£26, 12s. 8d., and for fifty-four days amounts to £1438, 4s. I think the pursuers are entitled to decree for this sum instead of the sum decerned for by the Lord Ordinary.

The Court recalled the finding in the Lord Ordinary's interlocutor that the defenders were liable in the sum of £1171, 17s. 4d., which they altered to £1438, 4s., and otherwise adhered.

Counsel for Reclaimers—C. S. Dickson—Ure. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondents — Salvesen — Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, March 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MILNE'S TRUSTEES *v.* ORMISTON'S TRUSTEES.

Promissory-Note—Joint Obligants—12 *Geo. III. cap.* 72, *sec.* 37—*Sexennial Prescription—Interruption of Prescription.*

A, B, and C, in return for a loan of £1000, granted to D a promissory-note, dated 15th May 1877, whereby they bound themselves, conjunctly and severally, to pay the said sum one day after date. A and B each paid one-half of the interest on the sum in the note down to 15th May 1880. In 1883 D raised an action, with general conclusions, against A, B, and C, for the sum of £1000, contained in the said promissory-note, with interest thereon from 15th May 1880, and decree in absence was pronounced against them therefor. In 1892 A and B each paid to D one-third of the principal sum of £1000 and interest, and expenses of process. Thereafter D raised an action against A for the remaining third. A admitted the debt, but averred that the only debtor now bound for the sum sued for was C, as the promissory-note had been prescribed, and the decree against each of the debtors obtained in 1883 was only for one-third of the debt. *Held* that A was liable to D for the sum sued for.

Opinions—per Lord Justice-Clerk and Lord Trayner, *diss.* Lord Young, and *dub.* Lord Rutherfurd Clark—that where an action has been commenced upon a bill within six years from the date of its maturity, whether against the whole or any one of the obligants under the bill, such action will exclude the statutory limitation.

By section 37 of the Statute 12 George III. cap. 72, it is enacted "that no bill of exchange, or inland bill, or promissory-note, executed after the 15th day of May 1772, shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes became exigible."

On 15th May 1877 William Thomas Ormiston, John Ord, and Samuel Swan, in return for a loan of £1000, granted a promissory-note for that amount in favour of Miss Marion Milne, whereby they bound themselves one day after date, conjunctly and severally, to pay to her within the office of the Royal Bank of Scotland in Jedburgh the said sum of £1000. The interest on the said note was to be at the rate of 5 per centum per annum.

William Thomas Ormiston died on 24th July 1878, Samuel Swan on 30th January 1880, and John Ord on 30th September 1880. They all left trust-settlements.

Until 15th May 1880 the interest on the sum in the note was duly paid, one-half by John Ord, and the other half by William Thomas Ormiston, and after his death by his representatives.

In 1883 Miss Milne brought an action in the Sheriff Court of Roxburghshire against the trustees and executors of the three granters of the promissory-note, in which she prayed the Court "to grant decree against the above-named defenders as trustees foresaid, ordaining them to pay to the pursuer the sum of £1000 sterling, with interest thereon at the rate of 5 per cent. per annum from the 15th day of May 1880 until payment, with expenses." In the condescendence she averred—"(5) The said promissory-note is still unpaid, and is due to the pursuer; and as the said trustees of the said William Thomas Ormiston, Samuel Swan, and John Ord now represent the granters thereof, the several estates entrusted to the management of the said respective trustees are thus jointly and severally liable in payment of the said sum of £1000 sterling, with interest thereon at the rate of 5 per centum per annum from the 15th day of May 1880 (since which date no interest has been paid) until payment thereof."

On 26th April 1883 the Sheriff-Substitute (RUSSELL) pronounced the following interlocutor—"In respect of no appearance for the defenders, holds them as confessed, and decerns against them in terms of the prayer of the petition, with £7, 1s. 8d. of expenses." Extract decree followed thereon, in which the Sheriff-Substitute in absence decerned and ordained the defenders as trustees and executors foresaid to make payment to the said Miss Marion Milne, pursuer, of £1000 sterling, with interest thereon at the rate of 5 per centum per annum from the 15th day of May 1880 till payment, with £7, 1s. 8d. of expenses of process as taxed, and 4s., being dues of extracting and recording this decree."

On 5th September 1890 Miss Milne died, leaving a trust-settlement.

In 1892 Mr Ormiston's trustees and Mr Ord's trustees each paid to Miss Milne' trustees one-third of the principal sum of £1000,

with interest thereon at 5 per cent. from 15th May 1880 to the date of payment, and expenses of process and dues of extract, as contained in the said promissory-note, and also the decree in absence of 26th April 1883, and receipts were granted therefor, reserving all further claims and answers.

On 29th June 1892 Miss Milne's trustees raised an action against Mr Ormiston's trustees for the remaining third of the principal sum of the promissory-note, with interest and expenses, in which action they prayed the Court to ordain the defenders, as trustees and executors foresaid, "to make payment to the pursuers of the sum of £537, 16s. 3d., with the interest thereof from the day of citation hereto until payment." In their condescendence the pursuers averred—"(Cond. 5) . . . The late Samuel Swan left no effects. The pursuers have applied to the agent in Mr Swan's executry, but have been unable to recover any part of the debt due to them under the promissory-note. (Cond. 6) One-third of the principal sum due under the promissory-note, with interest and expenses, is still resting-owing to the pursuers, and now amounts to the sum of £537, 16s. 3d. as sued for. In virtue of the above-mentioned action (the Sheriff Court action of 1883) the promissory-note still exists in force as a document of debt, the liabilities of the parties thereto are joint and several, and the defenders are accordingly resting-owing the amount sued for. The defenders, however, do not admit liability for this sum, and the present action has been rendered necessary in order to enforce the rights of the pursuers under the said note."

The pursuers pleaded—"(1) The sum sued for being resting-owing to the pursuers by the defenders, they are entitled to decree therefor against the defenders, as concluded for, with expenses. (2) The sexennial prescription or limitation of bills and promissory-notes having been barred or excluded by the action raised on the promissory-note in question, the said promissory-note exists in force as a document of debt, and the pursuers are entitled to recover from the defenders the balance of the said sum therein contained, with the interest and expenses, as concluded for."

Mr Ormiston's trustees lodged defences in which they admitted the loan, but averred that the only debtors now bound for the sum sued for were Samuel Swan's executors.

They pleaded, *inter alia*—"(3) The said promissory-note has undergone prescription, and cannot now be founded on. (4) The said promissory-note was superseded by the decree taken on 20th April 1883, and said decree is now the measure of the pursuers' rights. (5) The defenders not being indebted to the pursuers in any sum are entitled to absolvitor with expenses. (6) The grounds of debt not being competently alleged the action falls to be dismissed."

On 25th November 1892 the Lord Ordinary (STORMONTH DARLING) allowed the pursuers to amend their summons by inserting after the sum sued for, £537, 16s. 3d., the following words—"sterling, being the balance of principal and interest due on a promissory-note dated 15th May 1877, granted to the said Miss Marion Milne by the said William Thomas Ormiston, the late John Ord, and the late Samuel Swan, whereby they bound themselves, one day after date, conjunctly and severally, to pay to the said Miss Milne, within the office of the Royal Bank of Scotland in Jedburgh the sum of £1000."

On 9th December the Lord Ordinary pronounced the following interlocutor:—Repels the defences, and decerns against the defenders conform to the conclusions of the summons: Finds the pursuers entitled to expenses, &c.

"*Note.*—The late Mr Ormiston of Glenburnhall, whose trustees and executors are the defenders in this case, became liable, along with two other gentlemen, conjunctly and severally, on a promissory-note for £1000, granted in favour of the late Miss Milne of Otterburn on 15th May 1877. Her trustees now sue for the balance remaining due on the bill; and the defence is twofold: (1) That the summons is not competently framed, in respect that the note is not sued on; and (2) that the note is proscribed.

"With respect to the first defence, I have had no hesitation in allowing the pursuers to amend the summons by inserting a reference to the note. It seems to me that under the 29th section of the Court of Session Act of 1868 I was bound to allow this amendment, because it is clear from the condescendence and pleas-in-law that the action is laid on the bill, and the amendment was necessary for the purpose of determining in this action the real question in controversy between the parties.

"The second defence raises a much more difficult question, viz., this, whether the sexennial prescription was effectually interrupted by an action raised by the late Miss Milne in the Sheriff-Court of Roxburghshire against the representatives of all the co-obligants. The action was raised, and decree in absence was taken, in 1883, before the six years had expired; but the conclusions of the petition were so framed that nothing more could have been recovered from each of the three sets of trustees than one-third of the debt. In other words the petition did not conclude that they should make payment 'conjunctly and severally.' It is plain enough that this was by omission and not of design, for the fifth article of the condescendence distinctly averred that the defenders, as trustees of the original granters, were jointly and severally liable in payment of the amount in the bill with interest.

"The decree so obtained seems never to have been put in force; but in the course of the present year the defenders in this action, and the trustees of the second co-obligant, each paid one-third of the principal sum with interest and expenses, on receipts which bore that payment had been made and accepted under reservation of the pursuer's claim against all the parties to the note for the balance of the principal sum, interest, and expenses, and of the answers of all the said parties to such claim. It is clear that nothing turns on the pay-

ment thus made as of the nature of a transaction. The true question is, whether, as the pursuers allege, the Sheriff-Court action kept the bill alive to its full extent and effect; or whether, as the defenders allege, the bill is prescribed, and the decree in the action is now the measure of the pursuer's rights.

"I am of opinion that the action was effectual to interrupt prescription, and that the bill remains in force.

"It is settled law that it is enough to preserve a bill from prescription that there has been diligence done, or action raised, within the six years, though that particular action or diligence may not have been proceeded with; and further, that diligence or action against one co-obligant preserves recourse against the whole. Accordingly it was found in the case of *Paxton* v. *Forster*, 4 D. 1515, that where decree in absence had been taken within the sexennium against two of the representatives of the granter of a bill, and no payment had been made, the plea of prescription was not good as a defence against an action raised after the six years against four of his heirs-portioners. It is true that the Court in holding that the plea of prescription was elided by the earlier action, added the words 'when taken in connection with the proceedings at the meeting after the funeral.' But it appears that the only significance of the addition was, that by these proceedings the heritable and moveable estates of the deceased were massed together, so as to make his heirs-portioners liable in a debt which would otherwise have fallen primarily on his executor.

"It would thus appear that a defender cannot successfully plead that an action was ineffectual to interrupt prescription merely because it was one in which he personally could not have been found liable. It seems to me *a fortiori* that he cannot do so with reference to an action in which he might have been and was found liable, but only to a limited extent. Of course if the limitation of his liability had been established in *foro contentioso*, a plea of *res judicata* would have arisen. But that is not the case here. It is enough, in my view, to interrupt prescription that an action has been raised on the bill within the sexennium, before a competent Court, against all or some of the proper parties, even though the action has not concluded for the full measure of liability against each.

"The defenders do not allege that the balance sued for has been paid, and the result is that I must hold them liable."

The defenders reclaimed, and argued—The present action was laid on the bill only. Such an action must be brought within the six years. No doubt, in this case, on the eve of the expiry of the sexennium an action had been brought. But that action only concluded as against such of the defenders to it for one-third of the amount of the debt. They had paid their third, and therefore the debt as regards them was extinguished. After decree was got in that action there existed a judgment debt which came in place of the bill. That judgment debt had been paid by them. The pursuers were not entitled to ignore the terms of the decree in the former action and raise another action. The bill was prescribed and the debt could only be proved by writ or oath—*Denovan* v. *Cairns*, February 1, 1845, 7 D. 378. An abandoned action will not interrupt prescription—*Gobbi* v. *Lazzaroni*, March 19, 1859, 21 D. 201. The case of *Paxton* v. *Forster* did not apply, as in that case the heirs-portioners by their actings had incurred liability to pay the debt.

Argued for pursuers—The defender said the bill had been prescribed, and that the debt could only be proved by writ or oath. Even if the bill was prescribed, the debt was admitted by the defenders on record. But the bill had not been prescribed. It had been kept alive by the action raised in 1883. A judicial demand founding on the bill, made within the six years, excluded the application of the statute to the bill, and in all future time prescription could not be pleaded by anyone liable under the bill. In short, a judicial allegation of indebtedness and demand for the debt takes the case out of the Act altogether. Prescription was elided by raising an action, by claiming in a multiplepoinding or other process of competition, by production of the bill in a process of ranking and sale, or getting decree against one of the acceptors—Bell's Prin., sec. 598; Bell's Comm., i. 420; Thomson on Bills of Exchange (2d ed.) 466; *Douglas* v. *Heron & Company*, F.C., November 26, 1784; *Maclachan* v. *Thomson*, June 16, 1831, 9 S. 753; *National Bank* v. *Hope*, December 5, 1837, 16 S. 177; *Paxton* v. *Forster*, July 13, 1842, 4 D. 1515; *Rays* v. *Campbell*, June 14, 1850, 12 D. 1028.

At advising—

LORD JUSTICE-CLERK—The pursuers in this case, when they instituted their action, sued as on a debt, the conclusions of the summons being simply that the defenders should be decerned and ordained to pay a certain sum. It was plain, however, from their pleadings, that the case they proposed to make, was one of holders of a promissory-note, seeking to recover a balance of the contents of the note as onerous holders for value. The Lord Ordinary, on the defence being stated that the summons was not competently framed for such a case, in respect it failed to set forth the note as the basis of the summons, allowed the summons to be amended. Accordingly, the summons is now in the form applicable to a suit upon a bill of exchange or promissory-note. It is as such that it must, in my opinion, be dealt with, and the Lord Ordinary has so dealt with it. It may be that if the summons had been left as it was, and the pursuers been put to prove the debt, they might have been successful in showing by writ or oath that the debt was due, but as matters stand, the question before us relates to a case founded upon a promissory-note, and I think must be so dealt with.

There are two questions in regard to the

promissory-note—(1) has it been rendered powerless by the operation of the sexennial prescription? and (2) if it has not, have the pursuers' rights of recovery under it been curtailed by the decree given in a previous litigation raised upon it?

There have been various decisions interpreting and applying the Act by which a sexennial prescription was established for bills. It appears to me that the general effect of these decisions is well summed up in the case of *Maclachlan*, in which the Court gave effect to two contentions. The first is that it is enough to preserve a bill from the statutory prescription, that there has been diligence done or action raised within the six years, although that particular diligence or action may not have been proceeded with, and this opinion is confirmed by that of Lord Fullerton, whose opinion is entitled to the very highest weight, in the case of *Denovan* v. *Cairns;* he says—"Here action has been raised within the six years which the Act says is sufficient to interrupt prescription." The second is that diligence or action against one obligant preserves recourse against all.

In this case there is no difficulty as to what may be included in the words "action raised," for it is beyond dispute that action was not only raised, but decree pronounced, within the six years, the note which was payable one day after date bearing date 15th May 1877, and the decree upon it having been pronounced on 26th April 1883. There is also no difficulty in this case as to the effect of an action raised only against some of the body of obligants, for in that former case all the obligants were cited. I have therefore no doubt in concurring with the view of the Lord Ordinary that the exception of "action raised" provided by the statute as against the sexennial limitation exists in this case.

There is, however, a separate point made. It appears that, probably through inadvertence, the summons in the former case did not ask that a joint and several liability should be found against the defenders, although the pleadings maintained this to be the right of the pursuers. Accordingly by the decree of 26th April 1883 the defenders were ordained to make payment of the sum, but not severally as well as jointly. It is now maintained on the part of the defenders, who have paid their proportion under that decree, that that decree "is the measure of the pursuers' rights," and that they are not entitled now to make good any balance still due of the sum in the promissory-note, by enforcing any fuller liability against any of the obligants than is found by that decree. The facts as regards what took place under the decree of 1883 are, that it was never enforced, but that the present defenders have lately paid them one-third under that decree, and the trustees of another co-obligant have paid another third, these payments being made and accepted under reservation of the pursuers' claim and their answers to their claim for the balance.

I am unable to see grounds for giving effect to the defenders' plea. The fact that the pursuers raised an action and took a decree in absence which was never enforced, cannot in my opinion deprive them of a claim which they had before raising such action. If the promissory-note is not prescribed, as I hold it not to be, and if part of the sum in it has not been paid, I see no ground for holding that the pursuers cannot sue, for any balance due, any obligant, or the representatives of any obligant, who by his signature upon the note is liable for the whole sum. I would therefore move your Lordships to adhere to the Lord Ordinary's interlocutor, and to dismiss the reclaiming-note.

LORD YOUNG—This case raises, according to the view taken by the Lord Ordinary, an important question upon the limitation of bills of exchange, and upon which question I am not prepared to take his Lordship's view or the view expressed by your Lordship. But I agree in thinking that the case may be and ought to be decided upon another ground.

The statute—for it is a statutory limitation which we have to consider—provides, section 37, that "no bill of exchange or inland bill or promissory-note executed after 15th May 1772 shall be of force or effectual to produce any diligence or action in Scotland, unless such diligence shall be raised and executed or action commenced thereon within the space of six years from and after the terms at which the sums in the said bills or notes become exigible."

I do not think that these words admit of any doubt. The promissory-note loses its virtue and force by too long keeping after the lapse of six years, and is thereafter not to have any force or effect unless diligence upon it has been raised and executed or action commenced upon it within the six years. I think the meaning and import of that is plain, viz., that if action is commenced or diligence used within the six years, the expiry of these six years shall not interfere with the action so commenced or diligence used. The action or diligence is alive, and you may proceed with it.

I am not moved in the consideration of the matter by old decisions, including decisions of the date of those to which your Lordship has referred. We are all familiar with the case *Cullen* v. *Smeall*, July 12, 1853, 15 D. 868, which led to considerable modification and change in the views regarding the application of the triennial prescription—a case in which Lord Justice-Clerk Hope in his judgment entered fully on the question—and since that time the authority of prior decisions has been denied, and the Courts have refused to follow very many of them. I remember when I was a reporter hearing Lord Jeffrey refer to the case and say that he had read it carefully, and that the opinion of the Lord Justice-Clerk Hope had changed his view, although he jocularly confessed that he had found it very hard reading.

I do not think the case referred to by the Lord Ordinary—*Paxton* v. *Forster*, 4 D.

1515,—is very satisfactory, although at the same time I do not think it is much in point. There the granter of several bills and promissory-notes died before the expiry of six years, and the holder brought an action against the granter's executors and took decree against them, so that the bills, so far as the representatives of the deceased were concerned, had passed into a judgment debt—the decree was not subject to the statute—*transit in rem judicatam*, it remained good after any length of time, and the holder of the decree was not a creditor on the bill, and the persons against whom the decree passed were not obligants on the bill, but creditor and obligants on a decree of the Court. Then the action with which the Court dealt was raised against some heirs-portioners who had taken the heritage, and they were held responsible for the debt, because at a general meeting they had undertaken to pay the moveable debt, constituted not by the bill but by the decree. The obligation formerly existing under the bill became converted into an obligation upon the decree, *transit in rem judicatam*, and the heirs-portioners became liable for this judgment debt because they had undertaken to pay it. I do not therefore regard that case as interfering with the plain meaning of the Act, and I am not prepared to do or say anything which will give countenance to that view to which your Lordship referred, that any action whatever raised upon a bill or promissory-note within the sexennium preserves recourse by all parties interested against the whole co-obligants.

Now, I think when the Lord Ordinary ordered, suggested, or encouraged this amendment of the summons, by putting the reference to the prescribed bill into the conclusions, he was acting upon an erroneous notion. He did not seem to have before him that the prescription of the bill—its going out of life after the lapse of six years—this left the debt for which it was granted, if it was granted for a debt, outstanding.

Our law on that question is clear. If a man who is owed a debt takes a promissory-note for it, then the debt is only paid if the promissory-note is paid, and if six years lapse without payment of the promissory-note, or with only partial payment of the promissory-note, then the debt is not paid at all, or is only partially paid.

Now, I assume as matter of fact what would be proved if disputed, that this promissory-note was granted for debt. On the face of the record the promissory-note was granted for debt. It is averred on the one side and admitted on the other, that the three gentlemen whose names were on the promissory-note borrowed £1000 in 1877 from Miss Milne and granted the promissory-note for it. If nothing had been paid, the promissory-note would have left the debt outstanding. It would have to be supported by proof if not admitted. But the debt for which the promissory-note was granted is admitted, and it is also admitted that payment has only been made to the extent of two-thirds. There, therefore, is a debt owing to the extent of one-third, and so *prima facie* judgment must go against the debtor in the debt for that third which is unpaid. What possible answer is there to it? What has the prescription of the promissory-note to do with it? Why should the pursuers be held to be suing on the promissory-note? they are suing for the debt which has only been paid to the extent of two-thirds. I am not prepared to hold that the pursuers are prejudiced because they accepted the invitation of the Lord Ordinary to amend their summons. That is not an amendment at all.

In 1883, before the promissory-note had prescribed, and when Miss Milne was alive, the holder brought an action, which is printed and which is before us, against the representatives of the three debtors upon the note, concluding for payment of the amount. It sets out a conjunct and several liability as the Lord Ordinary truly says, but the conclusions are merely general against the whole three sets of defenders for payment of £1000 with interest and the expenses of process. The decree sets out that the Sheriff decerns and ordains the three sets of defenders "to make payment to the said Miss Marion Milne, pursuer, of the sum of £1000 sterling, with interest thereon, at the rate of 5 per centum per annum, from the 15th day of May 1880 until payment, with £7, 1s. 8d. of expenses of process."

The Lord Ordinary reads this as if the conclusion had been against each of the three for one-third of £1000, *i.e.*, £333, 6s. 8d., and for one-third of the expenses, and as if the decree had been against each of the three defenders for the same proportion. I must say if I had been able to read the decree so—as the just and fair meaning—I should have thought that the old lady had considered, from reasons known to herself, that she was only entitled to take one-third from each of the three debtors under the promissory-note. There might quite well have been facts precluding her from conscientiously demanding more than one-third of the sum from each debtor.

The Lord Ordinary says—"Of course if the limitation of his liability had been established *in foro contentioso*, a plea of *res judicata* would have arisen."

I do not see any distinction on this question between a decree after litigation *in foro contentioso* and a decree in absence. If the conclusion of the summons had been to find the debtors liable jointly and severally, and the parties had appeared, it might have been established during the course of the action, that decree should only be pronounced against each debtor for one-third of the debt, and if that had been done, it could not now have been gone back on. But if that had been done in a decree in absence the result I think would have been exactly the same.

I had occasion recently in this Court to consider a judgment-debt and the position in which it puts a party; the case concerned an action against people who were

conjunctly responsible for fault. We held that conjunct responsibility could not be inquired into, it being matter of judgment, and Mr Brown in his book on Legal Maxims, states it as strongly as this—"If there is any one principle of law settled it is this—*transit in rem judicatam* for ever." So that if this judgment was upon a document which made conjunct and several liability *prima facie*, but was one in which each was decerned to pay one-third only, I do not think it could be gone back upon, the original ground of debt being gone for ever. Therefore if I could take that view which I would with difficulty, because I think it is against the truth or justice of the matter—if I could reach the Lord Ordinary's view of the decree—I should be obliged to hold that it was *res judicata*—that the liability which rested on each set of defenders was for one-third of the debt, and expenses of the action.

But I think one is entitled in construing a decree to look to the summons and condescendence. Now, the condescendence sets forth plainly the promissory-note, averring conjunct and several liability distinctly, and concluding for decree for the amount. I think therefore the only fair reading of the decree is that the decree for £1000 is in terms of the obligation set forth in the action.

That being so, it does not need the promissory-note to be sued on. In the view I take it has been sued upon and has passed into a judgment-debt, and no question of prescription on the promissory-note can arise. But in the result I concur there is no reason here why the original liability for the unpaid portion of the debt should not be enforced by the enforcement of the decree.

Lord Rutherfurd Clark—The paper in an action which is looked at for the grounds of action is the condescendence, and looking there I find that this action is laid upon the debt as well as on the promissory-note, and I see from the defences that the debt is admitted.

It is clear therefore that the defenders are bound to pay the debt. I do not think I am precluded from giving decree on account of the amendment of the summons. The original grounds of action remain, and are not in my opinion affected by the amendment. I am therefore prepared to give decree in terms of the summons.

On the question of prescription I am disposed to think that according to the present state of the authorities the bill may be sued on as a document of debt. I must say however that I doubt very much if that view of the law is right. But I give no further opinion. It is a question which the Court may take up on a fitting occasion.

Lord Trayner—The pursuers originally libelled their claim simply as a claim of debt, but by an amendment of the libel they have now made it a claim founded upon a particular bill, which they have described. Whether such an amendment was necessary is not now matter for consideration, as the pursuers have chosen to make it. I take the summons and deal with the case entirely as the pursuers now present it.

The action being founded upon the bill, the first defence is that the action is excluded by the terms of the Act 12 George III. c. 72. Whatever opinion I might have formed as to the meaning of that statute had the question been an open one, it appears to me to have been decided in a considerable number of cases, varying almost as considerably in the peculiarity of their circumstances, that where action has been commenced upon a bill within six years from the date of its maturity, whether against the whole or any one of the obligants under the bill, such action will exclude the application of the statutory limitation. Such an action was admittedly commenced upon the bill in question, and therefore I agree with the Lord Ordinary that the defence founded on the statute must be repelled. Any other judgment would be contrary to what has been in my opinion established by a series of decisions.

The second and only other defence maintained by the defenders is that the pursuers having under their previous action only asked a decree against the defenders for a third of the amount of the bill (at the same time asking a similar decree against the other two obligants in the bill), and having got decree accordingly, are now precluded from asking any further decree, or making any further claim against the defenders in respect of the bill in question. I think the question raised by this defence is not without difficulty, but I have come to agree with the Lord Ordinary that it also should be repelled. Originally the defenders were debtors for the full amount of the bill, and they necessarily remain so unless the pursuers, the holders of the bill, have consented to discharge them for less, or have done something which imports a discharge; which *quoad* the defenders has in law the same effect. I think no such effect was produced by the pursuers' previous action. By it the pursuers doubtless asked less from the defenders than they were entitled to ask, expecting that what they asked they would obtain from each of their debtors. But being disappointed in that, I see no reason why they should not now insist on what they might previously have demanded but did not, namely, full payment of the bill from the present defenders. The previous demand does not appear to me to import or operate any discharge or abandonment of a claim or right then undoubtedly existing although not fully insisted in.

The Court adhered.

Counsel for Pursuers—Jameson—Boyd. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defenders—Guthrie—Cook. Agents—Pringle, Dallas & Co., W.S.