1858, 18 D. 797, and 3 Macq. 321. Now, Mr Dymond in the former branch of the case relied on his bottomry bond, and under it claimed the whole fund, having no interest to raise this question as to the captain's claim. This claim of the captain, although not formally stated in his claim, was admitted by the owners of the cargo in the witness-box, so that there was here no surprise.

Argued for Scott and others — A party who had not been called would no doubt be allowed to come forward with his claim at any time, but when he had been in Court in one character, and his claim as in that character had been rejected, he could not come forward with a new claim in a different character. The captain although in full knowledge of this claim failed to make it, and neither he nor his assignee could now do so—*Molleson* v. *Duncan*, June 3, 1874, 1 R. 964 (Lord President's opinion). This claim was in the same position, and should be rejected on the same principle, as a defence which was "competent and omitted"—*Stoddart* v. *Bell*, May 23, 1860, 22 D. 1092; *Downie* v. *Rae*, Nov. 20, 1832, 11 S. 51.

The Court allowed the claim to be received upon payment by Mr Dymond of the previous expenses found due by him in the cause, which included *inter alia* the expenses incurred by the claimants Scott and others.

Counsel for Claimant Dymond (Reclaimer)—Fraser—Thorburn. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Claimants Scott and Others (Respondents)—G. Smith—Young. Agent—Thomas Dowie, S.S.C.

Friday, November 16.

SECOND DIVISION.

[Lord Craighill, Ordinary.

SMITH *v.* HARDING AND OTHERS.

Relief—Co-obligants — Where a Law-Agent is employed on same Business by different Parties.

Several parties by separate mandates employed a law-agent for the same business. After rendering his account he accepted a certain sum, being less than their proportion of the whole, from each of two of them, the respective discharges bearing to be "in full of my account against him . . . this receipt being given and taken without prejudice to my claims against" the others, who were named.—*Held* (1) that there having been no special agreement, the parties were jointly and severally liable in the expenses incurred; but (2) (distinguishing the case from *Crawford* v. *Muir*, October 29, 1873, 1 R. 91, 2 R. (H. of L.) 148) that the terms of the receipt imported a discharge in so far as regarded two entire shares of the the whole expenses, and that there was no recourse against the remaining co-obligants for the balance unpaid by those who had been discharged.

This was an action at the instance of D. Howard Smith, an enrolled law-agent in Edinburgh, against three parties, named respectively Harding, Cornelius, and Clunas, the last-named being the sole partner of the firm of Clunas & Sey, for payment of an account for professional services rendered by him. The question arose out of business done in connection with the sequestration of a party named Levy, and the opposition to an application for the benefit of *cessio* following upon it. The pursuer, on 10th April 1876, received written mandates, in supplement of previously received verbal instructions, from each of the three defenders to act for them in the Sheriff Court in opposing the *cessio*, and subsequently they each gave written authority to the pursuer to appeal the Sheriff's decision, by which *cessio* had been granted, to the Court of Session. The defender Clunas, however, refused to allow his name to appear in the appeal, but agreed verbally to pay £3, 3s. towards the expenses. Two other parties named Scott and Forrest at this stage likewise gave mandates to the pursuer. The account sued for was made up and rendered on 2d November 1876. A separate statement was made up of the sums for which each was liable. The whole amounted to £89, 17s., and besides being rendered to the defenders, it was rendered to Forrest and Scott, "upon the footing," as the pursuer averred, "that each of the co-obligants would pay an equal share, but without prejudice to the pursuer's right to hold each liable for the whole account." Forrest and Scott settled their portion of the account by a payment of £10 each. The receipts given them were in the following terms:—"Edinr. 24th November 1876.—Received from , the sum of ten pounds stg., as in full of my account against him in connection with Levy's sequestration and *cessio*, this receipt being given and taken without prejudice to my claims against Mr Cornelius and Mr Harding and Mr Clunas for balance of said a/c."

The defenders were now sued as liable *singuli in solidum* for the unpaid portion of the account. The defenders Harding and Cornelius answered that the pursuer had not been employed by them prior to 10th April, and that they gave the mandates on condition that they would not be charged more than £7. The defender Clunas denied employment.

The pursuer, *inter alia*, pleaded—"(1) The defenders having employed the pursuer to perform the business and make the cash advances referred to in the account libelled on, they are legally bound to pay the charges and advances incurred under their instructions. (2) The defenders Henry Harding and William Cornelius are liable to the pursuer *singuli in solidum* of the account in question. (3) The defenders Clunas & Sey, and David Clunas as partner of that firm and also as an individual, are liable conjunctly and severally with the other defenders for the sum of £22, 5s. 10d. *pro tanto* of the total amount of the account referred to."

The defenders Harding and Cornelius, *inter alia*, pleaded—"(2) Assuming it to be true, as stated by the pursuer, that he has discharged Scott and Forrest of all liability for the account sued for, he has thereby discharged the defenders; —at least he has thereby discharged them for all but their own share of the account. (3) The defenders not having employed the pursuer for any

part of the business charged in said account prior to 10th April 1876, they are entitled to be assoilzied so far as that portion of the account is concerned. (4) With regard to the account for the appeal, the defenders having consented to prosecute said appeal only on condition that the pursuer's claim against them for expenses should not exceed £7, the pursuer is not entitled to charge them for any further amount than said sum. (5) With regard to the whole of the account in which the defenders employed the pursuer, the employment having been given to take proceedings only in combination with the other creditors beforenamed, the defenders can only be made liable for their proportion of said account along with said other creditors. (6) The pursuer is bound to give credit for all payments received from said other creditors."

At the proof which was led in the cause the pursuer gave the following evidence regarding the rendering of the accounts:—"In making out my account I anticipated that having acted in a friendly way all throughout these proceedings the parties would not see one of them pay more than another, and that they would settle the matter in a fair way as between themselves. I therefore put at the end of that account a scheme of division, just to make it in a business-like form, so that they might readily ascertain the sum payable by each. That scheme is on the account. All the parties but Mr Clunas were to pay share and share alike, and Mr Clunas was to pay his share of the Sheriff Court expenses, but so far as regards the Court of Session expenses these were to be restricted to three guineas. Credit has been given for these three guineas in this action in so far as regards the proportion that will be paid by the other defenders."

The Lord Ordinary on March 29, 1877, pronounced the following interlocutor:—

"The Lord Ordinary . . . In the first place, Finds as matters of fact—(1) That the employment of the pursuer by the defenders Henry Harding and William Cornelius was given on 10th April 1876; and that Thomas Scott and James Forrest were also employers of the pursuer at this time, and so long as the said defenders continued their employment in the same matters as those relative to which the defenders' employment was conferred; (2) That the employment of the pursuer by the defenders Clunas & Sey was given on 17th April 1876, and had reference to the same business as that upon which the pursuer was employed as aforesaid by the other defenders—that is to say, opposition to Levy the bankrupt's application for the benefit of the *cessio bonorum;* (3) That this application having been granted by the Sheriff of Edinburgh, the defenders Henry Harding and William Cornelius, in conjunction with the said Thomas Scott and James Forrest, employed the pursuer, without any limitation as to the extent of the costs for which liability was to be incurred, to reclaim to the Court of Session against the deliverance to this effect; and thereupon, as well as on an agreement by the defenders Clunas & Sey, to undertake liability to the extent of three guineas towards the expense of this proceeding, that portion of the account sued for, which has reference to procedure in the Court of Session, was incurred; (4) That the pursuer, for a payment of £10 from each of the said Thomas Scott and James Forrest, has discharged both of all further liability for the costs of any portions of the proceedings in the Sheriff Court and in the Court of Session which are covered by the account sued for; and (5) That the said Thomas Scott and James Forrest, as well as the defenders Henry Harding and William Cornelius and Clunas & Sey, are now and all along have been solvent, and able to discharge their respective liabilities to the pursuer in the premises: In the second place, Finds as matters of law—(1) That the defenders Henry Harding and William Cornelius are each liable to the pursuer in one-fourth of the account sued for incurred to the pursuer between the 10th and 17th April 1876, in one-fifth of the said account incurred between and including said 17th April and the close of the procedure before the Sheriff, and in one-fourth of the expenses incurred to the pursuer in the said procedure before the Court of Session, but this always under deduction of the three guineas for which, as aforesaid, the defenders Clunas & Sey agreed to become liable on account of the expenses last specified; and (2) That the defenders Clunas & Sey are liable in one-fifth of the account sued for, incurred between and including 17th April 1876 and the close of the proceedings in the Sheriff Court, and in the sum of three guineas, to which extent the said defenders undertook liability as aforesaid on account of the said proceedings in the Court of Session," &c.

The pursuer reclaimed, and argued—The case was one of employment. The balance unpaid of Forrest and Scott's share was chargeable against the others. The receipt given to them was not a discharge, but merely an undertaking not to sue them. There was joint employment, which inferred liability *singuli in solidum.* To exclude that there must be some special agreement.

Argued for the defenders—There was a special agreement with each party, and the method in which the accounts were rendered showed this. They claimed that Forrest's and Scott's whole shares were discharged, and no part could be claimed from them. [Lord Justice-Clerk—There are cases against that view. The discharge of one co-obligant with a reservation does not destroy recourse against the others.] Smith discharged these two defenders of his whole claim against them.

Authorities—*Walker* v. *Brown*, M. Appx. 1, *voce Solidum et pro rata;* Bell's Prin., 59–60; *Anderson* v. *Sinclair*, M. 14,706; *Chalmers* v. *Ogilvie*, M. 14,706; *Brand* v. *Wilson*, Hume 336; *Webster* v. *M'Lellan*, July 2, 1852, 14 D. 932; *Grant* v. *Wishart*, January 17, 1845, 7 D. 274; *Crawford* v. *Muir*, October 29, 1873, 1 R. 91, 2 R. (H. of L.) 148.

At advising—

Lord Justice-Clerk—The first question here is as to the question of employment before the 10th of April 1876. On that matter I agree with the Lord Ordinary. I think there is no evidence that the pursuer was employed by the defenders before that date.

The second question is as to the joint and several liability of the parties. Here I am of opinion that joint and several liability is implied from the nature of the employment. Where several persons employ a law-agent for the same

business, in the absence of some special agreement joint and several liability amongst the parties will follow. But it was alleged that there was here something of the nature of special agreement shown by the manner in which the pursuer in the account which he rendered made a separate statement of the sums which each of the employers were liable in; but this is explained by the parole evidence, which points to joint employment. The rendering of the account in the form in which it was done seems quite reasonable as it has been explained by the pursuer. On this part of the case I am of opinion that the Lord Ordinary's interlocutor is wrong—I mean with regard to the joint and several liability.

But then it is maintained that, even if that be so, the creditor has made a special agreement with some of the parties, and has so far released the other co-obligants from their liability. From the discharges granted to the defenders Scott and Forrest it would appear that they each paid £10 in full of the pursuer's claim against them, for which they were relieved of all liability.

As to the general doctrine pleaded, that in a case of joint employment a discharge to one of the co-obligants, with a reservation of the granter's rights as against the other co-obligants, preserves recourse against them for the whole claim unchanged, the law, as laid down in the case of *Crawford* v. *Muir*, admits of no doubt. But then, as laid down by the Lord Chancellor in the case of *Owen* v. *Homan*, 1853, 4 Clark's House of Lord's Cases, 997, referred to in the case of *Crawford*, there might arise circumstances which would bring the particular case from under the general rule.

In this case I think we have such circumstances, not only in the discharges, but also in the explanation given by Mr Smith himself in the course of his evidence. He says—"I discharged Mr Forrest and Mr Scott by the receipts. I took £10 from each of them in full under express reservation for the balance of my claim. The receipts bore no reservation against them. If I had done so, they would not have paid me the £10." I cannot read these expressions otherwise than as meaning that he discharged the liability of these gentlemen as co-obligants of their share of the whole debt under reservation of the balance, that is, the remaining portion due by the other co-obligants. In the case of *Crawford* v. *Muir* the reservation was of the entire claims against the other co-obligants, but here the reservation is of the balance only.

The result, then, that I arrive at is—First, that the liability of the co-obligants is joint and several, but that it does not begin before the 10th of April 1876; and second, the liability is restrictive by deducting the shares of Scott and Forrest.

The position of Clunas is different—he had made a special bargain.

Lord Ormidale—I am of the same opinion. Whether the pursuer could claim before 10th April depends on what proof he can show of employment before that time. There is some evidence that he attended some of the meetings at which these defenders were also present, and perhaps discussed with them the business in which they were all interested and engaged, but there is not enough to prove employment before the 10th of April.

As to the question of joint employment, I agree with your Lordship; I think they are jointly liable. There is no restriction in their mandates, and where several parties give separate mandates to an agent to act for them in the same business the result is just the same as to their joint liability as if they had made the appointment by a joint minute.

The position of Clunas is peculiar. He made a separate bargain for himself that as to the Court of Session case he was in no circumstances to pay more than three guineas.

The third question is, Assuming the joint and several liability, what is the effect of the discharge to Scott and Forrest? Your Lordship's statement has removed any difficulty I might have had, and I quite concur in holding that the true meaning of the pursuer in granting these discharges was to accept the £10 as in full of their shares.

Lord Gifford—I am of the same opinion, and upon the same grounds. On the first part I agree with the Lord Ordinary we cannot extend the employment beyond the date of the written mandates. On the nature of the employment I hold that it was joint and several. It is the case of an agent appointed by separate parties to attend to their interests in the same business; *inter se* they are liable *pro rata*, but towards the agent their liability is joint and several. The case of Clunas stands on a different footing; he made a separate agreement.

Then, as to the discharges, the agent was master of the situation; he could discharge in whole or in part. I do not think much of the form in which the account was rendered with separate statement of each person's share, but then when the pursuer comes to some of the co-obligants and takes £10 as in full of his claim, I think the case is removed out of the category of *Crawford* v. *Muir*. The pursuer's own explanation is consistent only with holding these parties freed from further liability as contributories as to the pursuer or as to the other co-obligants. I therefore cannot doubt that the equity of the case is as stated by your Lordship in the chair.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the pursuer against Lord Craighill's interlocutors of 29th March and 16th and 17th May 1877, Recal the fifth finding in fact and the findings in law contained in the said interlocutor of 29th March 1877 reclaimed against, and *quoad ultra* adhere to the said interlocutor: Recal the interlocutor of 16th May 1877: Adhere to the interlocutor of 17th May 1877: Find that the defenders Henry Harding and William Cornelius are jointly and severally liable to the pursuer in two-fifth parts of the account sued for, incurred to the pursuer between the 10th and 17th April 1876, in one-half of said account incurred between and including said 17th April 1876 and the close of the procedure before the Sheriff, and one-half of the expenses incurred to the pursuer in the procedure before this Court: Find that the defenders Clunas & Sey and David Clunas are liable conjunctly and severally with the said defenders Henry Harding and William Cor-

nelius to the pursuer in the said one-half of the account sued for, between and including 17th April 1876 and the close of the proceedings in the Sheriff Court, and in one-half of the sum of £3, 3s. on account of said proceedings in this Court: Further, find the said defenders Clunas & Sey and David Clunas liable to the pursuer in another fourth part of the said account sued for, between and including the 17th April 1876 and the close of the proceedings in the Sheriff Court, and in the other half of the said sum of £3, 3s.: Therefore decern against the defenders Henry Harding and William Cornelius, conjunctly and severally, for payment to the pursuer of the sum of £26, 6s. 5d., with interest thereon at the rate of five per centum per annum from 14th December 1876 until payment; and decern against the defenders Clunas & Sey and David Clunas for payment to the pursuer of the sum of £8, 16s. 3d., with interest thereon at the rate of five per centum per annum from 14th December 1876 until payment: Find no expenses due to or by any of the parties since the date of the Lord Ordinary's interlocutor of 17th May 1877; and decern."

Counsel for Pursuer (Reclaimer)—Fraser—Rhind. Agent—Party.

Counsel for Defenders (Respondents) Harding and Cornelius—Millie. Agents—Watt & Anderson, S.S.C.

Saturday, November 17.

SECOND DIVISION.

SPECIAL CASE—HOUSTON OR MITCHELL AND OTHERS.

Succession—Fee and Liferent—Protected Succession.

A testatrix disposed of the residue of her estate by giving two-fifths to her nephews and three-fifths to her nieces, the share of any one predeceasing her to be divided equally amongst the whole surviving nephews and nieces. The principal sums were to be at her nephews' disposal as they attained majority, "but my nieces' shares to be invested on good security, and in the event of any of them being married, to be settled on themselves and their children." In the event of any of her nieces dying after her without issue there was a destination-over of her share, which was to go to the surviving nephews and nieces. — *Held* (1) that the nieces of the testatrix were entitled to the absolute right of the fee of the shares falling to them, and that the terms of the will imported no effectual qualification of that right; and (2) (distinguishing the case from *Lady Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; and *Gibson's Trustees* v. *Ross*, July 24, 1877, 14 Scot. Law Rep. 694) that there was no such indication of the intention of the testatrix as would induce the Court to direct each niece's share to be invested for the purpose of excluding the *jus mariti* and preventing gratuitous alienation.

Miss Jane Houston died on the 15th of November 1853, leaving a holograph will dated the 8th of February 1847, which contained, among others, the following bequest—"The residue of my estate I bequeath to the children of my said deceased brother James Houston, and appoint the same to be divided among them in manner following, viz., I appoint two-fifths of said residue to be divided equally among my five nephews, sons of my deceased brother James Houston, and the remaining three-fifths of the said residue I appoint to be divided equally among my four nieces, daughters of my said deceased brother James Houston; and should any of my said nephews or nieces not survive me I appoint the share that would have otherwise fallen to said nephew or niece predeceasing me, to be divided equally among the whole of the surviving said nephews and nieces. The principal sums or shares falling to my nephews under this will be at their own disposal as they severally reach the age of twenty-one years; but my nieces' shares is to be invested on good security, and in the event of any of them being married, to be settled on themselves and their children. The interest of both nephews' and nieces' shares to be spent on their education till they reach the age of twenty-one years, or allowed to accumulate till then for their behoof, as my executors may see fit; and in the event of any of my nieces dying after me without leaving any children, the amount settled on her shall revert equally after her death to the remaining branches of the family of my deceased brother James Houston, viz., to be divided equally among the surviving nephews and nieces, and the children of such of them as may have died leaving children, in which case said children to be entitled to the parent's share." The will further contained the following nomination of executors—"And I hereby appoint [four were named], or such of them as shall accept the office and be at the time in Great Britain, to carry this, my latter will, into effect, with power to my said executors, if they shall see fit, in case of the death of any one of them, to appoint another or others to succeed to the charge."

After the death of the testatrix, her sister-in-law Mrs Helen MacDonald or Houston, one of the executors nominated by the will, accepted that office, and continued to exercise it until her death, when her son and executor-nominate Patrick Cruikshank Houston, M.D., who was the third party to this Special Case, entered into possession of the residue of the estate of his aunt Miss Jane Houston. The residue amounted to a sum exceeding £4000, and consisted entirely of moveables.

The Case was brought after all the beneficiaries had attained majority.

The first parties, who were Mrs Margaret Houston or Mitchell, wife of Arthur Mitchell, M.D., and her three sisters, the four nieces of the testatrix (Mrs Mitchell alone being married), maintained that under the will they were entitled absolutely to three-fifths of the residue of the estate, to be divided equally among them.

The parties of the second part, who were the only child of Mrs Mitchell, and his uncle Cruikshank Houston, the only nephew now interested