absence of express revocation, to imply the recall of all those previous writings which the testator had so carefully preserved in his repositories along with this very deed. By the adoption of the opposite view, I think violence may be done to his plainly enough declared intention in regard to several matters. Those charities which he had desired so much to benefit, which are not enumerated in the deed of 1868, in particular, the Infirmary, and certain others of special legacies which the prior deed alone declared, must be held inept. No writing but such as that subsequently executed would, according to this construction, receive effect; and as no deed of the kind in reference to his trinkets and jewels, and others so anxiously provided for in all his writings, are contained in any deed of subsequent date, and this notwithstanding the anxious reference to these very bequests in the passage above quoted. The more reasonable view, I cannot but think, is to hold that the codicil referred to, of whatever date executed, is any writing of the kind which might be found amongst his testamentary writings. And finally there a memorandum of date 24th July 1868, which, with the Lord Ordinary, I cannot but hold a testamentary writing, and which provides thus: "All the gifts to be over and above those named in any will I may have made. Initialed—J. R. S." Whether this has reference exclusively to the charities, as the heading of it may be held to confine it, or to other gifts as well, this is a declaration under the hand of the testator after execution of the deed of June 1868, that any will he may have made, and not this deed alone, should be read so far as his settlement.

The case of *Stodart* v. *Grant* in the House of Lords is referred to in the interlocutor, and although it is true that the deed did not contain a bequest of residue, this does not, in my apprehension, materially detract from the application to this case of the principle to which their Lordships gave effect.

That decision, I observe, was recently founded on by the Judge in Probate (Law Reps. vol. i, Probate, 62), in *Lunage* v. *Goodban*, whose observations are, I think, very important:—"The will of a man (he says) is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them than similar defects if appearing on the face of a single document." And afterwards: "This Court has been in the habit of admitting to probate such and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering, *not* what papers have been apparently superseded by the act of executing others, but what *dispositions* it can be collected from the language of all the papers the testator designed to revoke or to retain."

No authority was referred to in support of the contention of the trustees, and I am not aware of any decision to the effect that the last dated deed of settlement, though exhausting the succession by disposing of the residue, must be held *by implication* to have revoked all prior settlements. Suppose that the deed of June 1868 had been executed on deathbed, is it to be held that the heir-at-law could have maintained that the settlement of the heritage in the prior deeds had by implication been revoked, leaving the last deed, so far as regards the heritage, open to reduction at his instance? The case of *Anderson* v. *Fleming*, 17th May 1833, related to the effect of a deathbed deed in recalling a prior deed in all substantial respects the same, but it was only because of the deathbed deed containing an express revocation of former settlements that the heir-at-law prevailed. Here there is no clause of revocation. This being so, I cannot think that by implication prior settlements could be held to be superseded and recalled so as in a case of deathbed to operate the same result as an express clause of revocation. Yet this seems to be but the legitimate result of the plea maintained by the trustees.

On the whole, I am of opinion that the reclaiming note against the Lord Ordinary's interlocutor ought to be refused.

The case came up for final adjustment on the question of expenses before the Second Division On the question of expenses the Court found—(1) That the four claimants who had been entirely unsuccessful should be allowed between them from the fund the whole expense of one claim; (2) that all the other claimants were entitled to their expenses in the Outer House; (3) that those claimants who had been successful in getting the interlocutor of the Lord Ordinary altered, so far as it decided that the deed of gift, dated 24th July 1868, was not of a testamentary nature, were further entitled to one fee for watching the case in the Inner House, and to an additional fee for the discussion of the question of expenses. The Court strongly expressed an opinion that the question of expenses was decided on the specialties of the case.

Agents for Pursuers—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders—Hope & Mackay, W.S.

Saturday, January 14.

DUFF, ROSS & CO. *v.* KIPPEN.

Proprietor and Agent—Representation—Bona fides *—Improvements.* A was induced by the representations of C to enter into a partnership with B, believing him to be the proprietor of certain works. D, for whom C was general agent, was in reality the proprietor of these subjects. *Held* that A, who had in *bona fide* expended certain sums upon the property, was entitled to recover these from D to the extent to which he was *lucratus* thereby.

This was an action at the instance of Mr Ross, sole partner of the firm of Duff, Ross & Co., against Richard Kippen, brought in the following circumstances:—"In the month of August 1863, the pursuer, John Ross, who was then residing in Stirling, and was desirous of entering into business on his own account in Glasgow, noticed an advertisement in the *Glasgow Herald*, of 5th August 1863, in the following terms:—'Partner wanted by a practical engineer who has had long experience in the construction of land and marine engines. He is proprietor of a work and tools capable of doing a large business. The capital required is £3000, and a knowledge of the business is not essential. Apply to Kerr, Anderson & Brodie, 32 St Vincent Street, Glasgow." Mr Anderson was then and had been for several years

previously factor and commissioner for the defender."

The pursuer alleged that at a meeting which he had with Mr Anderson, on 7th August 1863, in consequence of the above advertisement, the latter represented to him that the person advertising for a partner was proprietor of the works and tools therein, which were of the value of £10,000, subject to heritable burdens to the amount of £3000, and that on 12th August he introduced him to Mr John Duff as proprietor of the Oakbank Engine Works. Acting upon these representations, Mr Ross entered into a partnership with Mr Duff, in November 1863, and the partners proceeded to carry on the business at Oakbank. The firm paid the half-yearly ground-annual on the property due in February 1864, August 1864, and February 1865, and various assessments due by the proprietors; they further expended various sums in making certain alterations and repairs upon the property; the whole sums thus expended by the firm, on the footing that they were proprietors of the property, amounted to £234, 10s. 8d.

In February 1865 the agent for the defender Mr Kippen, came forward and claimed arrears of rent due from the property, of which he produced an absolute disposition from Mr Duff in his favour, dated 1861. The pursuer then learned for the first time that Duff, instead of being owner of the property, held it on lease from Kippen.

In April 1865, Mr Kippen sequestrated the whole tools and implements in the works for the rents alleged to be due to him, and the works were accordingly closed.

The whole disputes between the pursuer and defender were referred to Mr Adam Paterson, writer, Glasgow, who pronounced the following award on September 5, 1867:—"Having again considered the submission proceedings: Finds that the only question remaining now to be disposed of is the right of property in the moveables within the foundry, which are claimed by Duff, Ross, & Company, by virtue of a contract of copartnery of that firm under which these moveables were, as is alleged, acquired by the company from Mr Duff, the owner then in possession, and which are likewise claimed by Mr Kippen by virtue of the disposition of May 1861 by Mr Duff in his favour, under which, as alleged by Mr Kippen, the moveables were acquired by him; or alternatively by virtue of the process of sequestration at Mr Kippen's instance against Mr Duff, and Ross, & Company, by force of which Mr Kippen's right of hypothec as proprietor of the work was, as contended by him, made effectual against these moveables; and having heard the parties' agents on their several pleas: Finds that the disposition by Mr Duff to Mr Kippen, so far as it imports a transfer of the moveables in the work was not completed by delivery, and that the moveables continued after as before that transfer in the actual and undisturbed possession of the seller: Finds that the contract of copartnery of Duff, Ross, & Company made in November 1863, whereby Mr Duff contributed the moveables in the works as in part of his share of capital, and assigned these articles to the copartnership, imported an onerous and *bona fide* transfer thereof, which was completed by the company entering on the actual possession of the work and whole contents thereof: Finds that the completed right of Duff, Ross, & Company, thus constituted, is not defeated or impaired by the process of sequestration at Mr Kippen's instance, in respect that that process was *ab initio* incompetent and inept: Therefore sustains the claim of Duff, Ross, & Company to all articles in and upon the premises, which have been found by the arbiter not heritable, and repels the claim of Mr Kippen thereto." It thus being finally decided that Mr Kippen was proprietor of the works, and also that the sequestration was incompetent, the pursuer claimed in this action (1) the sum of £234 odd, expended by him on the works while in the *bona fide* belief that they belonged to his firm; and (2) for a sum, in name of damages, for the injury sustained by him in consequence of this illegal sequestration.

The Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—

"*Edinburgh, 8th November* 1870.—The Lord Ordinary having heard counsel on the proof and whole cause, and having made avizandum, and considered the same, finds, as matter of fact, (1) that the sums, amounting together to the sum of £234, 10s. 8d., to which the 12th head of the condescendence and the first branch of the conclusion of the summons refer, were paid and expended by the firm of Duff, Ross & Company, in relation to and on the property of the Oakbank Engine Works, specified on the record; (2) that the said sum of £234, 10s. 8d. was so paid and expended by the said firm in the *bona fide* belief, founded on statements previously made by Mr William Anderson, accountant in Glasgow, to the pursuer Mr Ross, who became one of the two partners thereof, that the subjects of which the said engine works consisted were the property of the said firm of Duff, Ross & Company; (3) that the said William Anderson, at the period when the said statements were made by him, was acting in the capacity of factor for the defender, and made the said statements as such factor; (4) that the defender is the proprietor of the said subjects, the Oakbank Engine Works, under disposition dated 21st May 1861 (No. 22 of process); (5) that he, the said defender, as such proprietor, is *lucratus* to the extent of the expenditure of the sum of £234, 10s. 8d. as above found; (6) that the process of sequestration, at the instance of the factor and commissioner for the defender, which is referred to in the 18th and following articles of the condescendence for the pursuers, and to which the 6th plea in law on their behalf relates, was incompetent and inept as therein set forth; and (7) that, in consequence of the said proceedings on the part of the defender, the moveable machinery and others belonging to the pursuers within the works, suffered considerable depreciation in value, and to an extent not less than £150: Further, as matter of law, and with reference to the preceding findings, repels the first plea in law for the defender, reserved under the interlocutor of the 3d March last, and also the 7th plea in law on his behalf, and sustains the 2d, 3d, 4th, 5th, 6th, and 8th pleas in law for the pursuers; and in respect thereof, and with reference to the preceding findings, decerns, under the conclusions of the summons, for the sum of £234, 10s. 8d. sterling, with interest thereof as libelled, and also for the sum of £150 sterling in name of damages, as also libelled in the summons: Finds the defender liable to the pursuers in expenses, of which allows an account to be lodged; and remits the same to the auditor to tax, and to report.

"*Note.*—The case now disposed of by the Lord Ordinary is of importance to the parties, and involves considerations of difficulty. But these can-

not be dealt with other than in relation to the whole *res gestæ* and matters of fact, which appear from the record and proof, and to which the Lord Ordinary must therefore refer.

"In assessing the damages, in particular, the Lord Ordinary has felt much difficulty. But he has finally come to the conclusion that the sum he has fixed upon is not in any respect excessive, if he be otherwise right in his views."

The defender reclaimed.

MILLAR, Q.C., and ORR PATERSON for him.

PATTISON and STRACHAN in answer.

The majority of their Lordships held that the Lord Ordinary was right so far as regarded the first sum claimed, but held that the pursuer was not entitled to any damages for injury occasioned by the sequestration.

LORD NEAVES, who dissented, said—The action brought by the present pursuer is laid either on contract, *culpa*, or recompense. Anderson was the general agent for Kippen, but his power was limited to this extent that he could not alienate heritage. Then Duff, being tenant of these subjects under Kippen, while Anderson had the general management of them, Ross is introduced to Duff by Anderson, who gives him to understood that Duff is the proprietor. These two, Duff and Ross, then enter into a contract, but Kippen is no party to it. I do not think that a principal can be bound by misrepresentations made by his general agent unless a contract is entered into by the agent for the principal. Here a collateral contract between two other parties was induced by the false representations of the agent, and I do not think that the principal is liable in such a case. If this agent had made a contract for his principal, then the latter would be liable for the false representations of the former, but not otherwise.

With regard to *culpa*, in my opinion, if it can be shown that Kippen was enriched, then he may be liable to Ross for the extent to which he was *lucratus*. But in my opinion there is no evidence that he was *lucratus*.

I concur with your Lordship's decision with regard to the second part of the claim, viz., that for damages.

Agent for Pursuers—Andrew Beveridge, S.S.C.

Agents for Defender—J. & A. Peddie, W.S.

Saturday, January 14.

FIRST DIVISION.

MACBRAIR *v* SMALL.

Agent and Client — Expenses— Joint and Several Liability. In a case in which he had represented two different parties in a cause, whose interests were nearly identical, and whose defences were in general joint, but for whom it had been necessary occasionally to put in separate papers; the agent afterwards raised an action for his account of expense against one of the parties, but merely sued for his individual share, without raising any question of joint and several liability, on which footing he got decree. In his account, however, he charged the defender with the expense of all that was done separately in his individual name, and also with the whole expense of the joint proceedings. The auditor taxed off one-half of all these latter charges. *Held* that it was then too late to raise the question of joint and several liability, which should have been made the principal point in the case if it was to be brought up at all, and that the auditor had taxed the account upon the principle on which the action was brought.

Question—Whether the putting in of occasional separate pleadings would obviate the joint and several liability which would arise out of the otherwise joint conduct of a case.

This was the sequel of a case previously before the Court (*vide ante*, p. 141). The pursuer had obtained judgment in his favour, and been ordered to lodge his accounts with the auditor for taxation as between agent and client, before final decree was given for the amount.

The auditor taxed the account, and reported to the Lord Ordinary, who approved of the report, and decerned for the amount as taxed. The pursuer reclaimed, raising objections to the principle on which the auditor had proceeded.

GUTHRIE, for him, in support of the objections, referred to *Greenhill* v. *Gladstone*, 23 D. 1006; and *Mackenzie* v. *Cameron*, 15 D. 671.

STRACHAN, for the defender, was not called upon.

At advising—

LORD PRESIDENT—In the original action Mr Macbrair, the pursuer here, was very properly doing the work of agent for two different parties, for his clients had to a very great degree a common interest. But yet was it possible even in such a state of matters for him to charge the expenses of the separate defences and other papers put in for one of his clients against the other? However they may have been liable for such of the expenses as were joint, there is no doubt that each was solely liable for the expense of all pleadings lodged in his own name. This principle is acknowledged and applied by Mr Macbrair himself; and upon this footing his whole action is founded without there being a word said about joint liability. But whenever there is a slump sum charged for joint work, Mr Macbrair shifts his ground; he does not propose to separate the charges, but places them all to Mr Small's debit. Now this is perfectly inconsistent with the scope of the present action, and with the principle upon which Mr Macbrair has drawn his summons. I do not wish to say anything about joint and several liability, or upon the effect which the putting in of separate defences, &c., at certain stages of the action, may have had upon the question of joint and several liability; but this action was not brought upon the footing of joint and several liability at all. Mr Macbrair sues upon quite a different footing, upon the footing of individual liability, and upon that footing we have decided the question. We cannot now allow him to shift his ground, and bring up another and rather difficult and complex question, upon mere objections to the auditor's report, which we ordered by way of giving effect to our judgment. If he had wished to raise this question it should have been done as the principal point of the action. It is now too late.

The other Judges concurred.

The Court adhered.

Agent for Pursuer—D. J. Macbrair, S.S.C.

Agent for Defender—James Barclay, S.S.C.
