succession in heritable property of considerable value in Glasgow. The party who has been unsuccessful in the litigation, so far as it has yet proceeded, and has brought this appeal is in humble circumstances, and with a view to his having his case carried on he has executed an assignation of any rights he may have in the property in favour of his agent, who is prepared to supply the funds necessary for the action. On the face of it this assignation is absolute, but in point of fact it is qualified by a back-letter which has been produced in Court. By that back-letter it is declared that the assignation shall be good only to the extent of the sum due, or that may become due, to the agent, and in any case the security is limited to the sum of £400. In these circumstances the respondent in the appeal has moved that the agent should be sisted as a party to the case, or otherwise that the appellant should be ordained to find caution. In support of that motion the cases of *Fraser* v. *Dunbar* and *Walker* v. *Kelty's Trustees* have been cited. I do not think that the present case is on all fours with those cases. In both of these cases it was found as a fact that the true interest in the litigation enured to the assignee of the claim in the litigation, and that the nominal pursuer had no longer any true interest in the success or failure of the case, and I have no doubt that on the facts on which these cases proceeded the decisions are quite sound.

The underlying principle on which the Court proceeds in making a person party to a cause against his will, so as to render him liable in expenses, is well explained by Lord Kyllachy in *Fraser* v. *Malloch*. As Lord Kyllachy points out, the question in such cases is always whether the nominal party to the cause is suing for his own behoof or is suing as the agent of another. And if he is found to be really suing as an agent, then he is acting for an undisclosed principal, and it is quite right that that principal should be brought into the suit. But it must be shown that the party who is to be brought into the suit has the true interest in the cause, and by true interest I mean the entire interest, using that term not in an absolute sense but as denoting the whole interest for all practical purposes.

In the present case I cannot hold that the agent has the true interest in the suit. If the case is successful the agent will get at the most, under the assignation, £400, whereas the appellant will obtain the whole estate, which we are told is, roughly speaking, over £5000, minus what is due to the agent. Accordingly the agent's interest seems to me to be merely incidental, and an incidental interest does not make a party *dominus litis* even although he may also be supplying the funds required for the action. The true test of whether a party is or is not *dominus litis* is probably whether he has or has not the power to compromise the action. Judged by that test I do not think that the agent here can be held to be *dominus litis*.

On the whole matter, and treating the question as depending on the facts of the case—and a question of this nature must always depend upon the particular facts of each case—I am of opinion that the respondent's motion should be refused.

LORD M'LAREN—I agree with your Lordship that there is no ground for making the agent a party to the action. His only interest in the case is that he holds a security for £400 over the property in dispute. Now the value of that property is more than ten times that of the security, and it cannot therefore be said that the agent has the real interest in the suit.

On the question as to whether caution should be found, I think that the respondent's argument, if carried to its logical conclusion, would lead to the strange result, that a proprietor who had granted a bond over his lands could not litigate without first finding caution. It was said, however, that this case was peculiar in respect that the security was in favour of the agent. But that fact can make no difference, because the principle on which a litigant is ordained to find caution is that there is no substantial interest in the property remaining in the party after deducting the debts. I think that this is a clear case for refusing what, after all, must always be an exceptional remedy.

LORD KINNEAR—I agree.

LORD PEARSON was absent.

The Court refused the note.

Counsel for Appellant—D. P. Fleming. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for Respondent — Macmillan. Agents—H. B. & F. J. Dewar, W.S.

Thursday January 7.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

MACKENZIE *v.* MACALLISTER AND OTHERS.

Process — Summons — Defenders Sued Jointly—Dismissal as against Some only of Several Defenders Sued Jointly—Competency—Accounting.

An action of accounting against several defenders sued jointly was dismissed as irrelevant against two of the defenders.

Held that the action might competently proceed against the remaining defenders.

Murdo Mackenzie, Lombard Street, Inverness, brought an action against T. S. Macallister, hotel-keeper, Inverness, W. Macallister, wine merchant there, Robert Brown & Company, wine and spirit brokers, Glasgow, and Robert Brown, merchant, Glasgow, the sole partner of that firm, as such partner and as an individual, in which he sought decree (1) that the defenders should

be ordained to account for their intromissions with the pursuer's estate, whereby the true balance due by the defenders, or one or other of them, might be ascertained; and (2) that the defenders should be ordained, conjunctly and severally or severally, to pay to the pursuer the sum of £2000, the balance alleged to be due.

The following *narrative* is taken from the opinion (*infra*) of the Lord President—"The pleadings in this case are somewhat confused, but I think there is really not very much doubt as to the underlying case. As to whether that case has got any eventual merits in it, I am far from expressing an opinion. The matters arose out of a transaction whereby as long ago as 1893 the pursuer acquired a property called the Academy Street Hotel in Inverness. The price which had to be paid for it at that time was £3500, and the pursuer had not money to meet it. He raised the money first of all by bonding the property to such an extent as it would bear—we are not told the exact sum, but obviously it would not be to the full value of the property—and then by borrowing a sum of £1750 from a Robert Brown, who is one of the defenders in the action. Robert Brown, as acknowledgment and in security of this loan which he had given, took two things. He first took an acceptance for the sum of £1750, that acceptance being jointly given by the pursuer and by a certain Thomas Stewart Macallister, who is another hotel-keeper in Inverness. He also took an *ex facie* absolute disposition of the said hotel, but at the same time granted as a back-letter a minute of agreement by which he acknowledged that the disposition, although *ex facie* absolute, was truly in security, and by which also various arrangements were made as to the renewal from time to time of this acceptance for and the paying off of the £1750. The pursuer entered into possession of the hotel and carried on the business for about a year. That brings us to the year 1894, and then in that year, the arrangement about the money due not being altogether satisfactory, a new arrangement was made by which the pursuer agreed to pay over the whole of the drawings of the business to a Mr William Macallister (Thomas Stewart Macallister's son) under a deduction of twenty-five shillings per week for the maintenance of himself and his family, and the further deduction of the wages of an assistant. The Macallisters who took that money were, of course, out of the money to pay the necessary accounts which the pursuer incurred in connection with the business of the hotel, and—that was the theory of the arrangement—were to apply the balance to the gradual liquidation of the £1750. Well, that arrangement went on until the year 1904. In the year 1904 the position of affairs was altered, because in that year the premises were sold by a creditor in one of the heritable bonds, and the person that the hotel was sold to was William Macallister, the son of Thomas. After that time the pursuer was maintained in his position in the hotel as manager for William Macallister. Disagreements or misunderstandings, however, arose between them which eventuated in a Sheriff Court action at the instance of William Macallister against the pursuer, claiming an account of his intromissions as manager of the hotel, and that action was settled by a deed of settlement which undoubtedly embraced other matters than the matters raised by the action, because it dealt not only with the claims of the pursuer in the action, namely, William Macallister, against the defender of the action, viz., Mackenzie, but also dealt with claims that Mackenzie had against Macallister.

"Now, referring to the present action—the present action is brought by Mackenzie, and he calls Brown, Thomas Macallister, and William Macallister, and the first conclusion is against those three persons, and asks them to lodge accounts, 'to exhibit and produce a full and particular account of their whole intromissions with the means and estate belonging to the pursuer.' Now, the averment upon which that is based is an averment that these weekly payments which I have already mentioned of the drawings, which went on from the year 1894 till the year 1904, had provided money enough to more than pay off the £1750, to leave a balance in the hands of the defenders, which was due, of course, to the pursuer, and which now ought to be handed to him. The answer upon the merits is that that balance is wholly fictitious, that as matter of fact the drawings never amounted to such a sum as would pay off the £1750, but that the £1750 had really to be paid to Brown by Thomas Macallister, and that consequently there is no balance due. Now that of course is the merits of the action with which we are not at the moment dealing. The plea which we have got to dispose of is the plea of the relevancy of the averments upon which the action is based."

On 27th November 1908 the Lord Ordinary (GUTHRIE) repelled the defenders' pleas of irrelevancy and incompetency, and ordained them to lodge an account.

The defenders reclaimed, and argued, *inter alia*—*On the question of competency—Esto* that the action was irrelevant against Brown, it fell to be dismissed as against the other defenders also. A joint conclusion to account was in an entirely different position from a joint conclusion for payment. It was only where the conclusions were pecuniary that an action dismissed as against one of several joint defenders would be allowed to go on as against the others. In the recent case of *Fleming* v. *Gemmill*, December 20, 1907, 1908 S.C. 340, 45 S.L.R. 281, where an action was allowed to proceed against remaining defenders, the conclusion was not joint, but joint and several.

Argued for respondent—*On the question of competency—Esto* that the action was not relevantly laid as against Brown, it could competently proceed against the remaining defenders—*Milne* v. *Smiths*, Nov-

ember 23, 1892, 20 R. 95, 30 S.L.R. 105; *Robinson* v. *Reid's Trustees*, May 31, 1900, 2 F. 928, 37 S.L.R. 718; *Reilly* v. *Smith*, May 24, 1904, 6 F. 662, 41 S.L.R. 516; *Brodie* v. *Coplan*, March 30, 1906, 14 S.L.T. 35; *Fleming* v. *Gemmill* (*cit. supra*). *Esto* that if the conclusions were so inextricably intertwined as not to be separable, the action would have to go—*e.g.*, *Mackersy* v. *Davis & Sons, Limited*, February 16, 1895, 22 R. 368, *per* Lord M'Laren at p. 370, 32 S.L.R. 277—that was not the case here, for the separate liability of each defender was ascertainable.

LORD PRESIDENT—. . . [*After the narrative supra, and after examining the pursuer's averment, and finding that no relevant case had been stated against the defender Brown, his Lordship proceeded*]—. . . That, of course, must lead us to the dismissal of the action as against Brown, and then it has been pled to your Lordships that inasmuch as the introductory conclusion upon which all the other petitory conclusions rest, is a conclusion in which Brown and the two Macallisters are joined together without any indication of several liability as opposed to joint liability, therefore the action must fall. I see no reason for that. We have had several cases quoted to us where there being an original joint conclusion against several defenders, and where in the sequel it has been seen that either for want of relevant statement or want of merits there was no case against one or more of the defenders so called, nevertheless the action has been utilised as a perfectly good action against those who were left, and against whom a relevant case is averred. Although it is *obiter*, the point is put in so many words by Lord M'Laren in the recent case of *Fleming* v. *Gemmill* (1908 S.C. 340) in this Division, where his Lordship says this—"When an action is brought against several persons without the addition of words descriptive of the nature of their liability, then I take it that even if one of them should be assoilzied, or if the pursuer should pass from his action against him, the instance would still be good against the defenders who remained, the only question being whether they were liable jointly or severally. In the case I am putting, I think the better opinion is that they would only be liable jointly unless words denoting several liability were added. But then in order to avoid such a result under which the pursuer would lose a part of his claim, the law authorises the use of the words 'jointly and severally.'"

I am bound to say that the words I have just read, although *obiter*, seem to me a correct statement of the law. I could imagine, although I cannot at the moment think of an apposite illustration, still I can imagine theoretically that a person might table his cause of action, and so inextricably intertwine his cause of action with the joint liability of all, that if once the joint liability of the whole of the persons called was negatived, the action might have to be dropped. I cannot think of an illustration, but theoretically I think that might be so. But if the cause of action is not in that way inextricably intertwined, I do not see any reason why the action should not go on, and I think it has been allowed to go on in several cases, the best cases quoted to us, I think, being the case of a person who raised an action about the falling of a party wall against the landlord and against a neighbouring proprietor, and the case in which a person raised an action against a husband and wife for slander uttered by the wife. In the one case the neighbouring proprietor was let out, and in the other case the husband was let out, and yet the actions went on. Now I do not see anything so peculiar in a conclusion for accounting as to make any difference. I think I said, in the course of the discussion, that in an ordinary petitory action, whether you buttress the petitory conclusions by preceding declaratory conclusions or not does not really matter. Applying that to the present case, though the conclusion for accounting is convenient, I do not think it is a necessity of the situation. I do not see why a man who has a true claim against another upon what we usually call an accounting, should not, if he liked to risk his action upon a particular sum, do so by putting forward a mere petitory conclusion. It would not be so convenient, because there is not a floating balance asked for, but I see no irrelevancy in it; and if that is so, how can it make any difference that you put in the ordinary conclusion for accounting first? I think, therefore, the Lord Ordinary's interlocutor must be recalled, that the action must be dismissed as against the defender Brown, but that it must be allowed to go on against the two Macallisters. But I am bound to say that I think, before it is allowed to go on against the two Macallisters the pursuer must be given an opportunity of making his averment clearer than he has done in this condescendence in regard to the position of William and Thomas. I have not much doubt as to what he means, but he has not said it. The statements made in cond. 6 and in cond. 8 require revision in that matter, just as much as the answer made in statement 8, which is equally obscure.

LORD KINNEAR—I agree with your Lordship on all the points. I concur in holding that there is no relevant case against the defender Brown, and upon that point I have nothing further to add. The action must therefore be dismissed as against him.

Upon the point that arises upon that dismissal—to wit, that inasmuch as the conclusion for accounting is directed against all the defenders jointly, the action cannot go on as against the other defenders if it is dismissed as against Brown—I should only desire to add one observation to what your Lordship has said. The definition of liability in the conclusions of an action as "joint," "joint and several," or "joint and several or otherwise several," appears to me to be appropriate for conclusions for the payment of money, and I cannot at present

see that such conclusions would be appropriate to a mere demand for an accounting irrespective of a petitory conclusion, because the meaning of a decree against two people jointly and severally is simply this, that as regards the pursuer each is to be made liable *in solidum*, but that *inter se* they may be liable *pro rata*—that is, each for his own share—and therefore the decree against each for full payment to the pursuer will still leave open to each a claim for contribution against the other. Now in a case of that kind it might very well be that the dismissal of a conclusion against one defender might be prejudicial to the other, who after such dismissal still remains in the case, because upon the hypothesis upon which the pursuer brings his action he has a right of relief of which he is deprived by the discharge of a co-obligant. But a general demand against several persons to account for their intromissions implies a demand against each to render an account of the intromissions had by himself. It appears to me that once it is clear that one of the defenders originally called is not liable to account at all, there is no difficulty whatever in holding that the case must go on as against the others, who according to the allegation have had intromissions with the pursuer's funds, for which they have not yet accounted. It is not disputed that the petitory conclusions for payment are perfectly relevant so as to enable the pursuer to get his decree for money against one or other or both of the defenders remaining, although the action is dismissed as against the other defender Brown. And therefore I am quite unable to see that there is any reason why this action should not go on as against the remaining defenders, and I think the authorities which your Lordship has referred to are all in favour of that course being taken.

LORD PEARSON — I am of the same opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, dismissed the action as against the defenders Robert Brown & Co. and Robert Brown, and *quoad ultra* allowed the pursuer to lodge a minute of amendment of his condescendence against the remaining defenders.

Counsel for the Pursuer (Respondent)—Constable, K.C.—Munro. Agent—Thomas Henderson, W.S.

Counsel for the Defenders (Reclaimers)—Cooper, K.C.—Kemp. Agents—Sharpe & Young, W.S.

Saturday, November 14, 1908.

OUTER HOUSE.

[Lord Skerrington.

PENTLAND AND OTHERS *v.* PENTLAND'S TRUSTEES.

Succession—Testament—Clause Validating Informal Writings — Unsigned Holograph Writing Subscribed "Your Loving Mother."

A testatrix by her settlement directed her trustees to "give effect to any wishes which I may hereafter express in writing, however informal." She subsequently executed an unsigned holograph writing in favour of certain of her children, which she subscribed "Your loving mother." The writing was found in her repositories after her death enclosed in a sealed envelope, on which she had endorsed the words "Not to be opened untill." *Held per* Lord Skerrington (Ordinary) that the document was a valid testamentary writing.

Crosbie v. *Wilson*, June 2, 1865, 3 Macph. 870, *followed.*

Hamilton's Trustees v. *Hamilton*, November 28, 1901, 4 F. 266, 39 S.L.R. 159, *distinguished.*

Mrs Jane Muir or Pentland died on 30th June 1905 leaving a probative trust-disposition and settlement dated 19th January 1894, by which she directed her trustees to hold her estate in trust (*first*) for the liferent use of her husband in the event of his surviving her, and (*second*) on the death of the survivor of the spouses for the liferent use of two of her daughters Jeanie Pentland and Margaret Lawrie Pentland so long as they remained unmarried. The third purpose provided, *inter alia* "that after the death of the survivor of me and my said husband, and on both of the said Jeanie Pentland and Margaret Lawrie Pentland being married or dying, I direct my trustees (*first*) to give effect to any wishes which I may hereafter express in writing, however informal. . . ." In the *fourth* place she directed her trustees to divide the residue of her estate among her whole children then alive and the issue of predeceasers.

Mrs Pentland was survived by her husband and by eight sons and four daughters. Shortly after her death there was found in a drawer in a chest of drawers in her bedroom, where she was accustomed to keep private and important papers, a holograph writing enclosed in a sealed envelope, on which she had endorsed the words "Not to be opened untill." The writing was in the following terms:—"*The Cottage, Laverock Bank Road, Trinity, Edinburgh.*"—[The words in italics were embossed on the notepaper.]—"This is to certify that all the money given by my brother James and son Frank to me, and to be given as a loan to the firm, with the interest on same, is to be divided apart to all