the defenders, for it is plain that although the documents might have been at that date perfectly good and sufficient, they may now be worthless from various reasons. For instance, take the letter of guarantee: when that was granted there was a solvent party to fulfil the obligation it contains. He was open to the diligence of the defenders, but when they had received payment their hands were tied, the debt was extinguished, and they could recover from nobody.

That gentleman, we are told, has now left the country, but it is not said that he is insolvent; therefore returning this document does not replace Messrs Ferguson, Davidson, & Co. in the position in which they stood, nor reimburse them for whatever loss or damage they may have sustained. They can make nothing of that letter now, but there is no reason why they might not have done so then. Then, on the bill there are several co-acceptors with the bankrupt; some of them, as we can see from this proof, are now insolvent, but of some we have heard nothing and know nothing.

Now it rather appears to me that the defenders having had parties bound to them thus at the date of payment, are entitled to say, 'You cannot replace me in my former position by merely giving up these documents; you must do something more than that." It is for the pursuers to show, if they can, that the defenders could make nothing of these documents at that time. I am not inclined to lay down an absolute rule as to the *onus* of proof, but in this case it is evidently not compliance with the statute merely to deliver up the documents.

I am clear there must be an inquiry, and I shall be glad if your Lordships agree with me to hear what parties can arrange as to how this is to be conducted, or whether they cannot ascertain the facts by arrangement without the necessity of formal proof.

Lord Deas—I am of the same opinion as your Lordship. There are two points in the case that are perfectly clear: first, that the money paid was the money of the bankrupt, for I think that he would have been a very adventurous man that paid it for him; the second is, that the money was received by the defenders in *bona fide*. Now what are the consequences of this? I agree with your Lordship that it would not be sufficient for the trustee merely to give up the documents; he must in the circumstances replace the defender in as good a position as he was in before. Unfortunately we have no averments going to solve this question. There is no statement, on the one hand, as to the state of the party who gave the letter of guarantee, nor, on the other, as to the parties who accepted the bill along with the bankrupt. The matter of fact ought to be ascertained, but how is this to be done? As to that, I had rather not say anything till I see if the parties can agree to some way of doing it.

Lord Ardmillan—This case falls under sec. 111 of the Bankruptcy Act, and there are two facts in it beyond all doubt:—The first is perfectly plain, and is practically admitted, that Ferguson, Davidson, & Company were just creditors, and received payment of this debt *in bona fide*. The second is not admitted, and although after reading all the evidence I think it is the case, it is perhaps a little doubtful, viz., that the debt was paid out of the funds of the bankrupt. I am satisfied, I say, from the proof that that is so, but it is not so clear.

The pursuer, trustee on M'All's estate, which was sequestrated on his own petition on 5th February 1875, seeks to recover a sum of money in circumstances which bring him under this 111th section—that section introduces a provision that he can recover only on condition of replacing the creditor who has received payment *in bona fide* in the same position as that in which he stood. The word "unless" seems to have the object of showing that he must replace him. I cannot hold that in this case to hand him these papers is to replace him in as good a position as he held before payment was made. It is plain there must be some inquiry. One or two of the parties to the bill here are not accounted for; we cannot say they could have paid at the date of payment, and we cannot say that they are insolvent now. We cannot therefore do more than order an inquiry into the present solvency of parties as compared with their solvency at the date of payment.

If there has been any loss by insolvency, that is the loss and damage contemplated in the section of the statute, and the trustee cannot cut down this transaction without reimbursing the defenders for it.

Lord Mure—I entirely concur with your Lordship in thinking there must be further inquiry here. It is plain from the statute that the pursuer in a simple petitory action like this cannot recover unless he can replace the defender in the situation in which he stood before, and how he is to replace him must be ascertained by inquiry.

The Lord Ordinary's interlocutor was recalled, and further consideration of the case superseded till parties should agree upon admissions of a course of inquiry.

Counsel for the Pursuers — Balfour — Keir. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Defenders — Trayner—Maclean. Agent—P. S. Beveridge, S.S.C.

Saturday, June 10.

FIRST DIVISION.

[Lord Young, Ordinary.

NELSON, DONKIN & CO. *v.* BROWNE AND OTHERS.

Process—Competency—Summons—Value of Cause—Act 50 *Geo. III. cap.* 112, *sec.* 28.

A number of underwriters were sued for payment of £60, 13s. 1d., the sum due upon a policy of insurance, "and that according to the several proportions for which the said policy was underwritten by them, viz., the sum of £1, 4s. 3½d. sterling each."—*Held* that the objection that the process was not

competent in the Court of Session under the Act 50 Geo. III. cap. 112, sec. 28,—its value being under £25—was not good.

This was an action at the instance of Nelson, Donkin, & Company, shipowners, Newcastle-on-Tyne, against Robert Bennett Browne and others, being fifty in all in number, and designed as underwriters in Glasgow. The summons concluded for "payment of £60, 13s. 1d., being the sum due on a policy of insurance on the steamer 'Menzaleh' executed at Glasgow the 14th day of February 1874, and that according to the several proportions for which the said policy was underwritten by them, viz., the sum of £1, 4s. 3½d. sterling each," &c. The pursuers were managing owners of the ss. "Menzaleh," which was insured in different offices and places for the sum of £30,000; amongst others the defenders were insurers, and subscribed a policy of insurance for £50 each. On the vessel being damaged, and a claim under the insurance policies being made, the pursuers received payments amounting to £418, 11s. 8d., the defenders in this action alone denied liability, and refused to pay the sum of £60, 13s. 1d., the amount of the loss which fell to be sustained by them.

They pleaded, *inter alia*—"(1) The pursuers have no title to sue. (2) The present action is incompetent before the Court of Session, in respect the defenders have no joint liability in the premises, and the sum concluded for against each defender is less than £25 sterling."

The Lord Ordinary repelled these pleas, and allowed parties a proof of their averments.

The defenders reclaimed, and argued—In judging the value involved in an action the conclusions should be looked at. Here the conclusions were for sums below £25, and decree could only be got against each defender for £1, 4s. 3½d. Community of interest in the defenders was not enough. The case of *Dykes* v. *Merry & Cunninghame* involved a larger question than the mere pecuniary result.

Authorities—*Gifford* v. *Traill*, July 8, 1829, 7 S. 854; *Gibson, Thomson, & Co.* v. *Cameron*, June 9, 1827, 5 S. 784.

The pursuers argued—The Court of Session had jurisdiction in all causes, unless it was specially excluded. The criterion of the value of a cause was the amount the pursuer might recover. This was not a case for the Small-Debt Court.

Authorities—*The Liquidators of the Western Bank* v. *Douglas, &c.*, 1860, 22 D. 447; *Dykes* v. *Merry & Cunninghame*, March 4, 1869, 7 Macph. 603; Dove Wilson's Sheriff-Court Practice, pp. 91 and 487.

At advising—

Lord President—This is a question not without some difficulty, and we have had the benefit of a good argument upon it. I have had some doubt in the course of the discussion, but I have now come to be of opinion that this action is competent, and the plea of the defenders is not well-founded. It was undoubtedly competent for the pursuer to convene all the defenders in one action irrespective of the value of the cause. If each defender were liable for a sum exceeding the amount of £25, it would not admit of dispute that the action was competent against the whole of the defenders, because they are all convened as being obligants in one contract, and as all defenders in one single issue of fact.

That first point goes a long way to solve the question whether the circumstance of the liability of each individual defender being under £25 renders the action incompetent on the ground that it is for the recovery of a sum which is under the value of £25 as regards each defender separately. To make the action incompetent under the statute the sum involved in the cause must not exceed £25, and the question is, whether this case, in as much as it involves a sum which amounts only to £1, 4s. 3½d. to each of the defenders, is a case which is so excluded from this Court.

I am of opinion that this is not a case to which the statute applies. I think the value of the sum involved in the action is £60, 13s. 1d., because that is the amount of money which the pursuer will be entitled to recover if he is successful.

This is a question which has already been decided in the other Division of the Court in the case of *Dykes* v. *Merry & Cunninghame*, March 4, 1869, 7 Macph. 603, and if I had entertained any doubt as to the soundness of that decision, I should have thought it proper to consult our brethren; but I have come to think that case well decided, and that we ought to hold in conformity with it that this action is competently brought in this Court.

Lord Deas—I am clearly of the same opinion. The conclusions of the summons are in favour of the pursuers' contention, and they must be looked at in the first instance. They are not conclusive of the question, but taken along with the fact which your Lordship has pointed out, that the defenders have a common interest, I think there is enough to leave no doubt upon the point.

As regards the position of pursuers suing together in one libel, the rubric in the old case of *Gray* (M. 11,986) is as follows:—"Found that different parties could not accumulate their actions in one libel unless they had connection with one another in the matters pursued for, or had been aggrieved by the same act." It has always been my experience of the law that if there is a community of interest or connection between several persons, they can sue together for a sum due to them all in that capacity. In the same way, it is sufficient that a number of parties called as defenders shall all be connected together in reference to the defence. The present is the clearest possible case of that kind. The whole subject-matter of the action involves one question of fact affecting the whole of the defenders. The consequences, too, of our giving effect to the contention of the defenders in the amount of litigation which would ensue, and the expediency of the present course, are not to be left out of view. They are important considerations. The action could not be laid in the Small-Debt Court in one summons against the whole of the defenders, and the only alternative would be to bring an action against each, as a decision against one of the defenders would not be *res judicata* as against another.

The decision in the case of *Dykes* v. *Merry & Cunninghame*, which was quoted to us, laid down

the law most accurately, and it has not been doubted in the whole practice of the Court.

Lord Ardmillan—There is no presumption against the jurisdiction of this Court, which must be sustained unless it be excluded by statutory law. The statute excludes from our jurisdiction certain cases in which the amount at stake is under a certain value. The question how that is to be ascertained is matter for adjudication by this Court, and the decision of this Court on the question of the ascertainment of value is no encroachment on the statute.

Here the value to the pursuers is something above £60. The next important consideration is that the parties called are all united as obligants in one contract, which, *ex concessu*, is binding on all if on any. There is nothing here to raise a doubt that the pursuer can recover the whole sum of £60, 13s. 1d., if he recover anything at all. Apart altogether from the case of *Dykes* v. *Merry & Cunninghame*, to which we have been referred, I should be of opinion that, looking to the contract and the sum concluded for, the pursuer had rightly brought this action in the Court of Session; but looking to the case of *Dykes*, I think it is an authority applicable to the matter in dispute.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Guthrie Smith—A. J. Young. Agent—Thomas Dowie, S.S.C.

Counsel for Defender — Trayner. Agent—P. S. Beveridge, S.S.C.

Tuesday, June 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MRS GRACE MACDONALD OR KENNEDY AND HUSBAND *v.* MRS EUPHEMIA MENZIES OR MACDONALD.

Process—Expenses—Lis alibi pendens.

An action was dismissed on the ground that the summons was informal, and the defenders found entitled to expenses. Before the account was taxed another summons was signeted and executed.—*Held* that the former action was *lis alibi pendens*.

On 2d December 1875 the pursuers in the present action raised an action of reduction against the defenders in the present case. The Lord Ordinary dismissed that action by interlocutor dated 27th January 1876, on the ground of informality in the summons, and allowed an account of expenses to be given in, remitting to the Auditor of Court to tax the same and report. On the 28th January the summons in the present action, for reduction of the same judgment as that for reduction of which the former summons concluded, was signeted, and was executed on 29th January and 3d and 9th February 1876. It was called on 17th February 1876.

The defenders pleaded *lis alibi pendens*.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 18*th May* 1876.—The Lord Ordinary having heard the counsel for the parties on the record closed on the summons and preliminary defences, sustains the defender's plea of *lis alibi pendens:* Dismisses the action, and decerns: Finds the pursuer liable in expenses to the defenders: Appoints an account thereof to be lodged, and remits the same to the Auditor to tax and report.

"*Note.*—The pursuer on 2d December 1875 raised against the present defenders an action of reduction of the decree of judgment which is again sought to be reduced in the present action. In the former action an interlocutor was pronounced by the Lord Ordinary on 27th January 1876, finding that the summons was informal, dismissing the action, and finding the defenders entitled to expenses, and remitting their account to the Auditor for taxation. That interlocutor was not reclaimed against, and the account was taxed on 22d February 1876, but no decree for these expenses has yet been pronounced. The former action is therefore still a pending process. See *Aitken* v. *Dick*, 7th July 1863, 1 Macpherson, 1038.

"The summons in the present action was signeted on 28th January, and was executed on 29th January and 3d and 9th February 1876, and was called on 17th February 1876, all during the dependence of the former action. It is with reluctance that I give effect to such a purely technical objection as the plea of *lis pendens* is in the circumstances of this case, but the case of *Aitken* v. *Dick*, and the opinions of the Judges in the case of *Campbell* v. *Blackwood*, 7th November 1862, 1 Macpherson, p. 1, appear to me to be conclusive of the question, and I am therefore constrained to sustain the plea, and dismiss the present action, with expenses."

The pursuer reclaimed, and argued:— The tendency of legislation and of practice since *Aitken* v. *Dick* has been in the direction of disregarding technicalities and dilatory pleas such as *lis alibi pendens*. Besides that there was no action here; the judgment decided that it was merely a simulated action, and no process in reality. This, although a technical argument, may fairly be argued against a technicality. Then the pursuers are willing to lodge a minute abandoning all right of appeal in the former action, and by that means to bring themselves under the principle of the case of *Taylor* v. *The Glasgow, Paisley, and Ardrossan Canal Company*, 15 Dunlop, 14.

At advising—

Lord President — this has been called a very technical point, and therefore I do not propose to reason upon it, for when such a technical point is once settled it should never again be disturbed. Now this case was settled by the case of *Aitken* v. *Dick*. In that case the first action had been dismissed as incompetent, and before the expenses had been taxed the second action was brought. In this case, likewise, the former action is dismissed as incompetent and the defender is found entitled to expenses, and immediately, the very next day, before the taxation of the expenses could possibly have taken place, this action is brought.

Whether the rule laid down in that case is an