was not in fault at all. That question therefore does not affect the matter which I have already dealt with.

LORD M'LAREN—After hearing your Lordship's exposition of the facts I am satisfied that the defender might fairly maintain that he was not liable on the question of fault, and that on no reasonable estimate of its value was the case worth more than £25. It is provided by statute that cases below the value of £25 are to be brought in the Sheriff Court. But we can only imperfectly apply the rule, for in many cases we do not, when the action is initiated, know the real worth of a claim of damages. There are many cases, however, where a pursuer must know the extent of his claim, and in this case the pursuer could not conscientiously say that his claim of damages was worth more than £25. That being so, he can only justify his coming here by a preference for the Court of Session. It would not be convenient that expenses should be taxed on the Sheriff Court scale, and we do not have the machinery for doing so. I think, therefore, we may modify the pursuer's expenses to one-half of the taxed amount as your Lordship proposes.

LORD KINNEAR—I agree.

LORD PEARSON—I also agree.

The Court found the pursuer entitled to one-half of the taxed amount of his expenses.

Counsel for Pursuer — Wilton. Agent—C. Clarke Webster, Solicitor.

Counsel for Defender—Hunter, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Wednesday, January 16.

FIRST DIVISION.

[Single Bills.

WARRAND *v.* WATSON AND OTHERS.

(*Reported* December 14, 1905, 42 S.L.R. 252, 7 F. 253; July 19, 1906, 43 S.L.R. 799, 8 F. 1098.)

Expenses—General Finding against Several Defenders — Whether Liability Joint and Several or pro rata—Time at which such Question must be Raised.

Where parties desire a decree for expenses againt others jointly and severally, they must move for it at the time they ask for expenses, and it is too late to raise the question for the first time on the Auditor's report.

This was a case in which the proprietor of salmon fishings on the Ness had brought a petition of suspension and interdict against a number of persons who, he averred, had been trespassing on his fishings. After proof the Court granted interdict against certain of these persons, the interlocutor containing the following finding as to expenses "Find the said" A, B, C, D, the persons against whom interdict had been pronounced, "liable to the complainer in expenses, and find the complainer liable in expenses to the respondents" E, F, G, H, the persons against whom interdict had been refused, "and remit the accounts of said expenses to the Auditor to tax and report."

On 21st December 1906 counsel for the complainer moved the Court to approve of the Auditor's report, and to grant decree for expenses against A, B, C, D, jointly and severally.

Counsel for respondents opposed the motion.

Argued for the respondents—(1) A general finding of expenses against several persons implied only *pro rata* and not joint and several liability, especially where, as here, the cases of the various defenders were clearly separable. If it was desired to make the defenders jointly and severally liable, there ought, at anyrate, to have been a plea or a conclusion to that effect. (2) In any event, it was now too late to make the motion, which ought to have been made when expenses were moved for. The following cases were cited:—*Blair* v. *Paterson*, January 28, 1836, 14 S. 361, p. 373; *Inch* v. *Inch*, June 7, 1856, 18 D. 997; *M'Leod* v. *Heritors of Morvern*, February 16, 1870, 8 Macph. 528.

Argued for the complainer—Decree should be against the respondents jointly and severally. It was absurd to say that it was too late to make the motion. The decree had not gone out, and the Court were not being asked to alter their interlocutor, but merely to construe it. The cases of the various respondents were not separable. The following authorities were cited:—*Macgown* v. *Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494; *Lindsay* v. *Kerr*, January 15, 1891, 28 S.L.R. 267.

LORD PRESIDENT—This is a case where the proprietor of certain salmon-fishings on the Ness brought a petition of suspension and interdict against a number of persons who he said had been trespassing on his fishings. Various grounds of defence were stated, but, *inter alia*, it was denied that there had in fact been any trespassing at all. Eventually a proof was allowed and taken, and after the proof your Lordships pronounced an interlocutor granting interdict against some of the defenders and refusing it against the others. The interlocutor then proceeded—"Find the said" A, B, C, and D—the persons against whom interdict had been pronounced—"liable to the complainer in expenses, and find the complainer liable in expenses to the respondents" E, F, G, and H—the persons against whom interdict had been refused. As regards the latter part of the interlocutor, no question has arisen, except on the Auditor's report, but on the Auditor's report the complainer now asks that decree should go out against A, B, C, and D jointly and severally, while the respondents maintain that they are only liable severally.

I am surprised to find that this point has not been authoritatively settled one way

or the other. But counsel informed us that they had been unable to find any authorities in point, and I have not been able to discover any case in which the matter is definitely decided. But it is high time that it was settled, for it is not a point on which there ought to be any dubiety. It is settled practice in the ordinary style of a summons that, if a pursuer wants to obtain his decree against the defenders jointly and severally, he concludes for it in these terms. But that, of course, is not conclusive of the matter, for it is quite settled that the question of expenses is entirely in the discretion of the Judge, and if the parties appear and the process goes on, it is perfectly competent to make a motion for expenses, although expenses have not been concluded for in the summons. But still it is worth noting that such a practice exists, because it shows that the general understanding of the profession is that if they want a decree against any persons jointly and severally they must say so—in other words, it shows that the profession think that in the case of a decree in absence they would not be sure to get a joint and several decree unless they have prayed for it. It is also well settled that in obligations formally undertaken, as, for instance, in bonds, if the obligation is not stated to be a joint and several one the obligants will only be bound severally. There are, of course, exceptions, as, for instance, in bills of exchange, but still that is the general rule.

The result of the whole matter seems to me to be this, that the point will be best settled, and settled in accordance with what is the general practice, by holding that if parties want a joint and several decree they must move for it at the time they ask for expenses, and that it is too late to raise the question for the first time on the Auditor's report. That will not hamper the Court in any way, for if it is a case where the Court desire to see the Auditor's report before deciding the matter, nothing is easier than to put a reservation in the first interlocutor.

I think therefore that the motion that has been made here comes at too late a stage, and that we must refuse it. That is sufficient for the disposal of the case, but it is only fair to Mr Johnston to add that I do not think that the fact that he has been too late in his request has really made any difference. For I do not think that in this case, if we had been going to decide this question on the merits instead of on a rule of practice, we would have granted decree in the form now asked for. This is a case where a proprietor of fishings is seeking interdicts against a number of trespassers, and although it was clearly convenient that these should all be tried and disposed of in one case, it is really a congeries of cases against separate defenders which do not involve conjunct liability. It is possible to figure cases where the liability would be conjunct, as, for instance, where a gate has been removed by the joint action of the several defenders. But no such case is disclosed here. It may be that, as regards the discussion on the preliminary pleas, the expenses might properly have been awarded jointly and severally, but the substantial expense here was incurred with regard to the proof, and in that the interests of the defenders were clearly separate.

I think therefore that the motion must be refused, and that the decree must go out in the same terms as in the interlocutor.

LORD M'LAREN—I concur.

LORD PEARSON—I also agree.

The LORD PRESIDENT stated that LORD KINNEAR, who was absent at the advising, concurred in the judgment.

The Court pronounced this interlocutor—

"Approve of the Auditor's report on the complainer's account of expenses, . . . and decern against the respondents A, B, C, D. for payment to the complainers of the sum of . . . the taxed amount thereof. . . ."

Counsel for the Complainer—Johnston, K.C. — D. Anderson. Agents — Skene, Edwards & Garson, W.S.

Counsel for the Respondents—Hunter, K.C.—Constable. Agents—Morton, Smart, Macdonald & Prosser, W.S.

Wednesday, January 16.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

SWANSON *v.* MANSON AND OTHERS.

Title to Sue—Interest—Will—Reduction—Existence of Prior Settlement under which Pursuer not a Beneficiary—Agreement between Pursuer and Beneficiaries under Prior Settlement to Share Estate.

Held that one of the next-of-kin of a testator had no interest or title to sue an action of reduction of his last will and testament, where the effect of reduction would be to set up a prior deed which excluded the next-of-kin, although he had entered into an agreement with the beneficiaries under the prior deed by which, if he were successful in the action, he and the other next-of-kin were to receive a share of the estate.

The facts of the case are fully stated in the following portion of the opinion of the Lord Ordinary (ARDWALL):—"The present action was raised on 13th June 1906 by the pursuer as one of the next-of-kin of the deceased David Swanson, and it concludes for reduction of the last will and testament of the said David Swanson, dated 7th November 1905. The said will is in favour of the defender Mrs Manson, who is no relative of the deceased, and who with her husband and certain of the next-of-kin are called as defenders to the action, Mrs Manson being the principal defender, and the only one against whom expenses are asked except in the case of their opposing the conclusions