alimentary use the whole annual proceeds or income;" and further directing them to convey the whole residue, upon a child being born of such marriage, "to her and to the child or children of the marriage," subject to a power of division by the daughter. It was further declared that "neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *ius mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life." *Held* (by a majority of seven Judges—*disc.* Lords Deas, Mure, and Gifford—*rev.* Lord Curriehill) that the fee of the estate was in the daughter, but that the children had a right to the succession protected against any gratuitous alienation by their mother but subject to her power of division.

This was an action of multiplepounding and exoneration at the instance of Robert Gibson, residing in Portobello, and others, the whole trustees nominated and accepting under the trust-disposition and settlement of the late William Walker Gibson, corn merchant, Leith, pursuers and nominal raisers, against Mrs Ellen Percival Gibson or Ross, wife of William Ross, C.A., and only child of Mr W. W. Gibson, and also against William Walker Gibson Ross and Reginald Carew Ross, her pupil children, and Robert Dobbie Ross, W.S., and others, trustees under Mr and Mrs William Ross's marriage-contract, and against Mr Gibson's next-of-kin. The circumstances under which the action arose were as follows:—Mr Gibson, a partner in the firm of Gibson & Walker, Bonnington Steam Mills, died on 1st