and which acceptances had been discounted by these firms as the drawers thereof with the claimants and appellants the Clydesdale Bank, Limited: Find that after the declared insolvency of Martin, Turner, & Company, the claimants and the said Gardner & Company and Galloway & Company became desirous of obtaining the control of the said goods with a view to the sale thereof to the best advantage, and that the claimants, the said bank, on the eve of the sequestration of the estates of Martin, Turner, & Company, as the holders as aforesaid of the said bills accepted by Martin, Turner, & Company, induced them to agree to allow the said goods to be transferred to Messrs Gardner & Company and Galloway & Company in order that the prices thereof should be received by the said bank and placed to the credit of the said bills, so as to reduce the liability of Martin, Turner, & Company to that extent as acceptors thereof, and on the understanding that the prices thereof should be applied accordingly: Find that the goods were transferred accordingly and were thereafter sold, and the prices thereof were remitted from abroad to this country and received by the claimants the said bank: Find, in respect of said understanding, and in respect also of the ordinary rules of bankruptcy, that the claimants, the said bank, in making their claim on the sequestrated estate of Martin, Turner, & Company in respect of the said bills, are bound to give credit as a deduction from their claim for the prices realised for said goods transferred by the bankrupts on the eve of bankruptcy as aforesaid, as well as the payments made by the trustee on the sequestrated estate to the bank on account of remittances in transit to the country when the bankruptcy occurred: Find that the claimants have failed to show any ground in support of a claim to a preference on the sequestrated estate: Remit to the trustee to give effect to the judgment now pronounced by ranking the claimants and appellants, the Clydesdale Bank, Limited, as creditors on the sequestrated estates of the said Martin, Turner, & Company and individual partners in terms of the affidavits and claims, Nos. 51 and 52 of process," &c.

Counsel for the Clydesdale Bank—Sir C. Pearson—Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for Martin, Turner, & Company's Trustee—Lord Adv. Robertson, Q.C.—W. Campbell. Agents — Webster, Will, & Ritchie, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

(Before Seven Judges).

[Sheriff of Argyllshire.

NEILSON *v.* WILSONS.

Process—Joint and Several Obligation—Illiquid Claim—Constitution.

Where a plurality of persons are alleged to be bound jointly and severally in a debt or obligation which has not been constituted by writing or decree, the whole *correi debendi* subject to the jurisdiction of the courts of the country must be called in any action to enforce payment or performance.

In an action brought by an agent in a Debts Recovery Court concluding against three defenders jointly and severally for payment of the amount of an open account, one of the defenders was resident outwith the jurisdiction of the court, and the summons was not executed against him.

Held, by a majority of Seven Judges (Lord President, Lord Justice-Clerk, Lords Rutherfurd Clark and Adam—*diss.* Lords Shand, Young, and M'Laren), that it was necessary for the pursuer to constitute the debt against all the alleged joint and several obligants before proceeding to enforce payment against any one of them, and action *dismissed.*

Opinion (*per* Lord Rutherfurd Clark) that the rule should not be enforced in cases brought in a Sheriff Court for sums under £25 when one of the co-obligants was resident outside the jurisdiction of the Court.

This action was raised in the Debts Recovery Court of Argyllshire by Thomas Neilson, writer in Glasgow, against John Wilson, resident in Glasgow, and Thomas and Isabella Wilson, resident in Dunoon. The summons set out that the defenders "all jointly and severally, or severally defenders," were owing to the pursuer the sum of £25, 2s. 7d. on open account annexed thereto, and that they should be decerned and ordained, jointly and severally, to make payment to the pursuer.

John Wilson being resident beyond the jurisdiction of the Court, the summons was not executed against him, nor was he competently made in any way a party to the action.

Thomas Wilson pleaded—"(1) Incompetency in respect of no jurisdiction. The defender John Wilson resides in Lanarkshire, and has no place of business in the shire of Argyll. (2) No process, in respect the summons does not bear to have been served against the whole defenders. (3) Admitted that the defender employed the pursuer in the dispute between him and his son Aird Wilson, but the account is overcharged, and this defender is entitled to get credit for the proceeds of the sale of

his household furniture and effects carried through by the pursuer, and for which he has still to account."

Isabella Wilson pleaded—"(1) Incompetency in respect of no jurisdiction. The defender John Wilson resides in Lanarkshire, and has no place of business in the shire of Argyll. (2) No process, in respect the summons has not been executed against the whole of the defenders. (4) A denial of the debt. This defender never employed the pursuer."

On 11th September 1889 the Sheriff-Substitute (CAMPION) sustained the 1st and 2nd pleas-in-law for the defenders Thomas and Isabella Wilson, and dismissed the action.

"*Note.*—This is an action directed against three defenders who are sued 'jointly and severally,' or severally, and the summons is admittedly only served upon two of them."

The pursuer appealed to the Sheriff (FORBES IRVINE), who on 19th October 1889 pronounced this interlocutor:—"Sustains said appeal: Recals the said interlocutor: Finds the defenders Thomas Wilson and Isabella Wilson or Grant conjunctly and severally liable to the pursuer in the sum of £25, 2s. 7d. sterling concluded for in the summons, but reserving to them any claim of relief competent to them against the other co-defender; and decerns."

The defenders appealed to the First Division, and after counsel had been heard the case was appointed to be argued before Seven Judges.

Argued for the defenders and appellants —The claim being for an illiquid debt, and several persons being jointly liable, it was necessary for the pursuer first to constitute the debt against all the debtors, after which he might proceed for payment against any one of them. There was no joint and several obligation till it had been constituted against all of the defenders. It was possible that the defender who had not been made a party to the action might have a good defence which disposed of the claim—*Zuill* v. *M'Murchie, Ralston & Company*, March 4, 1842, 4 D. 871. Before proceeding against one member of a dissolved copartnery for payment of a partnership debt, it was first necessary to constitute the debt against all the members of the copartnery—*Muir* v. *Collett*, June 17, 1862, 24 D. 1119; *Reid* v. *M'Call & Douglas*, June 11, 1814, F.C.; *Bell* v. *Willison*, July 8, 1822, 1 S. App. 220; *Geddes* v. *Hopkirk*, June 2, 1827, 5 S. 747. The same rule applied in proceedings against individual creditors in a sequestration—*Reid* v. *Moffat*, February 21, 1828, 6 S. 570; *Johnston* v. *Arnott*, January 23, 1830, 8 S. 383; *Hamilton* v. *M'Laren*, March 11, 1830, 8 S. 709. The case of *M'Tavish* v. *Saltoun*, February 3, 1821, F.C., was an instructive contrast to the cases just quoted. In any view, the interlocutor of the Sheriff could not stand. If the action was not dismissed, then proof was necessary.

Argued for the pursuer and respondent—Each of the defenders being liable jointly and severally, it was reasonable that the pursuer should have a right to proceed against any or all. The plea that all parties were not called was always an equitable plea, one which the Court might repel in its discretion—Ersk. iii. 3, 74; *Richmond* v. *Grahame, &c.*, February 8, 1847, 9 D. 633; *Wilson and Others, Petitioners*, July 10, 1813, F.C.; *Walker* v. *Brown*, November 23, 1803, M. App. "Solidum and Pro Rata, No. 1"; *Chalmers* v. *Ogilvy*, February, 1730, M. 14,706. In *Zuill's* case the Lord Justice-Clerk made it a point in his decision that he was not clear that the liability was joint and several.

At advising—

LORD PRESIDENT—This action was raised in the Debts Recovery Court of the Sheriffdom of Argyll concluding against three defenders conjunctly and severally or severally for £25, 2s. 7d. said to be due by the defenders to the pursuers on open account produced with the summons.

The three defenders concluded against in the summons are John, Thomas, and Isabella Wilson. John being beyond the jurisdiction of the Sheriff of Argyll, the summons was not executed against him nor has he been in any way competently made a party to the action. Thomas admits employment of the pursuer himself as an individual, but pleads overcharge and counter claim. Isabella denies employment.

Besides these defences on the merits, the compearing defenders pleaded in effect that the action cannot proceed in the absence of one of the alleged co-obligants, the debt sued for not having been in any way constituted. This plea the Sheriff-Substitute sustained, and dismissed the action.

The Sheriff on appeal recalled this interlocutor, and decerned against Thomas and Isabella conjunctly and severally for payment of the sum sued for, overruling the objections sustained by the Sheriff-Substitute, and without giving any proof of the debt or of the conjunct and several liability alleged by the pursuer, or giving the compearing defenders an opportunity of establishing their defences, or having any regard to the denial of employment by the defender Isabella. But I understand that the respondent does not maintain the interlocutor of the Sheriff in so far as it disposes of the case on the merits

I am unable to support the judgment of the Sheriff, and I am of opinion that the action ought to be dismissed substantially on the ground assigned by the Sheriff-Substitute.

Conjunct and several obligations are usually, indeed almost always, constituted by writing. When two or more persons in a written instrument undertake a joint and several obligation, the words of the instrument are conclusive of the nature and extent of the obligation. If the instrument contains a clause of registration, diligence will proceed on a decree of registration against all or any of the co-obligants, because each is bound by writing under his own hand *in solidum*, and no suspension can be entertained on any

ground except payment or discharge. If there be no clause of registration, action will in like manner lie against all or any of the co-obligants, and no defence will be relevant except that the obligation is extinguished by payment or discharge. The reason is that the joint and several obligation is constituted by the written instrument against all the co-obligants. But where the joint and several obligation sought to be enforced stands on averment only to be established by parole evidence, and is denied, the alleged co-obligants have never been brought together, or in other words, the joint and several obligation has never been constituted, and cannot be constituted without proving the nature and extent of the objection against all the alleged co-obligants; for there can be no joint or joint and several obligation unless all the alleged co-obligants are bound. A joint or joint and several obligation undertaken or alleged to be undertaken by three persons cannot be proved by showing that two only are bound.

Thus in the case of *Paterson* v. *Borran*, 6 D. 987, where a bond to a bank bore that it was granted by four persons as co-obligants jointly and severally, but only three of the four subscribed the bond, it was held that those who had subscribed were not liable for the advances made under it though there was no special undertaking by the bank to procure the subscriptions of the whole. And a similar judgment was pronounced in *Scottish Provident Assurance Company* v. *Pringle and Others*, 20 D. 465.

The proposition maintained by the compearing defenders is that where a joint and several obligation has not been previously constituted by writing or by decree, the pursuer of an action to enforce such obligation must call all the co-obligants if it be possible. Cases of this description are necessarily of rare occurrence, for the reason I have already suggested, that it is very unusual for a joint and several obligation to be undertaken by words only. The consequence is that most of the authorities are to be found in connection with claims against the partners of dissolved companies.

When the company is still subsisting it is well settled that no partner can be sued for a company debt until the debt has been constituted against the company. But when the company is dissolved the partners remain jointly and severally liable to pay the company's debts, but no one partner can be sued without calling all the others, so far as that is possible, unless the company's obligation has been previously constituted by writing or decree.

The case of *Muir* v. *Collett*, decided in 1862 by the Second Division (24 D. 1119), is not a direct authority in the present question. But the opinions of the Judges recognise very clearly the principle on which the defence in this case is founded. The defence in *Muir* v. *Collett* was "that the action is irrelevant and incompetent as laid, in respect the pursuers have made no demand on the firm alleged to be their proper debtor, and have neither called the said firm nor any partner thereof other than the defender; and that the debt neither had been constituted nor is sought to be constituted against the said firm." In dealing with this defence I pointed out that it embraced two separate pleas, both founded on principles of equity. "The first is, that the action is brought against an individual partner of a company for payment of a debt incurred by the company without the debt having been constituted against the company; and the second is an objection that all parties interested have not been called. These are two quite separate and distinct preliminary objections, but both of these are founded, and obviously founded, on principles of equity. The first, that a creditor of a company cannot sue an individual partner singly without constituting his debt against the company rests on the obvious consideration of fairness, that where there exists a separate *persona* known as a company with a separate estate it would be in the highest degree inequitable to proceed against a single individual, he not being in possession of the company's funds, and not having it within his power to reach them. The other objection is founded on equitable considerations as clearly as the first, for where there are *correi debendi*, and one of them only is called into the field by the common creditor, he is manifestly put to a great disadvantage, for the obligants whom the pursuer does not chose to call may very possibly have a good defence against the whole demand, or may be in possession of a discharge of the whole debt." Lord Benholme and Lord Neaves concurred in these views, and Lord Cowan said —"When a creditor of a company has to constitute and recover payment of a debt incurred by a company which has been dissolved, he is bound to call as parties all the partners of that company who are subject to the jurisdiction of this Court, but if he does so, he does all he can be required to do."

It has been suggested in the course of the argument that these opinions are too broadly stated, because if read in their literal sense they would exclude cases where the debt was constituted by written instrument. I do not see how such a meaning could in any reasonable view be attached to the words used. For every expression of a judicial opinion must be read *secundum subjectam materiam*, and it would be as unfair to apply an opinion given on a case where there is no previous constitution of the debt, to another case where the obligation is constituted by written instrument, as it is to read judgments delivered in the latter kind of cases as intended to apply to and include the former.

But the opinions in *Muir* v. *Collett* introduce no novelty. They are nothing more than an embodiment and summary of previous judgments of the Court.

Johnston v. *Duncan*, 2 S. 532, was the case of a dissolved company in which the creditor of the company sued only one of the two persons who were partners of the company. The partner called as de-

fender objected to the competency, and the Court being satisfied that the other partner was within Scotland, sisted process till he should be cited. In *Geddes* v. *Hopkirk*, 5 S. 697, the pursuer called as defender the person who had been the manager of the company, and also the company itself, but as it appeared that the company was dissolved and could not be called, "the Judges held that as the debt was not constituted against the company it was necessary to call all the partners."

Munnoch v. *Dewar* (of which the best report is in the F.C., 23rd February 1831) was an action before the Magistrates of Glasgow in which one partner of a dissolved and bankrupt company was sued for a company debt. The Magistrates allowed a proof, but in an advocation Lord Fullerton (Ordinary) "found that all parties were not called, and therefore sustained that reason of suspension, suspended the letters and decerned," and the Court, without hearing counsel for the defender, adhered.

These are all cases affirming the obligation of the creditor of a dissolved company to call all the partners in an action for an unconstituted company debt, and it may be said that they are therefore not direct authorities in the present case. But they seem to me to be cases *a fortiori* of the present. Partners of a dissolved company are tied together in a conjunct and several liability for company debts; their relation to one another and to the dissolved company proves the nature and extent of their obligation as being conjunct and several, but joint liability for a debt arising from a verbal contract of employment is not necessarily conjunct and several; that quality of the obligation requires to be proved as matter of fact, and cannot be presumed from the relation of the parties.

But the case of *Zuill* v. *M'Murchie* (4 D. 871) is an example of the application of the principle to parties connected not as partners but as co-obligants in a promissory-note. So far as concerned the contents of the promissory-note the parties were of course liable *in solidum* and to be sued separately, because the debt was constituted by written instrument. But the action concluded also for the expenses of diligence, and the interest of the expenses of a note of suspension of the charge which had been presented by one of the co-obligants and refused. The summons was executed against one of the co-obligants only, who pleaded *in limine* that the others must be called. This defence was repelled by the Sheriff, but in a suspension of his decree the Lord Ordinary (Cuninghame) sustained the reason of suspension founded on this defence, and remitted to the Sheriff to "sist process till the other defenders set forth on the face of the summons are called." His Lordship in his opinion stated that two persons other than the suspender were set forth on the face of the summons as conjunctly liable for the debt. That "at least two of the sums concluded for (£4, 10s. 3d. and £5, 2s.) were as yet illiquid and unconstituted; and this being the case, it is a point quite established in practice that an action of constitution cannot proceed till all the *correi* are called." After citing some of the cases already noticed his Lordship proceeds—"The Lord Ordinary should think it very inexpedient to unsettle that decision, which he has always understood as invariably acted on in practice in this Court." The Second Division adhered to Lord Cuninghame's interlocutor. The opinions of the Judges of the Inner House have been subjected to some criticism, and perhaps not without reason, for there seems to have occurred at the advising a misapprehension as to the precise state of the facts. But although some difficulty was on account of this misapprehension suggested at first by Lord Medwyn, Lord Moncreiff enunciated the true principle very clearly in these words—"The question whether the obligants are jointly and severally liable must be determined by decree if there be no liquid document of debt;" and after referring to *Reid & M'Call* v. *Douglas*, the incorrect report of which in the Fac. Coll., his Lordship having been counsel in the cause, corrected from his own knowledge, he proceeds thus—"Where the obligants are not a company it remains to be shown that they are *correi debendi* by decree. They are all *correi debendi* for the amount of the promissory-note but not for the expenses. In the case of the bill the possession of the document presumes non-payment; not so as regards the diligence." Following on this Lord Medwyn said—"I should not dissent from a great part of the doctrine stated by Lord Moncreiff, specially in regard to the case of *Reid*."

The rule established by this series of cases appears to me to be that when a plurality of persons are alleged to be bound conjunctly and severally, no one of them can be sued separately for payment or performance of the whole debt or obligation till the debt or obligation has been constituted by writing or decree, or, in other words, that where such a debt or obligation has not been so constituted, the whole *correi debendi* subject to the jurisdiction of the courts of this country must be called in any action to enforce payment or performance. If I entertained any doubt as to the soundness or equity of the rule, which I do not, I should consider myself precluded by authority from challenging or reconsidering it.

In the present case the pursuer has brought his action in a Court of limited jurisdiction in which he finds himself unable to comply with the rule. He ought to have raised the action in this Court, in which he would have had no difficulty in convening the whole *correi debendi*. This is a mistake for which the pursuer alone is answerable.

It is unfortunate that this question should have arisen in the Debts Recovery Court, where the pecuniary interest is necessarily small, and it is very desirable that in a Court of such limited jurisdiction the difficulty should be obviated by legislation. This can be done very easily and appropriately by extending to the Debts Recovery Court the power given to the Sheriff by the

Small Debt Act of 1889, sec. 3, of citing parties resident in other sheriffdoms.

LORD JUSTICE-CLERK—Where it is proposed to sue for a debt for which it is alleged that several persons are liable conjunctly and severally, it is a rule that in the first instance the debt be constituted against them all. The rule is based on equitable considerations, and as such ought not to be dispensed with except on grounds of higher equity, such as that persons are beyond the jurisdiction of any Scottish Court competent to deal with the case. Such constitution may be established by writing under the hands of the alleged *correi debendi*, or by a decree already obtained against them. But where it is not thus constituted the rule applies, and ought to be carried out, unless such appeal to higher equity, as I have referred to, can be made with force. The sole question therefore in this case is, whether in the circumstances in which the pursuer is placed he is entitled to exemption from the operation of the rule on the ground that it would be inequitable to apply it? On that question I was at first inclined to think that it was a case in which the rule might be relaxed, but upon further consideration I have come to be of opinion with your Lordship that the pursuer is not in a position to demand that the Court shall interfere on the ground of higher equity to relieve him from the operation of the rule. This is not a case in which the pursuer is unable to sue all the *correi*. They are all within the jurisdiction of the Scottish Courts. Therefore no difficulty exists in convening them competently. The pursuer would be entitled to convene them in the Court of Session if they were not amenable to the jurisdiction of any one Sheriff, even although the amount sued for were not such as would in the ordinary case be competent ground of action in any other Court than the Small Debt Court. But in this case the sum sued for is such that it is the pursuer's right to have it tried in the Court of Session independently of any special ground for his doing so. And although it may be undesirable, and indeed unreasonable, that every case in which the sum sued for reaches £25 should be tried in the Court of Session, still that limit is fixed by statute as one at which it may not be unreasonable to proceed in the Supreme Court. Now, the pursuer having by statute the right to sue in this Court, in respect the sum sued for is sufficient to confer upon him that right, I hold that he cannot ask that the rule of equity in favour of *correi debendi* shall for greater equity be set aside in his favour so as to make it competent for him to sue one debtor of several liable to him in the same debt in a Sheriff Court, and then to ask decree without constituting the debt against them all by saying that the others are not amenable to the jurisdiction of that Sheriff Court.

I agree with your Lordship that it would be very desirable that in ordinary cases in the Sheriff Court the provisions of the recent Small Debt Act as regards jurisdiction should be made to apply to such cases, in which case no difficulty such as we have to deal with in this case would arise.

LORD SHAND—This case raises a question of process or procedure only, but the question is one of much importance. It arises in a Sheriff Court action, but the rule or principle contended for must be one of general application to be enforced in this Court as well as in all other courts of the country. The action is one in the Court of Argyllshire for £25, 2s. 7d., and there will be this extreme hardship for the pursuer, that if the plea of all parties not called be sustained, he will then not only have the present action dismissed, but unless he elect to give up his claim altogether he must raise a new action in this Court, where the expense he must incur will be out of all proportion to the amount of the debt due to him—and where he must call as defenders not only the present defenders who are liable to him for the full amount of his claim quite independently of the liability of any other person, but another defender against whom, for aught that appears, he has no intention or desire to make any claim.

The pursuer has three persons liable to him jointly and severally for the debt for which he sued—that is, each is liable for the whole. Two of these reside in Argyllshire, and he has raised his action against them in the Sheriff Court of Argyll. They plead that a third party who resides in Lanarkshire, and who is not subject to the jurisdiction of the Sheriff of Argyll, but who is also liable conjunctly and severally for the same debt, has not been made a party to the action, and the question is, whether this plea is sound, and whether it follows that the action should be dismissed. In other words, the question is, whether when a creditor has several persons liable to him conjunctly and severally for a debt—that is, each liable to him for the whole debt—he cannot have an action against one of them, but must summon the whole in order to recover even against one.

I confess it was with surprise that I heard the contention maintained that a pursuer in such a case could not maintain his action against any of his debtors—each of whom is under liability for the whole claim—for I thought, and I now think, with deference to the opinions of those of my brethren who hold otherwise, that the point is a clear one both on principle and on authority.

Mr Mackay in his work on the practice of the Court, published thirteen years ago, states the rule for the guidance of the profession under the head of "Proper Defenders to Call," as follows—"16. In actions for the sums due under or for implement of obligations or contracts where the obligation is joint, all the parties liable under it must be called as defenders, and if some only are called, they may insist, under the plea of all parties not called, that the others shall be made defenders before the action proceeds, but where it is joint and several, any one or more of them may be called, for each is liable for the whole debt." This is in my opinion a correct

statement of the law and practice, and it is fully borne out by the authorities to which he refers.

Mr Erskine, iii. 3, 74, says—"Though the obligation should be for the payment of a sum of money, yet the obligants are liable *singuli in solidum* in the special case where all of them are expressly bound conjunctly and severally, or as full debtors with one another; for these words plainly mean that each of them may be sued by himself for the whole."

In the case of *Richmond* v. *Gordon*, 1847, 9 D. 633, the point was expressly settled by a unanimous judgment of the Court. The rubric correctly states the import of the case, and is as follows—"Where a committee of management of a large body of shareholders bound and obliged themselves 'as well as the whole other commissioners and shareholders jointly and severally' to perform a certain obligation—*held* that the committee could be sued for performance of the obligation without calling the other shareholders, in respect they bound themselves jointly and severally;" and three passages from the opinions of the Judges will show how complete was the agreement of opinion as to the rule and the principle." Lord President—"We do not require the authority of Erskine to prove that if parties bind themselves jointly and severally anyone may be called; and looking to the general rule, the dilatory defence must be repelled." Lord Mackenzie—"I am of the same opinion. It is perfectly clear that the doctrine of Erskine and Bankton is here applicable, that parties bound jointly and severally may be severally sued. The act was done by these defenders. They have made out no exception to take their case from the general rule. It is not the same as if a party had sold property to B, and a third party had warranted the sale. In such a case there might be a question whether the guarantee could be sued without calling the person whose act is warranted. But here the parties are bound jointly and severally as principals, and that is enough to warrant the action." Lord Jeffrey—"I think it worth while to notice the paralogism in the argument of the counsel for the defenders. He argued that a decree of constitution is necessary against the whole concern before you can come against anyone of the persons bound jointly and severally, because it may turn out that there is no ultimate liability. It is said there could be no suit against anyone except on a contracted decree; that is not the law as laid down by Erskine. The law says that if people are bound jointly and severally you may cite them to your action severally, in the same manner as you can elect against anyone of the prostrate victims after you have got the extracted decree."

Further, in the earlier case of *Johnston* v. *Arnott*, 8 S. 383, Lord Glenlee puts the very case before the Court of a writer suing for payment one of several employers, and distinguishing it from the special case with which he was then dealing, of a question between a trustee and the creditors ranked (in which the plea of all parties not called was sustained), says:—"No doubt there is a great number of cases where recourse may be had by a party employed, on any one of his employers; but these are all cases of voluntary association of individuals to employ a person for their individual behoof. Such an association constitutes a society in which the parties are *socii* to the effect of employment, and are bound conjunctly and severally. The party employed has no connection with their interests except that he has to do with the work entrusted to him. It is totally different from the case of a trustee who has charge of the interest of all the creditors," &c.

It is said that all of these authorities are applicable only to the case in which the pursuer has a written obligation undertaking conjunct and several liability. I see nothing in the authorities themselves to warrant this. The words of Lord Glenlee which I have just read expressly exclude that notion, and the opinions of the Judges in the case of *Richmond* are expressed in terms indicating no such limitation of the principle. If from the nature of the contract alleged (as in the case of a law-agent and his clients) conjunct and several liability necessarily results, the creditor is *ex lege* in precisely the same position as the creditor who *ex stipulatione* holds a written obligation to the same effect, and accordingly there is no trace that I can find in any of the authorities of the distinction which the defender seeks to draw. I must make an exception of one case, viz., that of *Zuill* in 1842, 4 D. 871, several years before the case of *Richmond*. But I venture to say that the case of *Zuill* is of no value whatever as an authority on the question now to be decided, or indeed on any question. Lord Cunningham, who was Lord Ordinary in the case, proceeded on some such distinction as the defender now seeks to draw. But Lord Medwyn entirely differed from this. The opening sentence of his opinion is:—It is a general rule of law that *correi debendi* can be severally sued even though the nature of the obligation import joint liability, and the Lord Justice-Clerk expresses his agreement with this view. Lord Moncreiff again proposed to proceed on the specialties of the case, and seemed to favour Lord Cunningham's view. There was thus a divided Court, and in that state of matters the Lord Justice-Clerk suggested a ground of judgment on which the Judges agreed, which would certainly never be adopted now, viz., that as the summons in the case was taken out against several defenders, the pursuer was not entitled to serve it against one only, but was bound out of respect to the Court's writ to serve it against everyone called. His Lordship says—"With this ground of action the pursuer sets forth that all are jointly and severally liable, and concludes to have all decreed and ordained conjunctly and severally. Such is the summons which the pursuer has raised as the warrant for citation, and I think that he is not entitled to alter the writ of Court without any step in process. Had execution against the Stewarts

been returned as not found, or had they been cited and not appeared, the pursuer might have proceeded against the other; but he was not entitled to proceed against one merely when the action was raised against all. The summons is a most important writ, and not in the power of the party. It is by the Court, not by the party, that any alteration is to be made. If he does not call all the parties interested, the party called has a right to object. On these grounds I would sustain the interlocutor of the Lord Ordinary." To this Lord Medwyn added—"I am glad that your Lordships have proceeded upon this ground. I should not dissent from a great part of the doctrine stated by Lord Moncreiff, specially in regard to the case of *Reid*, which was a case of partnership."

This reference to the case of *Reid* leads me to say that in my opinion a very misleading element has been introduced into this whole discussion by the reference in the argument to the cases of copartnership, such as *Reid* v. *M'Call, The Edinburgh and Glasgow Bank* v. *Ewen*, and *Muir* v. *Collett*, as if these were analogous to such a case as the present. In my opinion that class of cases is to be entirely distinguished from a case of joint and several obligation either *ex stipulatione* or *ex lege;* and the reason is very obvious. A partner of a company is not a joint and several obligant in the ordinary sense for a debt due by the company of which he is or has been a partner. The debt is the debt of the company, and the company is the primary obligant. The liability of a partner, to use a familiar expression which Lord Ivory used in the case of *Ewen*, is reached "through the sides of the company." Bell in his Comm. ii. 619 (5th ed.) states the rule and the ground of it thus—"It is a consequence of this separate existence of the company as a person that an action cannot directly and in the first instance be maintained against a partner for the debt of the company. The demand must be made first against the company, or the company must have failed to pay or have dishonoured their bill before the partner can be called on."

It seems to me therefore to be clear that the principle which requires a debt of a company to be constituted before a partner can be sued (and all of the cases to which your Lordship has referred are, I think, of this class) has no application to the case of a debtor who is directly liable to his creditor jointly and severally with others. The distinction indeed is in effect pointed out in the case of *Richmond*, in the opinion of Lord Mackenzie already quoted. So also in the case of a dissolved company, the rule remains that the debt must be constituted against the company, though it is held sufficient, with a view to constitution, to call all the partners subject to the jurisdiction. It appears to me to be clear that the *dicta* in these partnership cases, in so far as they deal with partnership liabilities, have no application; and in so far as the *dicta* in these cases deal with the general law, *e.g.*, in the case of *Muir* v. *Collett*, such *dicta* were *obiter*. The correctness of these must be tested by the various authorities to which I have referred, and the principle there settled, which I am humbly of opinion are conclusive against the defender's plea.

The defender argues that equity supports his defence, and if it be assumed that the question is still open, equitable considerations might be entitled to weight. I know of no passage in which the view of the alleged equity is more fully stated than by your Lordship in the case of *Muir* v. *Collett*, 34 D. 1122—"Where there are *correi debendi*, and one of them only is called into the field by the common creditor, he is manifestly put to a great disadvantage, for the obligants whom the pursuer does not choose to call may very possibly have a good defence against the whole demand, or may be in possession of a discharge of the whole debt."

The first observation which occurs to one in reference to this observation is that it makes no distinction between a claim under a written or constituted obligation and an obligation or claim unconstituted, and the so-called equitable reason that another of the joint and several obligants, if called as a defender, might possibly have a good defence against the demand or a discharge of the debt, applies quite as directly to the case of a constituted obligation (in which case it is conceded the plea of all parties not called has no place) as to the case where the obligation is said to require constitution.

But neither in the one case nor the other can I find any equity in requiring the pursuer to call more than one of several debtors jointly and severally liable to him. It is said the defender has an equity which he can plead. What, then, is it? His creditor has dealt with him on the stipulation that he shall pay the whole debt if called on to do so, in the words of Erskine, "as the debtor is bound conjunctly and severally." These words plainly mean that each of them may be sued by himself for the whole. It appears to me to be inequitable that a creditor holding such a right should be subjected to the burden or obligation of calling any one beyond a debtor, who is bound to pay the whole debt; and that a debtor so bound has no equity to demand that his creditor shall call a defender in order to suggest a defence, which it is his business to discover (like that of any other defender) if such a defence exists, and that at his own expense, and not at the expense or inconvenience of the creditor. Further, there must be many cases in which other defenders, if called, may have special defences applicable to their own cases only (and indeed we have an illustration of this in the defence of one of the defenders in this case), which may constitute an answer for themselves to the pursuers' demand, or which might give rise to an expensive and tedious litigation, and I cannot see why a pursuer should be required to call such parties on account of any equitable considerations towards the debtor, who when called on is bound to pay his debt. Besides which there may be many cases in which the other debtors have

no means to meet the debt—and yet the pursuer out of consideration to the defender would be required to incur the additional expense of bringing such defenders into the field, and of possibly finding himself involved in unsuccessful litigation with them.

And so on these general grounds I am of opinion—and clearly of opinion—that this defence ought to be repelled, and that the Sheriff was right in his decision.

I am bound to add, that even assuming there were a rule of general application such as is maintained in defence in this case, I think the specialties of the case are such that the defence ought to be repelled.

The claim of the pursuer, it is true, is 2s. 5d. above the sum for which it was possible to bring an action in this Court, but surely it was much more desirable that it should be brought in the Sheriff Court. The rule founded on is, even in cases of partnership, relaxed in special circumstances, as, *e.g.*, where certain of the partners are abroad; and so it should I think be relaxed in a case like this.

I have further to observe that there can be no doubt that if this appeal be sustained general inconvenience must result not only in this Court but in the Courts below, because many cases which might have been brought in the Sheriff Court must necessarily be brought here. In regard to claims between £12 and £25, the same principle must hold. If a man happens to have a claim slightly upwards of £12, but has persons indebted to him in that sum living in different counties, if this appeal be sustained he cannot sue in the Sheriff Court but must come to this Court in order to reach even one of the defenders.

In England the rule is in accordance with what seems to me to be only reasonable, for I find that the practice there, as laid down by Mr Broom in his Commentaries, p. 118, is this—"The plaintiff may, at his option, join as parties to the action all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange or promissory-notes. And no action will be defeated by reason of the misjoinder or non-joinder of the parties, the Court dealing with the matter in controversy so far as regards the rights and interests of the persons actually before it." And in the rules of procedure in England—I quote from page 270 of the English Practice Register of last year—there is the following—"Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the parties liable thereto, but the plaintiff may proceed against one or more of the persons severally liable." I regret that in this matter of procedure such a rule as that should not receive the sanction of this Court. The result will be, I should think, that the inconvenience will become known and felt by the profession, and that we must find a remedy in some shape, by passing an Act of Sederunt, or if it shall be found that this is impracticable, then by an Act of Parliament. Your Lordship has suggested that this course should be adopted. In reference to that suggestion, I only say that I regret that in a matter of mere procedure the Court by decision should lay down any rule, which in the view even of a narrow majority of the Court is so indefensible that it ought to be altered, the alteration suggested being one which requires a resort to the Legislature; for I hold that in matters of procedure the Court—and especially when sitting as a bench of Seven Judges—has full discretion and power to regulate its own procedure in so far as this is not expressly regulated by statute.

LORD YOUNG—I agree with the opinion of Lord Shand.

I wish to add that I think the plea that all parties are not called is not always but most frequently an equitable plea. A defender may always plead it and try to satisfy the Court that regard for his interests requires another party or other parties to be called, and whenever the Court is of opinion that justice to the defender requires in trying the case that other parties should be called, it is always in the power of the Court to order the pursuer to call them. I think that is well settled and familiar law, but subject to that observation I am clearly of opinion that a party who has two or more pursuers liable to him severally is entitled to pursue any one or more of them as he chooses. The one or more whom he sues may state such an equitable plea as I have mentioned, and the Court will then deal with it as it thinks right.

The case before us is almost gross, so as to make one wonder so much could be said about it. I am afraid, however, I must add a few words, though I do not intend to refer to cases, and certainly not to cases dealing with company debts, which I think have no bearing on the present question.

The case is so gross as this—Three members of a family—a father, son, and daughter—had the misfortune to employ a Glasgow writer in a dispute with other members of the family. I say misfortune, because the result of the employment is the debt here sued for of £25, 2s. 7d., and they lost their cause as well. But the Glasgow writer wants payment of his account, and they having lost their case are not willing to pay it, and one may sympathise with them a good deal. The writer sues two of these, the son and daughter, who are resident in Dunoon, as liable jointly and severally, and if he did the work on their employment no one disputes that they are liable, each of them. In short, if the statements in the case are true in fact their liability is admitted, but they say that their father, who lives in Glasgow, ought also to be called as a defender, which he cannot be in the Sheriff Court of Argyll, and in order to have the whole three called, the action would have to be brought in the Court of Session. I do not think any man of sense can think that that is a sensible or desirable course if it could be avoided. If it cannot be avoided, of course it must be

submitted to or the claim must be given up altogether, but on the equitable view, and equity has been referred to, I do not think the result can be defended at all.

I ventured to put the question why the son and daughter wished the action brought in the Court of Session, and I could get no answer except that the writer would probably rather abandon the claim. The suggestion was made that if one of several *correi debendi* had a discharge of the claim against them, injustice would be done to the others if he were not called, but the others could ascertain if that were so, and state it as an equitable ground of defence. In short, the plea in this case is a mere device, and if we give effect to it, the result will be to prevent the pursuer going on with the action in the Sheriff Court and to compel him to come to the Court of Session for no end that I can see.

If the law requires such a course to be followed, of course it must be submitted to, but that, it seems to me, is a mere question of procedure, and taking the equitable rule to be as I have stated, perfect equity being secured under that rule, why should we be compelled to defeat the ends of justice, and prevent the case being brought in the Sheriff Court? That is a result surely we should desire to avoid, and why should we not avoid it? Is it because these decisions about company debts prevent us? Why? In forms of procedure we can, I think, remedy anything of the sort. But in a matter of equity and reasonable procedure some attention is due to what has been pointed out that under the rules of Court in England it is expressly provided that a plaintiff need not conjoin in an action as defendants any more persons who are jointly and severally bound to him than he chooses. Is experience only given to us so as to lead us to think that the English Judges have overlooked weighty considerations of equity. I imagine their experience is much greater than our own, and if no such considerations occur to them, and otherwise what I have just mentioned appears the *prima facie* reasonable course, we may, I think, reasonably follow a similar course.

I think accordingly in this action, brought by an agent against two out of three persons who employed him, that this plea, which is advanced merely for the purpose of disturbing the course of justice, should be repelled.

LORD RUTHERFURD CLARK—I concur with your Lordship in the chair, but should like to say that I do not think the rule ought to be applied in actions raised in Sheriff Courts for sums under £25.

LORD ADAM—I also concur with your Lordship in the chair.

LORD M'LAREN—The pursuer in the narrative part of the summons sets forth that he holds three persons bound to him jointly and severally under a contract of employment. But as one of these persons is not resident within the Sheriff's jurisdiction the action is only called against the two defenders who are within the jurisdiction. It is objected that all parties are not called, and as the third obligant is not within the Sheriff's jurisdiction, and cannot be called by the Sheriff's authority, the defenders contend that they are entitled to have the action dismissed. The question for consideration is, whether there is any necessity for calling the third debtor when the pursuer only desires to enforce the obligation against the other two obligants according to his contract with them.

In the case of obligations in writing I can hardly be mistaken in my statement of the law when I say that the effect of taking three persons, bound jointly and severally in one instrument is exactly the same as if each individual obligant had bound himself for the debt by a separate instrument. The addition of the word "jointly" makes no difference in the right of the creditor to proceed against any one of the obligants for the debt; it only expresses what the law would in any case imply, viz., that as between the co-obligants the obligation is divisible.

I have been trying to find (but without success) why the rule should be different in the case of consensual contracts, where writing is not necessary to the constitution of the obligation. If it were a thing altogether unprecedented that three persons jointly interested in a suit should employ a solicitor to prosecute a joint claim on their behalf, I could understand that an action of constitution might be necessary to determine the liabilities resulting from this supposed new or unusual form of engagement.

But there is nothing in the least unusual in the contract set forth in the summons, and the law is quite settled that where professional services are rendered on joint employment the employers are jointly and severally responsible for the payment of the account. In order that they should be so responsible it is not necessary that the words "jointly and severally," or any equivalent technical words, should be used in making the contract. The joint and several liability is the result of the fact of employing the professional man, or taking the benefit of his services when given, and the claim in this action is in accordance with this known and definite rule of liability. The pursuer's demand is therefore well founded if the facts which he states are true. But we are invited to tell him that he will not be allowed to proceed with his action, because he is unable to bring into the field the other co-obligant, whose appearance in the suit can be attended with no benefit to anyone, because nothing that he can plead on his own account will increase or diminish the liability of the actual defenders, or enable him to get rid of the claim of relief, if well founded, which they have against him.

I do not think that the supposed rule requiring that all the obligants should be called is one that would attract much support on its merits. Certainly, I have not heard it spoken of here in terms of warm commendation. But it is defended on the

ground of the supposed necessity of conforming to authority.

I have considered the cases which were cited to us as precedents on this subject, and it seems to me that this precise point has not been determined by authority, although there are expressions of judicial opinion which lend some support to the objection to the summons. On the other side there is the authority of Erskine, the cases of *Johnston* v. *Arnold*, and *Richmond* v. *Graham*, and I refer especially to the clearly expressed opinion of Lord Glenlee in the first mentioned case, which are all in favour of the creditor's right to proceed against the co-obligants separately and independently. The authority of the civil law, on which our law of obligations is largely founded, is to the same effect, because it is perfectly clear that before the introduction of the benefit of division by imperial rescript (and after its introduction, if the benefit of division were renounced) the creditor might bring his action against any one of the joint obligants, on condition of acknowledging the right of the defender to an assignment of the claim. I understand some of your Lordships to be of opinion that the instance would have been good, if the pursuer in this summons had not set forth that there was another obligant jointly and severally liable. If this view be sound I think the pursuer ought to be allowed to amend or restrict his summons to avoid the effect of what is thus reduced to a purely technical objection. I wish to add that I agree with Lord Shand in not giving much weight in this question to the cases arising out of claims against dissolved companies. In all such cases the individuals sued have a right of relief against the partnership estate, and in order that this right may be preserved, it is necessary that the dissolved company should be represented through its members. In the present case there is no joint estate on which recourse can be had, and the reason of the rule referred to in *Muir* v. *Collett* does not apply.

But I do not wish to represent this question as one which depends on the authority of cases, and indeed in a question of procedure there seems to be no good reason for giving a decisive weight to authority of any kind, because it may be kept in view that no rights are affected and no injury is done to any person by any improvement in its procedure which a court of law may introduce through its decisions. For my part, I prefer in a question of this kind to consider the case on its merits, and according to my own ideas of fitness and justice, rather than to try to find out how other Judges who died fifty years ago would have decided the case, if it had been brought before them.

I am of opinion that the defender's plea to the effect that all parties are not called is not well founded, and that the case ought to be remitted to the Sheriff for proof.

The Court pronounced this interlocutor:—

"Having resumed consideration of the cause, with the assistance of three Judges of the Second Division, and heard counsel for the parties upon the appeal and the record, after consultation with the said three Judges, and in conformity with the opinion of the majority of the Seven Judges present at said hearing, Recal the interlocutor of the Sheriff dated 19th October 1889 appealed against: Find that the summons concludes against three defenders jointly and severally to make payment of the amount of an open account: Find that the summons was not executed against the defender first named in the summons by reason of his being beyond the jurisdiction of the Sheriff: Find that the joint and several obligation on which the action was founded not being constituted either by writing or decree, the pursuer is bound to call all the alleged co-obligants: Therefore remit to the Sheriff to dismiss the action: Find the appellants entitled to expenses in both Courts," &c.

Counsel for the Pursuer and Respondent —M'Watt. Agent—W. B. Glen, S.S.C.

Counsel for the Defenders and Reclaimers —Maconochie. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 7.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MORRISON AND OTHERS (REDDIE'S TRUSTEES) *v.* LINDSAY AND OTHERS.

Succession—Mutual Settlement of Spouses—Amount of Joint Estate Carried by Husband's Testament.

By mutual settlement a husband conveyed to his wife, in the event of her surviving him, the whole estate which might belong or be due to him at the time of his death, constituting her his sole executrix, and the wife made a similar disposition in the husband's favour. These mutual conveyances were subject to the conditions (1) that any testamentary writing left by the predeceaser should receive effect, in the case of the husband being the predeceaser to an extent not exceeding three-fifths, and in the case of the wife being the predeceaser to an extent not exceeding two-fifths of the means and estate remaining at the death of the survivor of them; and (2) that the survivor should have full power by any writing *mortis causa* to test on or dispose of any part not otherwise tested on or conveyed away by the predeceaser as aforesaid.

The husband left a will whereby, on the narrative that the funds of his wife and himself amounted to £5000 at that date, of which £2000 belonged to his wife in her own right, he directed that