or the other. But counsel informed us that they had been unable to find any authorities in point, and I have not been able to discover any case in which the matter is definitely decided. But it is high time that it was settled, for it is not a point on which there ought to be any dubiety. It is settled practice in the ordinary style of a summons that, if a pursuer wants to obtain his decree against the defenders jointly and severally, he concludes for it in these terms. But that, of course, is not conclusive of the matter, for it is quite settled that the question of expenses is entirely in the discretion of the Judge, and if the parties appear and the process goes on, it is perfectly competent to make a motion for expenses, although expenses have not been concluded for in the summons. But still it is worth noting that such a practice exists, because it shows that the general understanding of the profession is that if they want a decree against any persons jointly and severally they must say so—in other words, it shows that the profession think that in the case of a decree in absence they would not be sure to get a joint and several decree unless they have prayed for it. It is also well settled that in obligations formally undertaken, as, for instance, in bonds, if the obligation is not stated to be a joint and several one the obligants will only be bound severally. There are, of course, exceptions, as, for instance, in bills of exchange, but still that is the general rule.

The result of the whole matter seems to me to be this, that the point will be best settled, and settled in accordance with what is the general practice, by holding that if parties want a joint and several decree they must move for it at the time they ask for expenses, and that it is too late to raise the question for the first time on the Auditor's report. That will not hamper the Court in any way, for if it is a case where the Court desire to see the Auditor's report before deciding the matter, nothing is easier than to put a reservation in the first interlocutor.

I think therefore that the motion that has been made here comes at too late a stage, and that we must refuse it. That is sufficient for the disposal of the case, but it is only fair to Mr Johnston to add that I do not think that the fact that he has been too late in his request has really made any difference. For I do not think that in this case, if we had been going to decide this question on the merits instead of on a rule of practice, we would have granted decree in the form now asked for. This is a case where a proprietor of fishings is seeking interdicts against a number of trespassers, and although it was clearly convenient that these should all be tried and disposed of in one case, it is really a congeries of cases against separate defenders which do not involve conjunct liability. It is possible to figure cases where the liability would be conjunct, as, for instance, where a gate has been removed by the joint action of the several defenders. But no such case is disclosed here. It may be that, as regards the discussion on the preliminary pleas, the expenses might properly have been awarded jointly and severally, but the substantial expense here was incurred with regard to the proof, and in that the interests of the defenders were clearly separate.

I think therefore that the motion must be refused, and that the decree must go out in the same terms as in the interlocutor.

LORD M'LAREN—I concur.

LORD PEARSON—I also agree.

The LORD PRESIDENT stated that LORD KINNEAR, who was absent at the advising, concurred in the judgment.

The Court pronounced this interlocutor—

"Approve of the Auditor's report on the complainer's account of expenses, . . . and decern against the respondents A, B, C, D. for payment to the complainers of the sum of . . . the taxed amount thereof. . . ."

Counsel for the Complainer—Johnston, K.C. — D. Anderson. Agents — Skene, Edwards & Garson, W.S.

Counsel for the Respondents—Hunter, K.C.—Constable. Agents—Morton, Smart, Macdonald & Prosser, W.S.

Wednesday, January 16.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

SWANSON *v.* MANSON AND OTHERS.

Title to Sue—Interest—Will—Reduction—Existence of Prior Settlement under which Pursuer not a Beneficiary—Agreement between Pursuer and Beneficiaries under Prior Settlement to Share Estate.

Held that one of the next-of-kin of a testator had no interest or title to sue an action of reduction of his last will and testament, where the effect of reduction would be to set up a prior deed which excluded the next-of-kin, although he had entered into an agreement with the beneficiaries under the prior deed by which, if he were successful in the action, he and the other next-of-kin were to receive a share of the estate.

The facts of the case are fully stated in the following portion of the opinion of the Lord Ordinary (ARDWALL):—"The present action was raised on 13th June 1906 by the pursuer as one of the next-of-kin of the deceased David Swanson, and it concludes for reduction of the last will and testament of the said David Swanson, dated 7th November 1905. The said will is in favour of the defender Mrs Manson, who is no relative of the deceased, and who with her husband and certain of the next-of-kin are called as defenders to the action, Mrs Manson being the principal defender, and the only one against whom expenses are asked except in the case of their opposing the conclusions

of the summons. Reduction is asked upon two grounds—first, that the testator was not of sound disposing mind at the date of the deed, and, second, on the ground of facility and circumvention.

"The defender Mrs Manson states as a preliminary defence that the pursuer, because of a prior will, has no title or interest to sue the present action.

"The history of the proceedings is, I think, of some importance in considering this plea. The summons was signeted on 13th June 1906; on 10th July 1906 preliminary defences were lodged. In these defences it was stated that the deceased had executed a trust-disposition and settlement dealing with his whole estate on 27th September 1900, with two codicils appended, and that the pursuer is not a beneficiary under these testamentary deeds. The pursuer states that this was the first time that the existence of this deed had been brought to his knowledge. Be that as it may, the result of his seeing this defence was that he proceeded to negotiate with such of the beneficiaries under the said deed of 27th September 1900 as were entitled to the moveable property of the deceased, with the view of coming to an agreement with them, and the result was that these beneficiaries entered into a minute of agreement with the pursuer and the whole other next-of-kin of the deceased David Swanson, dated 24th and 27th August and 3rd September 1906. By this agreement it was provided that in the event of the settlement now under reduction being reduced, and notwithstanding the terms of the prior testamentary deeds, the parties thereto agreed to divide the whole moveable estate of the deceased equally among them. This agreement was set forth on record by the pursuer at or before the adjustment, and the record was closed, *inter alia*, upon the averments above set forth on 23rd October 1906, production having been previously satisfied, under reservation of the defences so far as preliminary."

The defenders pleaded, *inter alia*—"(1) The action should be dismissed with expenses in respect (*a*) the pursuer, because of the prior will condescended on, has no title or interest to sue the present action; (*b*) all parties are not called; (*c*) the pursuer's averments are irrelevant."

On 20th December 1906 the Lord Ordinary (ARDWALL) repelled the defenders' first plea-in-law, and appointed the pursuer to lodge issues for the trial of the cause.

Opinion.—[*After stating the facts above quoted*]—"The case was thereafter sent to the Procedure Roll, and at the discussion there it was maintained that because the pursuer had at the date of the action being raised no interest to sue, he had therefore no title to sue, and that on the authority of the case of *Symington* v. *Campbell*, 21 R. 434, the action ought to be dismissed. This contention appears to me to be founded on a confusion between title to sue and interest to sue. In *Symington's* case neither title nor interest to sue existed in the person of the pursuer when the action was raised, and therefore it was dismissed, but that decision is not conclusive of the present case. Title to sue is one thing, interest to sue is another, and although in practice and pleading they are often mixed up, it is well in a case like the present to keep them distinct.

"The courts of law refuse to entertain actions where the pursuer has no title to sue, because there can be no right cognisable by law without a title of some sort, and further, because no person is entitled to bring another person into Court without having been in a position before the raising of the action to give that other person a valid discharge for the claim he is seeking to enforce. If it were to be held otherwise a defender would have no security that, after meeting an action regarding a particular subject-matter, he might not be exposed to another at the instance of some other party having the real title. It must further be noted that, though a person may have an interest to sue an action he may yet have no title, and the action will therefore be bad. A familiar illustration is the case where a party has suffered heavy loss through the negligence of a law-agent and yet has been held to have no action against such law-agent because he was not his employer, the title to sue such an action depending solely on the contract of employment.

"On the other hand, it has been held that though a pursuer has a title to sue, yet if he has no interest he is not entitled to insist in an action. The grounds of this rule are (1) that the law courts of the country are not instituted for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary rights or his status; and (2) that no person is entitled to subject another to the trouble and expense of a litigation unless he has some real interest to enforce or protect.

"It follows that while a 'title' is necessary to enable a person to raise an action, and the possession of such title renders an action competent, want of interest may be successfully pleaded as a defence unless the pursuer can satisfy the Court that interest exists. Want of interest was successfully pleaded in bar of actions of reduction in the cases of *Strathmore* v. *Strathmore's Trustees*, 8 S. 530, *affd.* 5 W. & S. 170; and *Kerr* v. *Vaughan*, 8 S. 694, *affd.* 5 W. & S. 718. In both of these cases it was made absolutely clear to the Court that if the reduction concluded for had been granted the pursuers would not thereby have benefitted to any extent whatever. But it is also evident from decided cases that the want of mere pecuniary interest will not be too curiously examined into provided a good 'title to sue' accompanied by a possible interest exists. The case of *Duncan* v. *Duncan*, 20 R. 200, is an example of this. Further, it appears from the case of *Gilchrist* v. *Morison*, 18 R. 599, that a person holding the character of next-of-kin to the granter of a deed in favour of strangers is entitled to pursue a reduction of that deed as being

to his prejudice without satisfying the Court what precise interest he ultimately might have in the deceased's estate when the deed under reduction should be set aside. This case seems to be very much in point in considering the present. In the present case the pursuer's title to sue as one of the deceased's next-of-kin is clear, and the action was competently raised by him as possessing that title. On the action being called in Court the pursuer was met by the defence of no interest. In answer to this he might, if the circumstances had permitted, have stated that if he succeeded in setting aside the deed presently under reduction he intended to raise a reduction of the prior deed, but his answer is that since the existence of the prior deed was brought to his knowledge he has entered into an agreement with the beneficiaries under that deed or some of them, under which they are to share with the whole next-of-kin of the deceased, including himself, the whole moveable estate of the deceased in the event of the present action being successful. This minute, in my opinion, makes it clear that the pursuer has now an interest to insist in the action which he had a good title to raise. I therefore repel the defenders' plea founded on want of interest. I also repel the remainder of his first plea-in-law. The sum found due as expenses is, I have satisfied myself, a moderate estimate of the expenses of a discussion in the Procedure Roll where two counsel are employed.

The defenders reclaimed, and argued that as the respondent was excluded by the prior deed and did not propose to reduce it, he had neither title nor interest to sue.

Argued for the respondent—The agreement founded on gave him an immediate interest, and his position of next-of-kin a good title—*Gilchrist* v. *Morrison*, February 28, 1891, 18 R. 599, 28 S.L.R. 441 (*per* Lord M'Laren); *Duncan* v. *Duncan*, December 14, 1892, 20 R. 200, 30 S.L.R. 167.

Lord President—This is an action of reduction raised by one of the next-of-kin of a certain deceased David Swanson, and concludes for reduction of his last will and testament, the grounds of reduction being insanity and facility. The trustees and a number of beneficiaries under the will put in defences in which they deny the allegations and table a prior settlement by the same testator which excludes the next-of-kin. The pursuer closed the record upon that statement, and then produced a certain deed called an agreement—and I am quite willing to take it as an agreement, although in its form it is a unilateral deed—by which the beneficiaries under the first settlement, whom the pursuer alleges to be the whole beneficiaries under the first settlement, agree that if the second settlement is reduced they will proceed to halve the estate of the deceased between themselves and the next-of-kin. Before the Lord Ordinary the main argument seems, so far as one can judge from his Lordship's note, to have turned upon whether this change of front, so to speak, was timeously made, and his Lordship came to the conclusion that it was, although not made before the closing of the record.

In one sense of course the pursuer's title must be judged of as at the time he raises the action, and he cannot get a new title. You cannot introduce new pursuers and you cannot introduce a new title for an old pursuer. But at the same time, where the objection to the pursuer's title is only tabled in the defence, I am bound to say that if it had been merely a question of the time—although I am not perhaps certain on the subject—I should have thought that, with the powers of amendment now existing it would have been allowable to open up the record and to allow the pursuer to put in this new statement, which really does not give him a fresh title, but is really an answer to an answer which is made to him in the defences.

But a much more formidable, and what seems to me an unanswerable, answer to the pursuer's case arises upon a matter which does not seem to have been argued before the Lord Ordinary, so far as one can judge from his note; and it is this, that the pursuer does not allege either that he is in a position to reduce the first settlement upon any grounds analogous to those upon which he seeks to reduce the second, or that he is in a position to allege that the persons who have an interest to maintain the first settlement are prepared to allow that settlement to be reduced and to go by the board. On the contrary, what he alleges is that those parties propose to take under the first settlement and then to make a distribution of the property with the pursuer.

Now I am absolutely unable to see how that helps the pursuer one bit in the action which he now raises. The pursuer's only right to raise an action at all is because he has a title as next-of-kin. A good title as next-of-kin to reduce a settlement is a title which is founded on interest. If it were not the law of Scotland that in default of a settlement the next-of-kin took the property, he would not have a title to raise the action. The law of Scotland might be different. It might not give the right of succession to the next-of-kin but might give it to some one else; and I take it that the right to reduce the settlement would then leave the next-of-kin and would go to those other persons. Now the moment that another settlement is tabled which cuts out the next-of-kin it seems to me perfectly clear that the title of the next-of-kin is gone because their interest is gone—their interest, that is to say, as next-of-kin; and it seems to me confusing the matter altogether to say, as the pursuer's counsel now says, that he has got an interest, in the sense that he has bargained for getting something of the estate from the people who are really entitled to it, namely, the beneficiaries under the first settlement. According to that anybody might have a right of reducing a settlement if they were allowed to simply bargain with somebody who had right in a former settlement and then say "In order

to make this right of mine available I propose to reduce the latter settlement." I think the whole matter is rested upon confusion. It seems to me the present pursuer's title and interest are gone unless he is in a position to say he is as able to get rid of the first settlement as he is of the second. On the contrary he does not say that at all, and therefore I am of opinion that the action ought to be dismissed. Parties are not agreed on the other side as to whether they really have here got the whole of the next-of-kin; and before we could allow an issue, as was done by the Lord Ordinary, that disputed matter of fact would have to be cleared up. But I do not think that is necessary, because the agreement says the first deed, so far from being reduced, still stands; and if the first deed stands it seems to me that the title of the pursuer is gone.

LORD M'LAREN—I agree with your Lordship. I think that the only title put forward in this summons is a title as next-of-kin. You find that title in the first article of the condescendence, and there is no other averment of title. Now, it has always been recognised as a good answer to any claim of reduction at the instance of an heir-at-law or the next-of-kin that the only effect of the reduction would be to set up an earlier deed, and that is the point taken against the pursuer in this case. I am not of opinion that the objection to the title can be obviated by an agreement between the next-of-kin and the parties interested in maintaining an earlier deed, because, while agreeing with your Lordship's observation as to the ground of decision, I should be disposed to go further. I think the only effect of the agreement put forward is to put the pursuer in the position of assignee of the legatees or beneficiaries in the first deed, and as an assignee can be in no better position than the cedent it would be necessary that he should be the pursuer in the action. I should not be disposed to allow the introduction of a new pursuer in an action of reduction to set aside a deed, and I think that is in substance what is here proposed, viz., to introduce as pursuers in the action the beneficiaries in the first deed. What their rights might be if they chose to sue in their own name is another matter, but that would require a new action. This objection is one that is by no means confined to actions of reduction. It applies to cases raising questions of construction of deeds, and it was the subject of a decision in the House of Lords in the case of *Kirkpatrick* in 1874. The view which prevailed was that the attempt to set aside a second deed on the ground of the omission of the word "dispone" must fail, because there was a prior deed in existence which was correctly expressed according to Scots law language. Even in intestate successions it has always been considered to be a good objection to the title of an heir who is claiming a service that you can show that there is a nearer heir in existence, although that nearer heir may not be coming forward to claim in his own name. The ground in all these cases is want of interest in the person who is making the claim. I think that the objection of want of interest must be judged of as at the date of the summons, and that it cannot be cured by an arrangement such as is set forth in this case.

LORD PEARSON—I am of the same opinion.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer and Respondent—Watt, K.C.—C. D. Murray. Agent—S. F. Sutherland, S.S.C.

Counsel for the Defenders and Reclaimers—Hunter, K.C.—W. Thomson. Agents—Macpherson & Mackay, S.S.C.

Saturday, January 19.

SECOND DIVISION.

FORREST.

Poor's Roll—Admission—Declaration and Certificate of Poverty—Applicant a Soldier in India—Remit to Regimental Chaplain.

Where an applicant for admission to the poor's roll was a private soldier stationed in India, with a Scottish domicile, the Court remitted to the chaplain for the time being ministering to his regiment to take the applicant's declaration of poverty, and, if so advised, to grant him a certificate of poverty in usual form.

The Act of Sederunt of 21st December 1842 provides, sec. 2—"That no person shall be entitled to the benefit of the poor's roll unless he shall produce a certificate under the hands of the minister and two elders of the parish where such poor person resides setting forth his or her circumstances according to a formula hereto annexed, Schedule A."

James Forrest, a private in the 17th Lancers, stationed at Meerut, India, presented the following note to the Court:—"My Lord Justice-Clerk—The said James Forrest is desirous of applying for the benefit of the poor's roll to raise an action in the Court of Session against his wife.

"He is, and expects to be, for the next two years or so, with his regiment in India. On that account he cannot obtain the usual certificate of poverty from the minister and elders of a Scottish parish required by the Act of Sederunt of 21st December 1842. He is, however, a domiciled Scotsman.

"He desires to make a declaration of poverty before the chaplain of his regiment, or any other suitable person.

"May it therefore please your Lordship to move the Court to remit to the chaplain for the time being ministering to the 17th Lancers, to receive the said James Forrest's declaration of poverty, and, if so advised,