accused. The weight which the jury will attach to such evidence will of course depend on the interval of time which has elapsed between the date of the alleged threats and the crime, and the Court will not permit evidence to be lead of threats or conduct which from their remoteness in time or otherwise cannot reasonably be supposed to have any connection with the crime charged.

Evidence was then led as to threats and acts of violence offered by the accused to his wife six months before the crime was committed.

The jury found the panel guilty of culpable homicide and he was sentenced to penal servitude for fifteen years.

Counsel for the Crown—T. B. Morison, K.C., A-D.—S. A. Gillon. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for the Panel—R. C. Henderson. Agent—G. N. Pomphray, Solicitor, Wishaw.

COURT OF SESSION.

Thursday, May 16.

SECOND DIVISION.

[Lord Johnston, Ordinary.

KERR *v.* HOOD AND OTHERS.

Jurisdiction—Election Law—School Board—Nomination Papers Rejected by Returning Officer—Order of Scottish Education Department Declaring Returning Officer's Decision Final—Ultra vires—Competency of Action of Reduction—Education (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 78), *sec.* 27 *and Schedule—Elections (Scotland) Corrupt and Illegal Practices Act* 1890 (53 *and* 54 *Vict. cap.* 55), *sec.* 30.

By the schedule appended to the Education (Scotland) Act 1878, which by section 27 of that Act was declared to be of the same force as if enacted in the Act itself, it was provided:—"The triennial election of a school board for any parish or burgh shall be held at such time and in such manner and in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe; and the Scotch Education Department may by order appoint or direct the appointment, and make regulations as to the duties, remuneration, and expenses of any officers requisite for the purpose of such election, and make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous regulations." An order of the Department, *inter alia*, provided — "The returning officer shall decide whether any nomination is valid, and his decision shall be final." Section 30 of the Elections (Scotland) Corrupt and Illegal Practices Act 1890 enacts—"An election may be questioned by an election petition on the ground . . . (*c*) that the person whose election is questioned was at the time of the election disqualified, or (*d*) that he was not duly elected by a majority of lawful votes."

In a school board election, there being nine vacancies and eleven candidates, the returning officer declared the nomination papers of A and B, two of the candidates, to be invalid, and declared the remaining nine duly elected. A having brought an action of reduction of these decisions against the returning officer and the candidates declared elected, on the ground that his objections to the nomination papers were frivolous, the Court *held* (1) that the order if intended to exclude the jurisdiction of the Court was *ultra vires*, and that the decisions were subject to review; (2) that the case did not fall under the categories in which an election petition might be brought, and that the action of reduction was competent.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), Sched. B, prescribes general rules respecting the election of members of a school board subsequent to the first election. Section 14, subsequently repealed, *inter alia*, enacted—"Any question or dispute regarding the election of a candidate shall be summarily determined by the Sheriff of the county on the petition of any person interested having a legal title and interest to raise such question, and the determination shall be final."

The Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), sec. 26, enacts—"The principal Act" (*i.e.* the Act of 1872) "shall be construed as if there were substituted for the rule numbered four in Schedule B to the principal Act the rule in the schedule to this Act." Section 27—"The schedules to the principal Act and to this Act shall be of the same force as if they were enacted in these Acts respectively." And the schedule is quoted *supra* in the rubric.

The Scotch Education Department, acting under the power conferred by the Schedule to the 1878 Act, on 2nd October 1905 issued a general order for the regulation of the triennial election of school boards which fell to be held in 1906, in which they made regulations as to the nomination of candidates, and by clause 9 of said general order, *inter alia*, provided—"The returning officer shall decide whether any nomination is valid, and his decision shall be final."

The Elections (Scotland) Corrupt and Illegal Practices Act 1890 (53 and 54 Vict. cap. 55), sec. 2, enacts, *inter alia*—. . . "'Corporate office' means the office of county councillor, town councillor, or police commissioner of a burgh, member of parochial board, or member of school board.' 'Election' means an election to a corporate office as defined by this Act. . . . 'Election court' means a court constituted under this Act for the trial of an election petition. 'Election petition' means a petition under this

Act complaining of an undue election. . . . 'Election' when used with reference to a petition means the election to which the petition relates. . . ."

Section 30 (1)—"An election may be questioned by an election petition on the ground (*a*) that the election was wholly avoided by general bribery, treating, undue influence, or personation; or (*b*) that the election was avoided by corrupt or illegal practices; or (*c*) that the person whose election is questioned was at the time of the election disqualified; or (*d*) that he was not duly elected by a majority of lawful votes."

George Kerr, writer, Hawarden, Port Glasgow, a ratepayer of the burgh of Port Glasgow, who was entitled to vote at the school board election after mentioned, raised an action against (1) John Hood, solicitor, Glenclune, Port Glasgow, returning officer at the election of the Port Glasgow School Board, which took place or was alleged to have taken place on 29th March 1906, and (2) Alexander Butler and others, being the persons declared by the first defender to have been elected members of the Port Glasgow School Board at the said election. The pursuer in his action sought to have reduced and declared null and void (First) two pretended decisions made and intimated on 15th March 1906 by the said John Hood, the defender first called, as returning officer foresaid, whereby he declared that nomination papers lodged in his hands on the 14th day of March 1906, nominating the said George Kerr and Louis Blair, solicitor, residing at Braeside, Port Glasgow, as candidates at the election of the said School Board for the burgh of Port Glasgow, were invalid; and (second) a pretended declaration of the result of the said election of members of the said School Board on 29th March 1906, made, published, and subscribed, by the said John Hood, the defender first called, as returning officer foresaid, whereby he declared the defenders second called to have been duly elected members of the said School Board without the necessity of a poll.

The pursuer, *inter alia*, pleaded—"1. The pursuer is entitled to decree of reduction and declarator as craved for, with expenses, in respect (1) that the said nomination papers were valid and were illegally rejected by the defender first called, and (2) that no valid election took place on or about 29th March 1906. 2. The said nomination papers, although valid, having been maliciously rejected by the defender first called, and no valid election having taken place, decree of reduction and declarator should be granted as craved, with expenses. 3. The provision in clause 9 of the General Order referred to, that the returning officer's decision as to the validity of nominations is final, is *ultra vires* of the Scotch Education Department and is no bar to the present action."

The defenders, *inter alia*, pleaded—"1. No jurisdiction. 2. The action is incompetent. 3. No title to sue. 4. All parties not called. 5. The pursuer's averments are irrelevant and insufficient to support the conclusions of the action."

The *facts* of the case appear from the opinion of the Lord Ordinary (JOHNSTON), who on 28th February pronounced this interlocutor—"Repels the first four preliminary pleas-in-law for the compearing defenders: Reserves the fifth preliminary plea-in-law for said defenders to be discussed with the pleas-in-law for said defenders on the merits: Allows said defenders to satisfy the production in six days: Finds said defenders liable in expenses to the pursuer in connection with the lodging of preliminary defences: Allows an account to be given in, and remits the same to the Auditor to tax and report: Grants leave to reclaim."

Opinion.—"In this case George Kerr, writer, Hawarden, Port-Glasgow, who is admittedly a ratepayer of the burgh and was entitled to vote at a recent School Board election which took place in March 1906, and who was also a candidate for election, seeks to have the election set aside by reason of the returning officer's rejection of the nomination papers of himself and of another candidate, Lewis Blair, also writer, Port-Glasgow. For this purpose he has raised an action of reduction (*first*) of two decisions made and intimated on 15th March 1906 by John Hood, solicitor, Port-Glasgow, the clerk to the School Board, and *pro hac vice* the returning officer at the election, whereby he declared the two nomination papers foresaid, which had been lodged in his hands on the previous day, which was the nomination day, to be invalid, and (*second*) of the declaration by the said John Hood, as returning officer foresaid, of the result of the election, whereby he declared the remaining candidates to have been duly elected without the necessity of a poll. By the rejection of the two nomination papers in question there were left only nine candidates, being the exact number required to complete the board, and so no poll was required.

"To this action of reduction the pursuer calls as defenders (*first*) the said John Hood, as returning officer, and (*second*) the nine candidates who had been declared elected. These latter he calls as individuals, and he does not call the School Board as a corporation. The returning officer and five only of the candidates who were declared to have been duly elected have entered appearance to defend the action.

"They have entered a plea—'No. 4. All parties not called'—founded on the contention that the School Board, which is a body corporate under the Education Act 1872, ought to have been called in its corporate character. Counsel for the defenders, however, intimated that they did not press the plea, as the parties were all desirous of having a decision of the matter at issue. I do not think that I can accept the situation so created, as I am dealing with the election of a public body, in which the public of Port-Glasgow and not merely the candidates for office are interested, and I shall therefore consider the plea in due course.

"Stated shortly, the pursuer complains of the rejection of his and Mr Blair's nomination papers on the ground that the returning officer's objections to them were frivolous and not justified by any good reason, that they were taken by him for a sinister purpose, and that, had he meted out the same measure to all the other candidates, he would have been bound to reject several, if not the whole of them. To this action certain preliminary pleas are taken which I am called upon now to dispose of.

"The defenders plead, in the first place, that the Court has no jurisdiction. This plea I understand to be founded on a regulation of the Scottish Education Department whereby it is declared that 'the returning officer shall decide whether any nomination is valid, and his decision shall be final.' I do not think that it was *intra vires* of the Department to confer finality on this decision of the returning officer so as to exclude all appeal to the Court. The powers of the Department are to be found in the schedule to the Education Act 1878, whereby it is declared that a school board election is to be held at such time and in such manner and in accordance with such regulations as the Department may by order prescribe; and power is conferred on the Department to appoint or direct the appointment of any officer requisite for the purpose of such election, and to make regulations as to his duties; and further, to make regulations respecting all other necessary things preliminary or incidental to the election. I do not think that these powers either entitled the Department to determine finally—that is, to the exclusion of the Court's jurisdiction—the validity of a nomination or to depute to the returning officer or to anyone else to do so. I think that what the Legislature intended to do by this schedule was to empower the Department to enact all necessary regulations for the due and orderly conduct of an election, so that there should be a known order or method for the conduct of the election, with prescribed times, seasons, and modes of doing all necessary acts, with sufficient publicity and effectual equality and fairness to all concerned. Therefore I think it would be quite within the powers of the Department to direct that the returning officer should decide in due time whether any nomination was valid, so that the proper and timeous publication of the candidates' names should be made, election papers be prepared, and the election itself proceed according to the prescribed order without check or delay. But it is another thing to enact that the decision of the returning officer shall be final. I cannot hold such an enactment to be a regulation in accordance with which an election is to be held. Nor can I hold it to be a regulation as to the duties of an officer requisite for the purpose of an election, or a regulation respecting any necessary matter preliminary or incidental to such election. Were it to receive the effect claimed for it, it would preclude all inquiry into the conduct of a returning officer in the matter of a nomination, however grossly incompetent, or biassed, or even corrupt, such conduct may have been. I therefore think that the plea of no jurisdiction falls to be rejected.

"In the second place, the defenders plead that the action is incompetent. That plea I understand to be founded on the contention that, if any relief is competent it can only be had by petition to the Sheriff of the county. Apparently the ruling enactment is the 30th section of the Elections (Scotland) Corrupt and Illegal Practices Act 1890, which provides that an election may be questioned by an election petition before the Sheriff on four specified grounds, and that an election shall not be questioned on any of these specified grounds by way of reduction or suspension, or by any form of proceeding except by an election petition. But the ground upon which the present election is challenged is not one of the four specified grounds, and I do not therefore think that the action is rendered incompetent by reason of this enactment. I concur in the opinion expressed by Lord Kincairney in *Hodge* v. *School Board of Ballingry*, 1897, 35 S.L.R. 634. I would also refer to section 44 of the Corrupt and Illegal Practices Act 1890, which recognises that the Court of Session has jurisdiction, at least to some effect.

"In the third place, the defenders plead no title to sue, but they presented no argument upon this plea, and I see no ground to sustain it. The pursuer has manifestly a good title to sue as a voter and a candidate in respect of his own nomination, and as a voter in respect of Mr Blair's nomination.

"In the fourth place, it is pleaded that all parties are not called. I have already referred to this plea, but after full consideration I think that it falls to be repelled. The summons has evidently been modelled on that of *Duncan* v. *Crichton*, 1892, 19 R. 594, which was directed, not against the School Board, but against the individual members who claimed to be the School Board. As here, the contention was that the whole election was invalid. Now, a school board which has not been duly elected is not a school board (*per* Lord Rutherfurd Clark at page 600), and I think that it would be inconsistent with the scheme of the action to require the pursuer to recognise that as a school board by calling it in its corporate capacity which he comes into Court seeking the opportunity to prove is no school board. It may be no school board, and yet its acts preceding the decision of the question of the validity of its election may be effectual—see the Corrupt, &c., Practices Act 1890, section 44. Though there was no decision of the point in *Duncan's* case, as it was not raised, I think that the procedure there was correct, and may be followed in the present case.

"In the fifth place, there is a plea to the relevancy. I cannot say that I see much ground for this plea. But owing to the way in which the relevancy and merits are

mixed up in this case, I think that it would be as well to reserve it by making the inquiry into the facts which is necessary one before answer.

"But I am not prepared to allow this proof without limitation. There are serious averments made by the pursuer as to the motives of the returning officer in rejecting the nomination papers in question. So far as these alleged motives may have been of a personal character I do not think that they are relevant to the inquiry. He may have had the deepest *animus* against the pursuer, or the most extravagant bias in favour of the other candidates, though I am far from suggesting that he had either, but if the nomination papers in question were invalid he was bound to reject them, and it does not matter that he may have done so with a sinister satisfaction in that he was thus affording a clear road to election for his friends. All personal matters therefore between the pursuer and the defender the returning officer must be excluded from the proof. But it is another thing to exclude all inquiry into the manner in which the returning officer has dealt with the nomination papers of other candidates. The objections taken by the returning officer to the nomination papers in question, though not very clearly stated by him on record, appear to be somewhat matters of degree and impression, and it may be—I do not at present and until I know the facts say that it is—competent and proper to judge his action with regard to the papers rejected to some extent in view of his action with regard to papers accepted.

"I shall accordingly, after the production is satisfied and the record in a position for me to deal with the merits, pronounce an interlocutor before answer allowing parties a proof of their respective averments, exclusive of those contained in condescendence 12, so far as they allege the action of the defender John Hood to have been malicious."

The defenders reclaimed, and argued—The decision of the returning officer was final. The order of the Scottish Education Department declared it to be so. That order was not *ultra vires;* it was made in exercise of the powers conferred on them by the schedule to the Education (Scotland) Act 1878. The whole machinery of elections, including the ballot and nomination papers, was the creation of the Education Department, and consequently it was within their power to issue the regulation in question. The following authorities were referred to —*Bone* v. *Sorn School Board*, March 16, 1886, 13 R. 768, Lord Adam at p. 773, 23 S.L.R. 537; *Hodge* v. *School Board of Ballingry*, November 2, 1897, 35 S.L.R. 634. (2) In any case procedure should have been by petition to the Sheriff under section 33 of the Corrupt Practices Act 1890, and not by action of reduction. The present case fell under the third, or at any rate under the fourth, of the categories of that section. The words "by a majority of legal votes" were not intended to exclude the case where no voting was necessary. There was equally an election whether a candidate was elected at a contested election or whether he was declared duly elected because there were no more nominations than vacancies. Petition to the Sheriff was intended to be the ordinary mode of review. It had been so under section 14 of the Education Act of 1892, and the repeal of that section was simply for purposes of codification.

Argued for the pursuer (respondent)—The order of the Education Department if intended to exclude review by the Court was *ultra vires*. Possibly, however, it was only intended to provide that while the election was going on the decision of the returning officer should be final. The power to make regulations should be construed strictly, as in *Duncan* v. *Crighton*, March 10, 1892, 19 R. 594, Lord Rutherfurd Clark at p. 600, 29 S.L.R. 448. In *Bone, cit. sup.*, Lord Adam in saying, regarding the finality of a returning officer's decision as to nomination papers, "No one disputes," did not express his opinion, but merely pointed out that the opposite had not been argued. (2) The appropriate method of reviewing the matter had been taken in bringing an action of reduction, because the present case did not fall under any of the four instances stated in section 30. There had been no election "by a majority of lawful votes" as required in the fourth case.

LORD JUSTICE-CLERK—I think this case has been exceedingly well argued, but after having listened carefully to the arguments placed before us I am unable to say that the Lord Ordinary has gone wrong in the decision at which he arrived.

It is merely a decision affecting preliminary pleas. In the first place the argument of the reclaimer is that there is no jurisdiction in this Court. Now I think it will be agreed on all hands that the jurisdiction of this Court can only be excluded by statutory enactment, and that words to exclude the jurisdiction of this Court and the ordinary Courts of the country, whatever they may be, must be clear and unambiguous. Now we have been referred to no such words in any Act of Parliament. The whole argument of the Dean of Faculty and Mr Chree has been that no definite words exclusive of the Court's jurisdiction having been used in any Act of Parliament, such an exclusion was to be inferred. In the first place, it is said that there is no jurisdiction because the returning officer has been made final on the question whether a nomination is or is not valid. I entirely agree with the Lord Ordinary in holding that that is not a deliverance or regulation that the Education Department were entitled to make if thereby it was intended to exclude the ordinary jurisdiction of the Courts of the country, and therefore when the defenders found on the words that the decision of the returning officer shall be final I should hold that these words were of no effect whatever. I can hardly believe that the Education Department intended

anything of the kind. I think it perfectly possible that what was intended to be done was simply to declare that the returning officer's decision should be final on such a matter as this, in the sense that nothing should be done by anyone to stop the election during its course. Whether the Department had power to do that or not I do not say, but I say that would be a reasonable exercise of their power if they had the power. Of course it is better, if a point of that sort arises during the election, that it should be disposed of then and there by some officer and that the election should go on. It may be a question after the election has taken place whether the election should be set aside. If nothing has happened that should make it necessary to set it aside, all is well; if something has happened to make it invalid, it does not matter that the election has proceeded to a conclusion.

It is said also that the action is incompetent on the ground that if any relief is competent at all it could only be had by petition to the Sheriff. I have looked at the Act of Parliament and the sections referred to, and am decidedly with the Lord Ordinary in holding that these clauses do not affect such a case as this. There is jurisdiction given to the Sheriff for certain purposes, but not in all circumstances in which an election might come before this Court for consideration.

LORD STORMONTH DARLING—I agree with your Lordship in the chair, and with the Lord Ordinary. It seems to me that the Lord Ordinary's very careful opinion completely covers the ground.

The importance of the case undoubtedly lies in the first and second preliminary pleas, the first being a plea to the jurisdiction of this Court, and the second to the competency of the action on the ground, as your Lordship has explained, that the only remedy open to the pursuer was an election petition to the Sheriff. I think the Lord Ordinary has acted quite rightly in repelling both these pleas, and indeed in repelling all the four preliminary pleas for the defenders and reserving the fifth for discussion on the merits.

On the first of these I do not desire to add anything to what your Lordship has said, except to say that it is always exceedingly difficult to exclude the jurisdiction of the Supreme Court in matters where such exclusion does not rest upon an express enactment of the Legislature; especially is it difficult to hold that the Legislature has deputed to anybody else to declare that the jurisdiction of the Supreme Court is excluded. The only attempt here to show that it has been excluded is by saying that the Legislature deputed to the Scotch Education Department to make regulations for the conduct of the election, and that one of the regulations made by the Department was that the decision—any decision—of a returning officer should be final. Now, there may be convenience in directing that the decision of the returning officer shall be final for certain purposes and to certain effects, but that cannot be held to extend to a finality which shall have the effect of excluding the jurisdiction of this Court. I think Mr Spens was quite well founded when he said that you cannot assume that the right of the lieges to resort to the Supreme Court is taken away by anything short of very express and clear enactment or (which is the same thing) by implication so plain as to be *in luce clarius*.

So far as the case depends on the Corrupt and Illegal Practices Act of 1890, I think the matter stands as your Lordship has put it. The intention of that Act I think very clearly was by the combined effect of section 2 and section 30 to put school board elections on the same footing as other elections not being parliamentary, and to make the same regulations apply to them all. So reading the Act, petitions about the election of a school board are to take the ordinary form of an election petition before the Sheriff. That is all quite right, but that is only in certain prescribed and defined cases—the cases set out in section 30, which cover, be it observed, all the normal grounds for challenging any of the elections to which the Act relates. That leaves any case not falling under these four heads to rest on the ordinary law, which, if I am right so far, left it open to this Court to deal with any objection to an election based on grounds other than those specified in section 30. This view is confirmed, as the Lord Ordinary points out, by section 36 and by section 44, both of which contemplate a decision of this Court upon questions arising as to such elections. On the whole matter, I entirely agree with your Lordship and the Lord Ordinary, and think it unnecessary to say more.

LORD LOW—I am of the same opinion.

LORD ARDWALL — I am of the same opinion. I do not think it admits of doubt that this Court is competent to entertain actions for reduction of any documents or proceedings unless reduction is excluded by the nature of the documents or proceedings themselves, or by statutory enactment.

Now, there is nothing in the nature of the documents or proceedings here to exclude reduction. But it has been argued that the jurisdiction of the Court is excluded by statutory enactment, and in this way—It is said that power is given by statute to the Education Department to make regulations for School Board elections, and, in the second place, it is said that by the order issued by the Board on 2nd October 1905 the returning officer's decision on the validity of any nomination of candidates for the School Board is made final. Now, if the order had merely provided that the returning officer should decide as to the validity of nominations, I do not think any objection could be taken to that. But the question is whether the words which follow, to the effect that such decision shall be final, are *ultra vires* or *intra vires* of the Education Department. Now that depends on the meaning to be attached to these words "shall be final." If they possibly

only mean, as suggested by your Lordship in the chair, that the returning officer is to decide for the purpose of getting through with the election and till the election is over, whether a nomination is valid or not, I think that might be a very proper regulation for the Board of Education to make. But if they mean that the decision of the returning officer is to be final to the effect of excluding the courts of law, I think that *ultra vires*, for the reasons so lucidly stated by the Lord Ordinary, and particularly upon the ground which is set forth at the part of his opinion where he says—"Were it to receive the effect claimed for it it would preclude all inquiry into the conduct of a returning officer in the matter of a nomination, however grossly incompetent or biased or even corrupt such conduct may have been." Now here it is alleged that the conduct of the returning officer was unfair and malicious. Whether that allegation is true or not remains to be seen, but in view of the possibility of such cases arising it would be a serious thing indeed if it were to be held that it was in the power of a returning officer finally to determine whether a person was to be refused a right of being placed in the list of candidates or not just as he chose to decide. It might be under the influence of wrong motives, or it might be perfectly *bona fide* but on grounds quite unfounded in point of law. If that is the meaning of the finality clause here I do not think it can be held that it is a clause which the Education Department were entitled to enact.

With regard to the second point, I concur in what has been said by your Lordships. The Act of 1890 being a general Act applicable to various kinds of elections, it really was intended to reserve cases arising on the most common grounds of objection in such elections to be dealt with in an election petition before the Sheriff, and to leave cases arising on any other competent ground to be dealt with under the common law remedy of reduction. I may say that I quite concur with Lord Kincairney's opinion in the case of *Hodge* v. *School Board of Ballingry*, 35 S.L.R. 634.

The Court adhered.

Counsel for Pursuer (Respondent)—George Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for Defenders (Reclaimers)—The Dean of Faculty (Campbell, K.C.)—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, May 16.

FIRST DIVISION.

[Lord Dundas, Ordinary.

KRUPP AND ANOTHER v. JOHN MENZIES, LIMITED.

Proof—Contract—Written Contract—Error—Performance—Admissibility of Parole Evidence to Prove in Defence against a Claim for Performance an Error in a Written Contract.

In defence to an action by the late manager of an hotel against the proprietor, in which the pursuer sought an accounting of a fifth of the profits of the business alleged to be due to her, under a written contract of employment, the defender averred that the share of the profits due was five per cent., not a fifth; that the error in the contract was the clerical or arithmetical error of the clerk who prepared it; that this was well known to the pursuer, who had accepted certain payments on the basis of five per cent.; that the terms of the contract had been arranged on the basis of a similar contract with another employee, but with a difference as to the share of profits, which had consequently been discussed and settled; and that the share of profits agreed upon, *i.e.*, five per cent., was referred to in the correspondence between the parties' law agents preceding the contract.

Held that the defender was entitled to a proof before answer of his averments.

On 29th December 1905 Mrs Jessie Andrews or Krupp, residing at Station Hotel, Oban, with the consent of William Krupp, her husband, and he for his own right and interest, brought an action against John Menzies, Limited, 12 Queen Street, Edinburgh. In it the pursuers, *inter alia*, sought that the defenders should be ordained "(*second*) to exhibit and produce before our said Lords a full and particular account of the profits of the business of hotel-keepers and others carried on by the defenders at the Station Hotel, Mallaig, Inverness-shire, for the period from 1st November 1900 to 31st October 1905, whereby the true one-fifth part or share thereof due by them to the pursuers may appear and be ascertained," and to make payment to the pursuers of £1000 or such sum as should be ascertained to be the balance due on such accounting, with interest at five per cent.

The question upon which the case is now reported was whether the defenders, who averred that the share of profits payable to the pursuers was five per centum and not, as claimed and as stated in the written contract of employment, a fifth, should be allowed a proof.

The *facts* of the case appear from the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on 20th March 1906 appointed the defenders to lodge accounts as craved and allowed the pursuers to lodge objections thereto.