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

expedient rule or not is not *hujus loci*. It is certainly possible for the Legislature to alter it, or it may be possible for us to alter it by an Act of Sederunt, but we cannot by a judgment now go against the deliberate judgment of the Court in that case.

Lord Deas—There is nothing against which the law and practice of the country have set their faces more strongly than an accumulation of actions. There certainly would be an accumulation of actions here if we were to hold Mr Maclaren's argument to be correct. The first action was not at an end. It might have been reclaimed against, or might even have been taken to the House of Lords; nothing is more clear than that it was a depending action. It would be a great hardship if a point of this kind was reviewed and revised at an interval of fourteen years. The case of *Aitken* v. *Dick* settles this, and I can see no principle or expediency in any other course.

Lords Ardmillan and Mure concurred.

The Court adhered.

Counsel for Pursuers—Maclaren. Agents—Lindsay, Paterson, & Co., W.S.
Counsel for Defenders — Rhind. Agent — Robert Menzies, S.S.C.

Tuesday, June 13.

FIRST DIVISION.

[Lord Shand, Ordinary.

SHAW *v.* YOUNG AND OTHERS (SHAW'S TRUSTEES).

Process—Deed—Proving the Tenor—Title to Sue.

Where a pursuer's title to sue is founded on a deed which cannot be recovered, he must bring an action of proving the tenor.

This was an action brought by the pursuer John Shaw against the defenders, who were trustees and executors acting under the trust-disposition and settlement of the pursuer's father, the late Thomas Shaw, concluding for a sum of £2000 alleged to be due to him as partner with his father in a confectionery business in Glasgow. This business, the pursuer alleged, had been originally established by James Scott, who died on 13th January 1837, and it was thereafter conducted by his widow, Mrs Susan Scott or Shaw, who was married on 26th June 1843 to the said Thomas Shaw, from which date last mentioned the said Thomas Shaw was conjoined with her in the management. The children of the said James Scott, viz., Margaret, Janet, Susan, and Hannah, had, under his will or otherwise, rights and interests in the said business, which were regulated and adjusted by mutual agreement and contract of copartnery, dated 25th June 1847, entered into between and among the parties following, viz.,—(I.) Mrs Susan Shaw, sometime widow of James Scott, confectioner in Glasgow, then wife of Thomas Shaw, confectioner in Glasgow, and the said Thomas Shaw, on the one part; and (II.)—(1) Margaret Scott or Morris, wife of David Morris, hatter in Paisley, with consent of her husband; (2) Janet or Jessie Scott, residing in Glasgow; (3) Susan Scott, residing there; and (4) Hannah Scott, also residing there, on the other part. The pursuer on 24th June 1852 married the said Susan Scott. By assignation dated 19th, 22d, 23d, and 25th February 1856, the second and fourth daughters retired from the business, and assigned their shares to the pursuer and his father, and in 1858 the eldest daughter did so also. The pursuer's wife died in 1856, and Mrs Shaw, his stepmother, in 1867. In 1868 pursuer's father sold the business and stock-in-trade. In virtue of the assignations mentioned, and of the right acquired by him *jure mariti* to his wife's rights under the original contract of copartnery, the pursuer raised this action against his father's trustees, who averred in defence that the pursuer was not a partner, at all events ultimately, with the said deceased Thomas Shaw. If he ever was a partner, the partnership must have ceased many years ago.

The defenders further averred that even if the pursuer was at any time a partner, he duly received at least his share of the profits, and that upon an accounting they are not due him any sum whatever, and that his father for a great number of years, the precise time being to the defenders unknown, had to support the pursuer, and frequently to pay debts of his.

The assignations and contract of copartnery were not produced, and the pursuer failed to recover them under a diligence.

The Lord Ordinary pronounced the following interlocutor:—

"23*d May* 1876—Having heard counsel, remits to Mr William Brown, chartered accountant in Glasgow, to inquire into the facts set forth in the record, and to report, and in particular to report a state of the profits of the copartnery business for the period referred to in the record, in so far as he may obtain materials enabling him to do so, and also the particulars of any sums paid to the pursuer or his wife by his late father, with power to the accountant to recover all books and documents bearing on the subject of the remit, and for that purpose grants diligence at the instance of the parties against havers; said report to be made *quam primum*.

"*Note.*—The record in this case, particularly the defenders' record, is in a very unsatisfactory state, and the defenders say they cannot make their statements more precise. In the circumstances it appears to me that a remit to an accountant, with power to recover books and documents, is the course appropriate to actions of this class, is the best means that can be adopted for ascertainment of the facts, or for putting the case in shape for a proof to be taken on certain specified points, if that shall be found necessary.

"The defenders maintain that the case should be sisted till the pursuer, in a formal action of proving the tenor, shall set up the deeds founded on; but in the circumstances I think this is unnecessary, and would impose a hardship and injustice on the pursuer. In a former litigation in this Court the contract of copartnery was produced and printed for the use of the Court, and admitted by the late Mr Shaw. Mr Shaw's receipt for the two assignations founded on by the pursuer is produced, and no account is given as to what has become of those deeds; and in