JUNE 25, 1861.

JOHN MACMILLAN ROBERTSON, *Appellant*, *v.* JAMES FLEMING and Others, *Respondents.*

Agent and Client—Summons—Relevancy—Issues—Solicitor—Jus quaesitum tertio—Reparation—*H. employed R. to effect a policy of insurance on his life, and borrow money on assignment of the policy to the Co., and F. was cautioner for H., who gave F. an assignment of a lease as a security. R. acted as the only law agent for both H. and F., and negligently caused damage to F. in not completing his security.*

HELD (reversing judgment), *That the proper issue for trial should be, "whether R. was employed by, or by the authority of F., to complete a security for F."*

A third party, who might benefit by a security prepared by a solicitor for his client, cannot sue the solicitor for negligence in preparing the security.

Appeal—48 Geo. III. c. 151, § 15; 6 Geo. IV. c. 120, § 28. *An interlocutor applying a verdict is subject to appeal.*[1]

In December 1856, Robert Hamilton, grocer in Stenhouse, obtained a loan of £250 from the English and Scottish Law Life Assurance and Loan Association, for which the assurance company obtained a bond, dated 12th December, by Hamilton, and the pursuers, James Fleming, farmer, Holm; James Summers, farmer and weaver, Stenhouse; and Euphemia Hamilton, a widow, residing at Stonehouse; with which bond there was combined an assignation by Hamilton of a policy of insurance on his life. The granters of the deed bound themselves, conjunctly and severally, to pay the borrowed sum, and to keep up the policy of insurance. Of the same date, 12th December 1856, Hamilton executed, in favour of the pursuers, a bond of relief of the obligations above mentioned, with an assignation in security to certain subjects in Stonehouse, held by him under a lease of 999 years. This bond of relief and assignation in security proceeded on the narrative of the bond to the assurance company, and that, although the pursuers became bound for payment of the sum due under it, "yet the whole sum of £250 sterling therein contained, was received by me [Hamilton] and applied to my own use, and no part thereof was received by them, or applied for their use and behoof, and I only am the true debtor therein; and that it was stipulated and agreed between the said James Fleming, James Summers, and Mrs. Euphemia Hamilton, and me, that I should grant them a bond of relief and assignation in security, in the terms after written: Therefore," &c. And it contained the following clause relative to the subjects assigned in security:—"And I, the said Robert Hamilton, bind and oblige myself and my foresaids to keep the houses and buildings erected on said piece of ground constantly insured, in a responsible insurance office, against loss by fire, to the extent of £300 sterling, at least, and to pay the premium of insurance and duty thereon regularly as it falls due; and failing my doing so, I hereby authorize and empower the said [pursuers] to effect the said insurance themselves, and to pay the premium and duty thereon, which I oblige myself and my foresaids to repay to them."

The defender, a writer in Glasgow, negotiated the loan from the assurance company, acting for behoof of Hamilton. He also prepared the two deeds above mentioned. Hamilton absconded in April 1858, and his estate was sequestrated on 24th April. The pursuers having been called upon by the assurance company to make good the obligation in the bond to the company, paid £60 to account on 22d February 1858; and being called upon to pay the balance, they brought the present action of relief against the defender, concluding for relief from all demands under the bond and for payment of the sums due under it, under deduction of any dividends that might be received from Hamilton's estate,—on the ground that the defender having been employed to prepare and complete the bond of relief and assignation in security in favour of the pursuers, had, from negligence and want of skill, failed to complete the assignation to the lease by intimation or registration, whereby the security had become ineffectual.

The pursuers averred, that it was a condition of their becoming cautioners for Hamilton, that he should grant them the bond of relief and assignation in security, and without such a condition they would not have entered into the transaction, and the defender was well aware of this. In

[1] See previous reports 21 D. 548, 982, 1204: 31 Sc. Jur. 542, 667. S. C. 4 Macq. Ap. 167; 33 Sc. Jur. 691.

preparing the bond of relief and assignation in security, the defender was "acting therein for behoof of the pursuers; and when subscribed by Hamilton it was handed to or left with the defender for their behoof," and that he might forthwith get it intimated to the landlord, and do whatever else might be necessary to render it a valid security. He neglected to do this; and, although he knew, that they were relying on his doing whatever was necessary to make the security effectual, he never told them, that it was necessary, that the assignation should be intimated, or that they should enter into possession; and when the statute 20 and 21 Vict. c. 26, was passed in August 1857, he did not avail himself of its provisions for completing the security, or advise them on the subject. Had the security been duly completed by the defender, the subjects over which it extended were sufficient to have relieved the pursuers.

The defender averred, that it was he who had suggested to Hamilton, that the bond of relief and assignation in security should be granted, and Hamilton instructed him to prepare the deed; he was employed by no one else, and was never employed to complete the security. The pursuers had never stipulated for such a security; and, accordingly, in revising the bond of relief, he had altered the narrative, which was at first in the ordinary form given in the Juridical Styles to the effect, that "it was stipulated and agreed between the said James Fleming," &c., "and me, [before they consented to join with me in executing said bond,] that I should grant," &c., by striking out the words within brackets, as being inconsistent with the fact. Hamilton called for the defender in February 1858, as to soliciting some indulgence from the insurance company, and the defender reminded him, that the pursuers' security was not completed; and Hamilton stated, "that he would, in the course of a few days, either take it away to give to the pursuers, or bring a letter from them dispensing with its being completed."

Mr. Summers, one of the pursuers, got the bond of relief from the defender on 16th February 1858, and granted a simple receipt for it. Some conversation occurred betwixt them, the different versions of which are given in the evidence; but it was admitted, that, on that day, after receiving the deed from the defender, Mr. Summers "took it to Hamilton, and left it with his cousin, John Summers, with instructions to take it to the Register Office, and have it recorded, provided the expense of doing so would not exceed one pound or thereby; that the said John Summers accordingly took the deed to the Register Office, but having found that the expense of recording it would exceed the sum above mentioned, he took it away with him."

At the time when the bond of relief and assignation in security was executed, the subjects in the lease were held by Andrew Ballantyne on an assignation *ex facie* absolute, but in reality in security of £500, and it appeared, that his title had not been intimated or otherwise completed, until it was registered under the provisions of the statute on 8th March 1858. It was admitted, that the value of the subjects at the date of the bond of relief was £350.

The case was tried before the Lord Justice Clerk and a jury upon the following issue:—"It being admitted, that, on the 12th day of September 1856, the pursuers, in conjunction with Robert Hamilton, grocer, Stonehouse, executed a bond in favour of Charles Baillie, Esq., advocate, and others, trustees for the English and Scottish Law Life Assurance and Loan Association, whereby they bound themselves to repay to the said Association the sum of £250, with interest at six per cent., as specified in the said bond, which sum of £250 had been advanced to the said Robert Hamilton by the said association:—Whether the defender was employed by the said Robert Hamilton to prepare and complete, for behoof of the pursuers, in relief of their obligation under said bond, a bond of relief and assignation of a lease held by the said Robert Hamilton, to be granted by him in favour of the pursuers? and, Whether, by the negligence, or want of skill of the defender, he wrongfully failed to prepare and complete the said assignation, to the loss, injury, and damage of the pursuers?"

The jury returned a verdict, in which they "find for the pursuers, and assess the damages at £198 16*s.* sterling, with interest."

The case thereafter was brought before the Court by the defender, (1.) on a bill of exceptions; and (2.) on a motion for a new trial.

The Court disallowed the exceptions, and refused a new trial, holding the defender Robertson liable in damages for failure to complete the right to the lease by intimation or registration.

The defender appealed, maintaining in his case, that the interlocutors of the Lord Ordinary and of the Court ought to be reversed—"I. Because the action was irrelevant, and the defender entitled to absolvitor:—(1*st*), In respect the pursuers made no sufficient averment in the record of employment of the defender as their agent, either by themselves, or by any other person authorized by them. (2*d*), In respect there is no sufficient statement of any duty which it was incumbent on him to perform, and the performance of which he neglected. (3*d*), In respect there is no relevant allegation of any loss arising out of any breach or omission of duty on the defender's part. II. Because the assignation in favour of the pursuers was only intended to be, and really was in point of fact, of such right (if any) as remained in Hamilton at the date of the assignation, subject to the previous assignation to Ballantine; and it was no part of the defender's duty, even if he had been employed by or for the pursuers, to defeat the previous assignation granted by Hamilton to Ballantine. III. Because even supposing it had been the defender's duty to

complete the assignation in question, so as to displace the previous assignation in Ballantine's favour, there was no means in law by which this could at that time have been effected. IV. Because, after the change of the law by the recent act, even the assignation could have been effectually recorded in the absence of the lease; and the pursuers had ample opportunity of recording the assignation. and it was their own fault that it was not completed. V. Because no issue should have been granted to the pursuers, inasmuch as they had no relevant case on the record against the defender. VI. Because the issue which was granted and sent to trial was not deducible from the averments on record, but, on the contrary, was inconsistent with the pursuer's averments. VII. Because, even if the issue had been warranted by the averments on record, it was an irrelevant issue, and bad in law. VIII. Because the facts established in evidence at the trial were not relevant or sufficient in law to render the defender liable to the pursuers. IX. Because the exceptions taken to the judgment of 17th June 1859, were competent, and ought to have been admitted and signed, and because these exceptions were in themselves well founded, and ought to have been allowed. X. Because no proceedings ought to have been taken in the Court of Session after the certificate of the Clerk of Parliament of the presentation of the appeal being offered had been served on the pursuers, and communicated to the Court."

In support of the interlocutor of the Lord Ordinary first appealed against, closing the record, the second reporting issues, the third and fourth of the Court approving of the issues, the respondents in their *printed case*, pleaded they were right—" I. Because the employment of the appellant as law agent having been for behoof of the respondents, he became responsible to them for the due discharge of his duty, and, in the event of the respondents proving the matters put in issue, the Court were right in holding them entitled to recover. II. The interlocutor fifth appealed against, disallowing the bill of exceptions, was correct—Because, by the statute 55 Geo. III. cap. 42, § 7, any appeal against this interlocutor should have been presented within fourteen days, which was not done. III. The interlocutor sixth appealed against (discharging the rule to shew cause) was correct—(1.) Because, by the statute 55 Geo. III. cap. 42, § 6, it is incompetent to appeal an interlocutor refusing a new trial. (2.) Because the evidence fully warranted the verdict. IV. The interlocutor seventh appealed against (applying the verdict) was well founded—(1.) Because no matter of law was before the Court in pronouncing this interlocutor. (2.) Because the respondents had proved to the satisfaction of a jury the matters put in issue, which the Court had previously decided would be sufficient to entitle them to recover. V. The interlocutor eighth of the Court appealed, appointing the auditor to proceed with the taxation, and the ninth approving of the auditor's report, were correct—(1.) Because they were competently pronounced by the Court below. (2.) Because the respondents, having been successful throughout the whole litigation, were entitled to have their costs taxed and decerned for."

R. Palmer Q.C., *Anderson* Q.C., and *J. C. Smith*, for the appellants.—This appeal is competent. An interlocutor applying the verdict of a jury may be competently appealed, for there is no statute which cuts off the *primâ facie* right to appeal against it. Such an interlocutor is final, and allows all the previous interlocutors to be brought up at the same time—48 Geo. III. c. 151, § 15; 6 Geo. IV. c. 120, § 28. An interlocutor settling issues, and at the same time settling the relevancy, may be also appealed—*Irvine* v. *Kirkpatrick*, 7 Bell's App. 186. To hold otherwise would be to prevent the appellant, in many cases, having any appeal at all. In *Melrose* v. *Hastie*, 1 Macq. 698, *ante*, p. 315, LORD CRANWORTH said it was competent to do so. And see *Johnson* v. *Johnson*, *ante*, *p.* 895; 3 Macq. Ap. 619; 31 Sc. Jur. 764. The 55 Geo. III. c. 42, § 9, plainly intends the same thing—*Bartonshill Coal Co.* v. *M'Guire*, 3 Macq. 300; *ante*, p. 785.

With regard to the objection taken in the Court below to the bill of exceptions to the judgment, that the exception ought to have been taken at the trial, that depends on the 17th section of the 59th Geo. III. c. 35, which gives the power to raise the point in that way. The language is there express, and was acted on in *Kerr* v. *Duke of Roxburgh*, 3 Murr. 144; *Scrutton* v. *Catto*, 3 Murr. 63.

[LORD CHANCELLOR.—Has that practice ever been adopted in modern times, since the Jury Court was abolished?]

There seems to be only one case, viz. *Cuthbertson* v. *Young*, 14 D. 375; and there the Court refused the bill of exceptions on another ground, but assumed, that it was competent to tender the bill at that stage.

As to the merits, there is enough on this record to warrant a judgment for the defender. The record contains no proper averment, that the pursuers were his clients, and that the relation of agent and client existed between them. The mere circumstance, that somebody employed the appellant, is no proof that the respondents employed him. The issue adopts the same looseness of allegation, and cannot be supported—Bell's Prin. §§ 154, 217; *Struthers* v. *Lang*, 2 W.S. 563; 1 Bell's Com. 461; *Purvis* v. *Lamond*, 12 Cl. & F. 91; *Cook* v. *Falconer*, 13 D. 167; *Hume* v. *Bailey*, 14 D. 821; *Gray* v. *Graham*, 2 Macq. App. 435; *ante*, p. 614; *Goldie* v. *Goldie*, 4 D. 1489.

Attorney General (Sir R. Bethell,) *Lord Advocate* (Moncrieff,) and *A. B. Bell*, for the respondents.—It is true there is a looseness in the pleadings in this case, which is an illustration of the mischief of allowing the issues to be settled before the relevancy is settled. Yet the words "for behoof of" were sufficient, according to the practice in Scotland, to allege the employment of the attorney, and a contract between him and the respondents—*Struthers* v. *Lang*, 2 W.S. 563. It was settled, that a Scotch law agent is responsible to the creditor in a real security for the mistake committed in preparing it; and, even though the party to be benefited never heard of the agent, the latter is liable to him. That was a fairer rule than existed in England.

The appeal against the refusal of the verdict was not competent, and such a practice is now unknown.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, during the argument of this case at your Lordships' bar a great number of questions were rather irregularly discussed; but I think, that our decision ought entirely to depend upon the single question, whether the issues were so defectively framed, that the verdict ought to be set aside, and a new trial granted on issues framed more properly?

The first objection rests on *non-relevancy*. This is certainly open to the appellant, and, if it were well founded, he would be entitled to a judgment of absolvitor.

But I am clearly of opinion, that, although, if the condescendence were to be scanned by the ancient rules of English special pleading, it might be open to a *special demurrer*, yet that, regard being had to the 2d, 3d, 4th, 5th, and 6th articles of the condescendence, there are sufficient allegations shewing the employment of the defender on behalf of the pursuers, the duty of the defender to the pursuers, and a breach of that duty whereby they are damnified. Indeed, this objection was not gravely urged at the bar, except as explanatory of the next objection, which deserves great consideration, and on which my opinion at one time fluctuated, although, after a very careful examination of the whole, I have come to an opinion which I can, with satisfaction to myself, submit for your Lordships' adoption.

This objection respects the framing of the two issues sent down for trial, and particularly the first, as to the duty cast upon the defender to prepare and complete the bond of relief and the assignation of the lease to the pursuer. As this duty was not imposed by any general law, and was not incumbent on the defender as a public functionary, I never had any doubt, that it could only be established by shewing privity of contract between the parties. I never had any doubt of the unsoundness of the doctrine, unnecessarily, and I must say, unwisely, contended for by the respondents' counsel, that where A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C, if, through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of opinion, that this is not the law of Scotland nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science. The Scotch authorities, under the head *jus quæsitum tertio*, have no application, for these contemplate a vested right absolutely acquired by a consummated transaction.

But if, in a transaction of borrowing and lending money on security, A, the borrower, employs B, a professional lawyer, to transact the business in which both A, the borrower, and C, the lender, have separate interests, and for which A alone is to pay B; although C has no personal intercourse with B, if, from the instructions expressly given by A to B, or from the usual course in which such business is conducted, B knows, that he and no other professional lawyer is employed in the transaction, and that B is to act both for A and for C in preparing the security, I apprehend, that a jury, from this employment of B, might infer an undertaking from B to C to conduct the transaction on his part with reasonable skill and diligence. And so if, in the transaction of a loan on security, C was a surety for the borrower, and, according to the transaction as explained by A to B, C was to have a counter security from A, to be prepared and completed by B for C, as the only lawyer to be employed between them, a similar undertaking from B to C may be inferred.

This seems to me very reasonable and expedient, and to have been solemnly decided to be law in Scotland. In *Struthers* v. *Lang* I find no other facts on which the Court proceeded in holding Lang, the professional man, liable to the lenders of the money, except that he was employed by Newbigging, the borrower, in a transaction of borrowing and lending on security to prepare a heritable bond in favour of the lenders, and, that Lang, knowing, that although he was to be paid by Newbigging, he himself was to be the only professional man employed on behalf of the lenders of money, did prepare the bond, and was guilty of gross negligence in not perfecting the security by infeftment. I do not discover any other fact in the case to establish privity

between Lang and the lenders. They sued Lang, having through his negligence lost the money which they had advanced to Newbigging.

The facts not being in dispute, the case was decided by the Judges of the Court of Session, when it was strenuously urged by the counsel of Lang, that he was only liable to Newbigging. But, "*per Lord Glenlee*," one of the soundest and most learned lawyers who ever sat on the bench in Scotland, "The idea that Lang is only bound to Newbigging is most erroneous; although Newbigging was the employer, the security was for behoof of the pursuers. The liability of the agent does not depend on who gives the order, but for whose behoof it is given." All the other Judges concurred. *Lord Robertson.*—"When Lang was employed to prepare a security, it was surely to make an effectual one." *Lord Pitmilly.*—"Lang must undoubtedly be liable for neglect." *Lord Alloway.*—"Has Lang made an effectual security? He has not, and he must be liable for the consequences." *Lord Justice Clerk* (head of the Second Division of the Court).—"Taking Lang's own statement he must be liable." So there was judgment for the pursuers.

An appeal being brought to this House, it would appear, that, in the appeal case, some reasoning was introduced by the appellant to the effect that he was liable only to Newbigging, and not to the lenders of the money. But, when the argument came on before that eminent lawyer Sir John Leach, then sitting as Speaker of the House of Lords, according to the report in 2 W. S. 567, this point seems to have been abandoned as desperate, and the argument turned almost entirely on the negligence. Sir John Leach stated the ground of his opinion to be, that Mr. Lang had departed from the usual practice of Scotch conveyancers, and, that the circumstances constituted *crassa negligentia*, although there might be some difference of opinion among lawyers as to the effect of the course actually adopted by him.[1] The interlocutor complained of was affirmed with £100 costs.

This decision is in conformity to the law as laid down by the Scottish institutional writers—"It is no defence to an agent employed in a joint transaction, as a loan, that he was employed by the granter of the bond, and not by him who suffers from any defect in the security. The liability does not depend on who gives the order, but for whose behoof it is given."—Bell's Commentaries, vol. i. p. 146.

The same very learned author, in his Principles of the Law of Scotland, treating of the liability of a law agent employed by the borrower in such a transaction, says—"He acts for both parties, and the person injured, or who is to receive the security, is he for whose behoof the law will interfere, and by whom the order is held to be given."—Bell's Principles, § 154.

In settling the issues in the present case before Lord Kinloch, the Lord Ordinary, there seems to have been a strong desire on the part of the defender to have them so framed, that he might be able before the jury to contend, that it lay upon the pursuers themselves to prove, that they had personally employed him as their agent. I think that it might have been as well if the Lord Ordinary had allowed the words "or by their authority" to be introduced.

Still the issue would substantially have been the same, and the pursuers would have made out a case to go to the jury, if they had proved the arrangement between them and Hamilton for the counter security; that this was communicated to the defender; that the defender was told he was to be the only law agent employed in the transaction; and that he was employed to prepare and complete the counter security. The Lord Ordinary, however, in settling the issue, preferred adhering to the language of Lord Glenlee and the author of Commentaries on the Law of Scotland, and he framed the issue—Whether the defender was employed by Hamilton to prepare and complete for behoof of the pursuers, in relief of their obligation under said bond, a bond of relief and assignation of a lease held by Hamilton to be granted by him in favour of the pursuers. The affirmation of this issue would, I conceive, be supported by the same evidence.

It is said that "for behoof" has two meanings—"for the benefit of" and "on behalf of," or "on account of." But must it not be supposed to be used here in the sense in which it is used by Lord Glenlee—"on behalf of," or "on account of"?

Let us bear in mind that we are now considering the case after verdict. Must we not presume, that the Judge at the trial put the proper interpretation upon the expression, and explained to the jury, that, before finding for the pursuers, they must be convinced upon the evidence, that the defender was employed by Hamilton on behalf or on account of the pursuers to prepare and complete the bond of relief and the assignation of the lease? The defender's counsel might have called upon the Judge at the trial to do so, and might have tendered a bill of exceptions if the direction was not as he required.

He had again an opportunity of moving for a new trial for a defective or erroneous direction. But neither at the trial nor after the trial was there any complaint of the direction of the Judge. The only bill of exceptions tendered at the trial was for the improper admission of evidence. That was abandoned, and the only ground on which the new trial was moved for was, that the verdict was against the weight of evidence. The Lord Ordinary, in settling the issue, said, that

[1] This is not stated in the report in 2 W. S. 567; but LORD CAMPBELL wa one of the counsel in that case at the bar of the House of Lords.

although the general terms were those proper to be used in the issue, the pursuers would have to state and make out at the trial, that the security in question was stipulated for at the time when the pursuers became bound for Hamilton, and that Hamilton instructed the defender to prepare the deed for their behoof.

I must own, therefore, my Lords, that I do not see how this issue can now be held to be vicious, as not raising the question of the defender's liability to the pursuers, unless you are prepared to alter what has been considered the established law of Scotland respecting the rights and liabilities of parties in such a transaction.

The other issue seems to me to be quite unexceptionable—"Whether, by the negligence or want of skill of the defender, he wrongfully failed to prepare and complete the said assignation, to the loss, injury, and damage of the pursuers?"

If this should be the opinion of your Lordships, the first, second, third, and fourth interlocutors appealed against must be affirmed.

The fifth interlocutor appealed against is abandoned.

Against the sixth it is quite clear, that the 6th section of 55 Geo. III. c. 42, makes the appeal incompetent, this being an interlocutor refusing a new trial.

The attempt, by tendering a bill of exceptions after the interlocutor refusing the new trial, to raise upon appeal to this House the objection, that there was no evidence before the jury to support the case of the pursuers, must fail, for we have no such bill of exceptions before us, the Judge having very properly refused to receive it, and, if such a bill of exceptions were competent, this appeal would not be the proper remedy for the refusal of the Judge to receive it.

I was therefore prepared to advise your Lordships to dismiss the appeal; but I find, that the noble and learned Lords who heard the appeal with me have formed an opinion in favour of the appellant. One of my noble and learned friends strongly objects to the relevancy of the condescendence, and they all agree in thinking, that the issue is improperly framed. I must, with the most sincere deference, doubt how far it is right to arrive at such a conclusion by referring to a statement of what is supposed to have passed at the trial, there having been no bill of exceptions nor motion for a new trial on the ground of erroneous or imperfect direction by the Judge at the trial, and an appeal being forbidden against an interlocutor refusing a new trial on the ground, that the verdict was against evidence. The conclusive presumption of law, under such circumstances, I had understood to be, that the direction of the Judge was right, and that there was sufficient evidence to support the verdict.

One of my noble and learned friends is influenced by the consideration, that it could not be the duty of the defender to complete the security of the pursuers, as this would have been a fraud upon the prior security which he had himself prepared for Ballantine. But there is great difficulty in seeing how this objection can be brought forward on this record, and, if taken in an earlier stage of the proceeding, it would only have led to changing the charge against the defender from negligence in not perfecting the security, to fraud in conniving with Hamilton to fabricate a security for the pursuers, which he must have known to be unavailing. But, of course, the interlocutors appealed against must be reversed, and the cause must be remitted to the Court of Session, with such directions as to future proceedings as your Lordships may deem fit.

LORD CRANWORTH.—My Lords, on the first point made by the appellant, namely, as to the relevancy of the summons, I concur with my noble and learned friend on the woolsack. A relevant case is certainly stated, and the interlocutor of the 14th of January 1859, directing the parties to lodge the draft of the issues they proposed, was therefore right, and so the appeal, so far as relates to this interlocutor, ought to be dismissed.

But the real question is as to the interlocutor directing the issues. My noble friend is of opinion, that these issues did fairly raise the true question of fact which was to be decided. I confess that on this point I cannot concur with him. But though I have the misfortune thus to differ, it is satisfactory to me to think, that there is no difference of opinion as to what the law of Scotland is on this subject. My noble friend states very clearly, that no duty was by the law of Scotland cast on the appellant, except such, if any, as arose by reason of contract. The doctrine contended for at the bar, that where A employs B, a professional man, to do some work professionally, under which, when done, C would derive a benefit, if then B is guilty of negligence toward his employer, so that C loses the contemplated benefit, B is, as a matter of course, responsible to C, is evidently untenable. Such a doctrine would, as is pointed out by my noble friend, lead to the result, that a disappointed legatee might sue the testator's solicitor for negligence in not causing the will to be duly signed and attested, though he might be an entire stranger both to the solicitor and the testator. Where, indeed, in a transaction of borrowing and lending, the law agent is employed by the borrower, and he is informed, that no independent solicitor is employed by the lender, it may often be a reasonable inference of fact, that the agent undertook to act for both parties, and then, of course, he will be liable for the consequences of his negligence to the lender who adopts the agency as well as to the borrower.

The question to be decided in this case is, whether the appellant was so employed as, that he was in truth acting as agent of the respondents as well as of Hamilton, the borrower, for I agree

with the argument of the respondents, that the transaction, though not as between the respondents and the appellant one of actual borrowing and lending, must be governed by the same rules and principles as would have been applicable between borrower and lender. It is, I think, much to be regretted, that the Lord Ordinary refused the application of the appellant to insert in the issue, words which would have raised the precise question whether the appellant was employed under the authority of the respondents. But my noble friend, though concurring with me in regretting, that the Lord Ordinary did not allow the words, "or by their authority," to be introduced into the issue, does not consider their omission to be important, as the issue would still, in the opinion of my noble friend, have been substantially the same as that actually sent for trial. It is here, that I am unable to go along with my noble and learned friend. I think, that the issue, as actually framed, raised no question, except whether the appellant was employed by Hamilton to prepare and complete, for the benefit of the pursuers, the bond of relief and the assignation mentioned in the pleadings.

Indeed, it is not unworthy of remark, that the issue as framed, does not raise the questions which the Lord Ordinary considered to be material, in order to fix the appellant with responsibility.

The Lord Ordinary states, that if the security was stipulated for at the time when the respondents became bound to Hamilton, and if Hamilton employed the appellant to prepare the deed for their behoof, that was enough to render the appellant liable to the respondents for professional negligence. Now the issue omits altogether the question, whether the security was stipulated for at the time when the respondents became bound. That would have been one very material ingredient in determining whether the appellant was or was not acting by authority of the respondents. As it is, the only question raised was, whether the appellant was employed by Hamilton to prepare and complete the deeds for behoof of the pursuers. If "for behoof of" means "for the benefit of," then the issue was clearly insufficient to raise the real point in dispute.

But it was argued for the respondents, and in this argument my noble and learned friend concurred, that the words, though they may mean merely for the benefit of, yet may also mean on behalf, or on account of, and, that it must be assumed, as if there was no objection to the summing up of the learned Judge, that he had put the proper interpretation on the words, and would tell the jury, that before finding for the respondents, they must be satisfied, that the appellant was employed by Hamilton on behalf, or on account, of the pursuers. But that argument assumes, that for behoof of, as used in the issue, means on behalf of, or by the authority of. The contention of the appellant before the Lord Ordinary was, that these words had no such meaning; that they meant merely "for the benefit of." Was he right in his construction? That he was so seems to me clear from the summing up of the learned Judge at the trial. In the report of what passed in the Court of Session, on the motion for a new trial, the Lord Justice Clerk, by whom the cause was tried, is reported to have said—"There were four points for the consideration of the jury; *first*, whether the defender had been employed to prepare this security; *second*, whether the employment extended to the completion of the security; *third*, if so, whether there was failure on his part; and *fourth*, what damage was the result of that failure?"

It is plain, from this statement, that the Lord Justice Clerk considered, that employment by Hamilton would necessarily be sufficient to entitle the pursuers to maintain the affirmative of the issue, if that employment extended to the completion as well as to the preparation of the security. He did not think it material to consider, whether the appellant had been employed mediately or immediately by the respondents. He proceeded on the ground, that as the thing was to be done for the benefit of the respondents, therefore he was responsible to them for any neglect or default, whether he was employed by them, or only by Hamilton. Unless this had been his opinion—in other words, if he had thought that the words "for behoof of," could be construed as meaning by authority of, he would assuredly have told the jury, as suggested by my noble and learned friend, that in order to find a verdict for the respondents they must be satisfied, that the appellant was employed mediately or immediately by them. There was no doubt, that the security was prepared for the benefit of the respondents, and the Lord Justice Clerk deemed it sufficient. The opinion delivered by the other Judges rests on the same foundation.

On these grounds I have come to the conclusion, that the words, "for behoof of," were not intended to raise, and were not understood to raise, the question, whether any employment emanated directly or indirectly from the respondents. The language of the Lord Justice Clerk seems to me to put this beyond doubt. I am aware, that no question is before this House as to the propriety of the summing up. I do not refer to it for the purpose of questioning its accuracy. On the contrary, I think it was, if that were a matter in controversy, perfectly correct, but that is because I construe the words, "for behoof of," as it is clear the Court construed them, namely, as meaning only "for the benefit of." I refer to the summing up only for the purpose of shewing what was understood to be the meaning of the words "for the behoof of."

But by the statutory regulations as to Scotch appeals, the appellant had no power of bringing

this question here till after the interlocutors which followed the trial. He objects now, at your Lordships' bar, that the issue, as framed, did not raise the question which alone could determine his liability to the respondents. I confess I think he has established his proposition; and even if the words used were equivocal, the construction put on them by the Judge at the trial shews the objection of the appellant to be well founded.

My opinion, therefore, is, that the interlocutor settling the issue, and all the subsequent interlocutors, ought to be reversed.

It is not, perhaps, absolutely necessary that I should say more, but it was argued so strongly at the bar, that by the law of Scotland, differing in this respect from the law of England as to the subject of damage occasioned by his neglect, an agent is responsible to those who suffer by his default, although there may not have subsisted the relation of principal and agent between them, that I have felt myself bound to look attentively to the authorities relied on in support of this proposition, but they fail to establish it.

In Erskine, b. iii. t. 3, s. 37, it is laid down, that where a mandatory, receiving a salary for his services, causes a damage to the mandant by his neglect, he is liable to make it up to his employer, or other person who suffers by it.

The latter words might seem to give colour to the argument of the respondents. But, on referring to the case cited by Erskine in support of what he had thus laid down, it is plain that, by the words "other person who suffers by," it is meant other person representing the mandant or employer.

The case relied on by Erskine is that of *Goldie*, which was decided in 1757, and is reported in M. 3527.

The facts of the case are as follows: A person named Garden died in 1742, leaving George, William, and Janet Keir, children of his deceased sister, his next of kin. William set up a claim to the whole executry, which induced George to grant a factory to Henderson, a Writer to the Signet, to get him conjoined with his brother William in the executry. George supposed, that Henderson was taking, or had taken, the proper steps for this purpose. In 1745 George assigned his share of the executry to his wife, Katherine, the respondent. Soon after this, George died, when it was found, that Henderson had neglected to take the necessary steps for getting George conjoined in the executry, so that William and Janet, according to the then law of Scotland, became the sole next of kin, and George's widow got nothing. For this neglect Henderson was held to be responsible to her in damages.

It is obvious, that this decision proceeded on the intelligible principle, that the widow had succeeded to the rights of her deceased husband, and was therefore in the same position as she would have been in, if she had been the person employing Henderson. Of the correctness of this decision there could be no doubt.

Great reliance was placed on a passage in Bell's Principles, supposed to go the whole length contended for by the respondents. The passage is found in article 154, where the learned author of that very useful work is explaining the obligations arising out of the hiring of skilful labour. The article is divided into several sections, and in section seven the law is thus laid down: "It is no defence to a messenger at arms, that he has not injured or betrayed the interest of his employers, or to an agent bungling an act in which adverse parties are concerned as a loan, that he was employed by one of them as by the granter of the bond. He acts for both parties, and the person injured, or who is to receive the security, is he for whose behoof the law will interfere, and by whom the order is held to be given." For this statement of law Mr. Bell refers to three decided cases, the case of *Grant* v. *Forbes*, decided on the 8th of July 1758, and reported in M. 2081; the case of *Struthers* v. *Lang*, 4 S. 418; and *Haldane's case*, decided in 1836. The decisions in all these cases were affirmed in this House. I am not aware, that there exists any report of the proceeding on the appeal in the first of these cases; but the appeal in *Struthers* v. *Lang* is reported in 2 W.S. 563, and that in *Donaldson* v. *Haldane*, 7 Cl. & F. 762. It is important to examine these cases in order to discover how far they bear out the proposition, in support of which they are cited.

The case of *Grant* was of this nature. By the law of Scotland every messenger, who acts in executing the process of any Court, is obliged to give a bond with cautioners to the Lord Lyon, for duly executing the office of messenger to all the lieges, and for payment of damages occasioned by default. It appears from the report, that James Grant was desirous of obtaining from one Forbes a lease of some land, but which lease Forbes was unwilling to grant. In order to compel him so to do, James Grant took these steps. Being a creditor for a small sum due to him on a bond by Forbes, he put the caption into the hand of Henderson, one of the messengers, who had given a bond in the usual way to the Lord Lyon. Henderson, instead of executing the caption regularly, seized and secreted Forbes, and carried him about from place to place till, in order to obtain liberty, he was content to execute the lease which Grant desired. Forbes, having been released, raised an action, and obtained a decreet for reduction of the lease. He then instituted proceedings against the messenger and his cautioners in the bond to recover damages from them in respect of the illegal detention and imprisonment. The Court of Session, and afterwards this

House, held, that the action was maintainable. Lord Kames, in a report of the same case, made, I presume, before it had been affirmed in your Lordships' House, expresses great doubt as to the propriety of the decision. The bond, his Lordship considered, is required in order to secure the proper performance by the messenger of his duty towards those against whom he is acting. This view of the case was not, it seems, taken in this House; and assuming the bond to be, according to its construction, a bond indemnifying against the wrongful acts of the messenger not only the party by whom he is employed, but also those against whom he is acting, the decision was manifestly right, for the bond is given to the Lord Lyon, not for his own benefit, but as a trustee for those injured by the wrongful acts of the messenger; and though, if a similar bond were given in this country, the action would be a mere form, the substantial party enforcing such a bond would be the party whom, according to its terms, it was meant to protect. And the Scotch procedure, more convenient, perhaps, in this respect than the English, enables the party intended to be protected by the bond to sue in his own name. I cannot think, that this decision has any bearing on the question, whether a law agent can incur responsibility towards any one except his employer.

The next case, that of *Struthers* v. *Lang*, occurred in the year 1826, and is reported in 4 S. 418, and, on appeal to this House, in 2 W.S. 563. We have had the advantage of examining the appeal case when it was brought up to this House, from which we have the facts appearing in the record more distinctly than in either of the reports. It appears, that in the year 1810 Lang, who was a conveyancer of eminence, by direction of one Archibald Newbigging, prepared a bond and disposition in security for securing £1200 to two gentlemen, as tutors and curators for Jean Struthers and others, being the children of John Struthers, deceased, then in their minority. Lang accordingly prepared the deed. On the faith of it the tutors and curators advanced and lent the £1200 to Newbigging, and the bond was signed by Newbigging on the 12th of April 1810. Interest was regularly paid, but in 1819 Newbigging became insolvent, and it was then discovered, that Lang had omitted to obtain the confirmation of the bond by the superior of whom the lands were held, which was necessary, according to the form in which the bond was taken, in order to give it complete validity. The consequence was, that some subsequent creditors, who had duly perfected their bond subsequently to that given to the tutors and curators of the minors, acquired priority. For this neglect on the part of Lang he was held, first by the Court of Session, and afterwards by this House, to be responsible to the minors.

The respondents relied on this decision as an authority for the proposition, that a law agent employed by a borrower is necessarily, and in all cases, responsible to the lender for any loss occasioned by his neglect or mismanagement in the completion of the security, though he may have had no employment by, or communication with, him. But on referring to the appeal case, as laid before this House, it appears to me, that no such general principle was laid down. The respondent in this case insisted, that the facts appearing on the record led reasonably to the inference, that Lang acted as well for the lenders as the borrower. Accounts were referred to, shewing, that he had acted as law agent for the minors from 1807 to 1819, and that he had previously acted in 1801 for their father. Lang admitted, that the bond in question was in his hands from January 1818, and the appellant submitted, that it had never been out of his custody, which was a not unreasonable inference from the facts admitted on the pleadings. It was necessary for the minors to take sasine of the lands included in the security, and Lang, acting for them, gave a sub-commission empowering an attorney to receive earth and stone in their name. On these grounds the appellant submitted, that Lang must be taken to have been the agent both for the lenders and the borrower. Your Lordships considered, that in that case the only question was, whether there had been negligence.

But surely it cannot be justly represented, that such a decision warrants the proposition, that whenever an agent is employed by a person to prepare and perfect a deed under which some other person is to be benefited, and no agent is employed on behalf of that other person, then the agent preparing the deed is necessarily the agent of the other person also, or is responsible to him for any neglect of duty of which he may have been guilty in preparing the security. If such a general proposition could have been sustained, it would have been idle to go into the numerous special circumstances relied on in the pleadings for the purpose of leading to the conclusion, that Lang was in that case acting for the minors as well as for Newbigging.

The third case relied on by Mr. Bell is that of *Donaldson* v. *Haldane*, 7 Cl. & F. 762. There Donaldson, the law agent of Archibald Dunlop, a distiller at Haddington, obtained for him from Henry Haldane a sum of £2000 by way of loan on the security of a long lease of a field with a distillery building on it, and which Dunlop held under the magistrates or town council of Haddington. The lease had been previously assigned by Dunlop to a person named Cunningham, but Cunningham made a transference of it to Henry Haldane. Donaldson omitted to complete the title of Haldane by intimating to the magistrates and town council the fact of the lease and the assignation of it to Haldane. Haldane died, and the respondents representing his interest in the loan, and the security of Dunlop, before Haldane's death, obtained the absolute property in the field and buildings by a feu disposition from the magistrates and town council, and he was

regularly infeft thereon. Some time after the death of Henry Haldane, Donaldson prepared a bond and disposition in security over the property in favour of the respondents, who thereupon delivered up the lease to be cancelled. Previously to the giving of this bond, Dunlop had executed other securities to a large amount, which more than exhausted the whole value of the property, so that the respondents lost their money. The respondents then raised this action against the appellant, alleging, that in the original transaction he had been employed by Henry Haldane to obtain for him a safe and profitable investment, and that Haldane advanced the £2000 on being advised by the appellant, that the transference of the lease would form a valid and effectual security. The respondents further alleged, that after Haldane's death they left the money in the hands of Dunlop by the advice of the appellant, and on his assurance, that it would be expedient for them so to do, taking the heritable bond instead of the lease. The appellant denied his liability, insisting, that he was employed by Dunlop alone. The Court of Session, however, decided, that the appellant was liable, and your Lordships sustained that decision. But both Lord Cottenham and Lord Brougham, in advising the House, proceeded distinctly on the ground, that the respondents had acted under the advice of the appellant, and that, as that advice was wrong, he must be held responsible for it.

Surely, my Lords, neither of these support the position, that in all cases the person injured by the defect in a security has a remedy against the agent by whom it was prepared. What were the precise grounds on which the House acted in *Lang* v. *Struthers* cannot be ascertained. It seems to have been assumed to be clear, that Lang acted for both parties, and that the only question was, whether he had been guilty of neglect. And certainly there was an abundance of facts stated to shew, that Lang was acting as the law adviser of the lenders, as well as of the borrower. And in the latter case of *Donaldson* v. *Haldane*, the Lords who advised the House proceeded expressly on the ground of direct employment by the lender.

Some reliance was placed on a note of Mr. Macallan in his valuable edition of Erskine's Institutes, at the passage I have referred to, book iii. tit. 3, § 37. The editor there says,—"A law agent acting for the lender of money is liable for the amount advanced, if he neglect any of the appointed forms for completing or rendering effectual the deeds proposed as a security, and the money be therefore lost. He will also be liable, if he be aware of, and fail to disclose, imperfections, or if he omit to search the records;" and after putting several other cases, "or though he should prepare the deeds on the employment of the borrower, or though he acts for both borrower and lender." And in support of the two last propositions, he refers to the two cases of *Lang* v. *Struthers* and *Donaldson* v. *Haldane*. It will be observed, that Mr. Macallan is, throughout the whole of the passage I have cited, referring to a law agent acting for the lender of money, and to the law so propounded, no lawyer, either in England or Scotland, can take exception. We were not referred to any other authority in the Scotch law for the proposition, that a law agent can be made responsible for his neglect to any other person than his employer; and I concur with my noble and learned friend in saying, that the proposition argued at the bar cannot be sustained. The authorities cited do not bear out any such proposition, and it is a proposition resting on no principle.

The result, therefore, at which I have arrived is, that all the interlocutors, except the first, ought to be reversed, and that the case ought to be remitted back to the Court of Session, with a declaration, that the issue ought to have expressly raised the question, whether the appellant had been employed by or by the authority of the respondents.

LORD WENSLEYDALE.—My Lords, in this case the respondents, the pursuers in the Court below, sought to recover damages against the appellant, a writer in Glasgow, the defender, for alleged negligence in not making effectual an assignation in security to them of some leasehold property.

The defender was employed by one Hamilton to effect a policy with an assurance company for £250 on his life, and also to obtain a loan from the same company for £250 on the security of an assignment of that policy, and the pursuers became bound as cautioners for Hamilton in a bond to the company to repay the money borrowed and interest of the premiums of assurance on the policy.

Hamilton, at the same time, gave a bond of relief to the pursuers and assignation in security to them of leasehold property, held by Hamilton on a tack or lease, in favour of the pursuers. These instruments were prepared by the defender. And it was alleged, that he was guilty of neglect in not making that assignation effectual. And the pursuer sought to recover the amount of damages sustained by them in consequence of that neglect.

The first question is, whether the suit, in the manner in which the condescendence is framed, is irrelevant, because it does not state the relation of principal and agent, or client and attorney, to have been created between the pursuers and defender—by the pursuers, by themselves or agents acting for them, employing the defender as their attorney or agent to prepare the assignation and security, and to take proper steps to make it effectual. And, secondly, whether there was a sufficient averment of the breach of the duty created by that relation.

It was made a question on this part of the case, whether the law of Scotland differs in this

respect from the law of England. By the law of this part of the United Kingdom the right of action depends entirely upon the question between whom the relation of principal and agent or client and attorney subsists. He only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect; and that employment must be affirmed in the declaration in the suit in distinct terms. If the law of Scotland is the same as the law of England in this respect, I think the condescendence either does not state the relation, or, at all events, does not state it with sufficient clearness; and the issue is certainly not properly framed to raise the true question. One would suppose *a priori*, that the laws of both countries would be the same, the question being purely one of duty arising out of contract, whatever the particular form of action would be; and it would be reasonable to hold, that only the contracting parties should be liable to each other for the breach of that contract.

It is said, however, that by the law of Scotland, quite independently of the question who the contracting parties are, whenever an attorney or agent is employed by any one to do an act which, when done, will be beneficial to a third person, and that act is negligently done, an action for negligence may be maintained by the third person against the attorney or agent. I cannot think, that any such proposition is made out to be part of the law of Scotland.

The case of *Struthers* v. *Lang*, 4 S. 418, and the ruling of Lord Glenlee, admitted universally to be a great authority in that case, is relied upon as establishing that point, and is indeed the only case cited in support of that proposition. According to the report of it, there appears to be evidence of employment of the writer, the defender, on other business of the pursuers, and the terms said to have been used were the same as in this issue. He is reported to have said, that "the liability of the agent does not depend on who gives the order, but for whose behoof it is given," and by those expressions he may have meant only on whose behalf, or from whom the order was given, and that a personal order by the pursuer was unnecessary. And I cannot help thinking, that on the facts of that case, Lord Glenlee, who was Judge of fact and law, thought that the defender was employed as agent to the plaintiff to do the act, in which the neglect took place on his behalf.

At any rate, it is impossible to support by a single case so extraordinary a proposition, as that persons, who were not employers of law agents to do an act, could have a remedy against them for the negligent performance of it. It is rightly said on behalf of the appellant, that if that proposition was true, numberless legatees and heirs of entail disappointed of their expectations by erasures and informalities would have invoked its aid to indemnify them, but no one ever did. The remark of Lord Gillies in *Goldie* v. *Goldie's Representatives*, 4 D. 1489, in which a widow sued her deceased husband's law agent for a blunder which deprived her of her terce was perfectly correct, that an agent cannot be responsible to a person by whom he was never employed.

The true question, therefore, in this case is, whether the respondents really by themselves, or by Hamilton as their agent, did employ the appellant as their attorney to prepare and complete the assignation in security. Such an employment is not positively stated in the condescendence, but there is a loose allegation to that effect in it, which might possibly be sufficient, if the issue had been properly framed, so as to present the true question of the employment of the pursuer by the defender for the consideration of the jury.

But the present issue, I am quite satisfied, is wrongly framed. It is worded ambiguously, and as it now stands, it seems to me to raise only the question whether Hamilton employed the defender not only to prepare, but to complete, for the benefit of the pursuers, a bond in relief and assignation in security of a lease held by Hamilton to be granted in favour of the pursuers, but it does not raise the question on which this part of the case depends, whether Hamilton, in so employing the defender, acted as agent for the pursuers to his knowledge, so as to make them in point of law the employers for those purposes of the defenders—so that the relation of client and attorney, or principal and law agent, was contracted between them.

If I were perfectly satisfied from what took place at the trial, that this ambiguity, to say the least of it, in the issue, had been cleared up, and fully explained to the jury, and their attention directed to the true question, whether the relation of principal and law agent was created between the pursuers, I should have thought, that the verdict might have been supported. But we have not before us the direction of the Lord Justice Clerk, who tried the cause, so as to enable us to say, that the proper question was left to the jury. Nor can I come to that conclusion from the observations made by his Lordship and the learned Judges on the motion for a new trial.

I think there was evidence on the trial from which the jury might conclude, that the defender was employed by the authority of the pursuers to act as their law agent for some purpose in the preparation of the bond and security. If the bond was given gratuitously by Hamilton, as the defender alleges, at his own suggestion, and gratuitously without any obligation to give it, there would not be any ground to suppose, that the defender was constituted agent for the pursuers in preparing it. It was made a part of the bargain between Hamilton and the pursuers, as a

condition for their becoming cautioners for him to the insurance office, that Hamilton should give to them the bond of relief and assignation, which must, of course, be prepared by a law agent, and no other person being named, it might be inferred, that Hamilton was to employ one; and the defender being so employed, and knowing of the condition, and not being desired by Hamilton to send the instrument for approval to another, might be considered as employed to his own knowledge by Hamilton, by authority of the pursuers, to act as law agent for the pursuers; and the necessary relation to sustain the action of breach of duty arising from that relation might be created. But to what extent that relation was created is another question. It could hardly be to attend solely to the pursuer's interest, for no other law agent being employed, it is unlikely, that such should be the intentions of the parties. If so, then the secondary question would arise, whether the employment was merely to prepare the instruments, or to complete and perfect them. To that question the evidence on the trial was directed, and I cannot help, after a careful perusal of the report of it, participating in the doubts expressed by the learned Judges on the motion for a new trial, as to the propriety of the conclusion to which the jury had come, especially considering, that the *onus probandi* in that issue lies upon the pursuer.

But if the employment, through the agency of Hamilton, of the defender was to act as legal agent for both the parties, as no doubt it was,—if he was made agent for any other than Hamilton himself, no other agent being employed to attend to the transaction on Hamilton's behalf,—another and important consideration arises. Was it his duty to do any act which would defeat the prior assignation to Ballantine of the same lease, by intimating the pursuers' assignation to the landlord, and taking possession? If he was acting singly for the pursuers, such would have been unquestionably his duty; but acting for both parties, I cannot help thinking, that he therefore owed a duty to both. Receiving his instructions from Hamilton, he was not bound to do an act which would defeat Ballantine's security, and be a wrong act on Hamilton's part.

I think, that the interlocutors, from that determining the form of issue to the final one exclusive, should be reversed, and the cause remitted, to have the form of the issue amended, on which a new trial must take place.

The form of the issue should be this: *First*, Whether the defender was employed by the said Robert Hamilton, by the authority of the pursuers, as their law agent on their behalf only; or, whether he was employed, on behalf of both themselves and the said Robert Hamilton, to prepare and complete, in relief of the obligation of the pursuers under the said bond, a bond of relief and assignation of a lease held by the said Robert Hamilton, to be granted by him in favour of the pursuers? And, secondly, Whether, by the breach of duty to the pursuers in his character of law agent for the pursuers, or for both them and Robert Hamilton, or by negligence or want of skill in either of those characters, as the case may be, he wrongfully failed to prepare and complete the said assignation, to the loss, injury, and damage of the pursuers?

LORD CHELMSFORD.—My Lords, as the competency of this appeal was altogether denied by the respondents, I will, in the *first* place, consider this preliminary objection, which has been shortly adverted to by my noble and learned friend, the LORD CHANCELLOR.

The appellant founds his right to bring up the whole of the interlocutors on the 15th section of the 48 Geo. III. c. 151. And he contends, that, by the 17th section of the 59 Geo. III. c. 35, he was entitled to tender a bill of exceptions to the judgment of the Court on his motion for a new trial, founded on the misdirection of the Judge who tried the issues in matter of law. To this the respondent answers, that although a bill of exceptions was tendered, yet the Court pronounced no interlocutor upon it, and, therefore, there is nothing to appeal from; that the endeavour of the appellant to convert the interlocutor refusing a new trial into a judgment on the bill of exceptions, cannot succeed, or that, if it could, the appeal would still be incompetent by the proviso in the 6th section of 55 Geo. III. cap. 42.

It appears to me, that if the right to appeal could be rested solely on the foregoing grounds, it would be successfully resisted by these arguments. But the Court of Session, after discharging the rule for a new trial, proceeded by their interlocutor to apply the verdict, by decerning against the defender for payment of the damages found by the jury. Now, if in doing so they pronounced a judgment of law as applicable to or arising out of the finding by the verdict, the appellant would be entitled to appeal under the 9th section of the 55 Geo. III. c. 42. It cannot, however, be doubted, that by applying the verdict, the Court decided, that, upon the facts proved, the liability of the appellant to answer to the respondent for negligence was established in law. And this view is supported by the opinions expressed in your Lordships' House in the case of *Morgan* v. *Morris*, 2 Macq. 359, *ante*, p. 591; and *Bartonshill Coal Co.* v. *M'Guire*, 3 Macq. 305, *ante*, p. 785.

But, suppose for a moment, that the appellant was for any reason precluded from appealing against this interlocutor, yet he would be enabled to bring them in review before your Lordships, sufficiently for his purpose, upon the interlocutors approving of the form of the issues. For, as was said by my noble and learned friend, LORD CRANWORTH, in *Melrose and Co.* v. *Hastie and Co.*, *ante*, p. 315; 1 Macq. Ap. 711, although the Statute 55 Geo. III. c. 42, § 6, with

reference to an interlocutor directing, that a matter shall be tried by issue, enacts, that there shall be no appeal, yet with regard to an interlocutor settling what the issue shall be, there is no statutable objection to an appeal; and he adds, that "this House could never lay down any rule so preposterous as that such an interlocutor should not be the subject of appeal when, in truth, the whole merits of a cause might be involved in it." This remark could not be more strikingly exemplified than in the present case, where the form of the issues involves the whole question both of law and of fact between the parties.

The appeal, therefore, being competent, the case may be fully considered under two heads: 1*st*, The relevancy of the alleged ground of action in the condescendence. 2*d*, The frame of the issues.

In considering the question of relevancy, if it must be assumed, that it was necessary for the pursuers to state an employment for the defender's benefit, there can be no doubt, that the allegations were amply sufficient. A condescendence is not to be tried by the strict rules of special pleading, though it must, of course, contain a statement of the ground of the action with reasonable certainty. Upon the assumption which has been made, it was necessary for the pursuer to state the defender's obligation to them arising from the employment by Hamilton. Whether that appears with a proper degree of certainty in the condescendence is a question upon which my mind is not entirely free from doubt. I am disposed, however, to think, that the allegations in the 4th condescendence are sufficient. It is there stated, that the bond of relief and assignation was prepared by the defender acting therein for behoof of the pursuers, and that this was the arrangement and understanding of all concerned, viz., the said Robert Hamilton, the pursuers, and the defender. Now, if all the parties agreed together, that Robertson should act for behoof of the pursuer, even if those words meant only for his benefit, the defender, by accepting the duty, would incur an obligation to the pursuer, for the breach of which he would be responsible to him. If it were necessary to decide this case upon the relevancy of the condescendence, I should be disposed to hold, that the ground of action was sufficiently alleged. But the question becomes wholly immaterial upon turning to the other point which relates to the form of the issues. If they are improperly framed, they can derive no aid whatever from the condescendence, for upon this subject I adopt, upon the present occasion, as I did in the case of *Morgan* v. *Morris*, 3 Macq. 339, *ante*, p. 806, the language of my noble and learned friend, LORD BROUGHAM, in the case of *Leys, Masson, and Co.* v. *Forbes*, 5 W. S. 403.

In judging of the propriety of the issues, it is essential to bear in mind what are the facts in controversy between the parties. For this purpose it is not unimportant to observe the difference between the plea in law annexed to the condescendence, and that which follows the revised statements of facts on the part of the appellant. In the original plea the defender was charged with gross negligence and breach of his duty, and of the obligations incumbent on him as law agent for the pursuers. The plea following the statement of facts charges the breach of duty, but omits the words "and of the obligations incumbent on him as law agent for the pursuers." The defender had in his answers to the condescendence, and in his own statement, denied that he acted as agent for the pursuers, or that he knew, or that anything had transpired which could lead him to suppose, that the pursuers were relying upon him in any way in reference to the completion of the bond of relief and assignation. He was, therefore, entitled to have the question presented unequivocally to the jury, whether he was employed by the pursuers, or by their authority, unless the employment by Hamilton created the duty to the pursuers, of the breach of which they complained. The question which the Lord Ordinary intended to submit to the jury is plainly shewn by his note. He there distinctly repudiates the idea, that employment of the defenders by the pursuers or by their authority, was a necessary ingredient in the case, and states his opinion, that if it was made out, that the security was stipulated for at the time that the pursuers became bound for Hamilton, and that Hamilton instructed the defender to prepare the deed for their behoof, this was enough to render the defender responsible to the pursuer for professional negligence. The object, therefore, in settling the issues, must have been to present the question in this shape to the jury.

It was, however, strongly urged on the part of the respondent, that the words, for behoof of the pursuers, necessarily implied an employment for and on their behalf. Upon which it was asked, whether the issue would have been proved, if nothing more had been shewn than that the securities were for the benefit of the pursuers. If I understood the answer correctly, it was admitted, that this proof would have been insufficient to establish the issue so construed. It is impossible, however, to accept the suggested interpretation of the words "for behoof of," consistently with the view of the liability taken by the Lord Ordinary. And, although behoof may mean "for and on behalf," it is clear, that it may also mean for the benefit of, and, therefore, this double meaning of the word makes it ambiguous, and the use of it renders the issue uncertain.

The respondents' case must depend upon their being able to affix one certain meaning to the words "for behoof" in the issue, and to shew, that in this sense the defender was, by the law of Scotland, liable, upon the employment by Hamilton, for the negligence alleged in the

condescendence. It appears by the evidence, that the bond was given by Hamilton to the pursuers by the suggestion of the defender. The negligence imputed is, that the defender never told the pursuers nor advised them that intimation of their bond of relief and assignation was necessary to be made to the landlord.

The case principally relied upon by the respondents was that of *Struthers* v. *Lang*, and from the language of Lord Glenlee in that case, that the liability of the agent does not depend upon who gives the order, but for whose behoof it was given, I think it is clear, that the general proposition, abstracted from the facts of the case, cannot be maintained to its full extent. It would, if taken in the unqualified terms in which it is delivered, apply to cases where there was no privity of contract between the parties, where my noble and learned friend, the LORD CHANCELLOR, admits that no liability would arise.

The full examination by my noble and learned friend, LORD CRANWORTH, of the cases which are referred to in the text books as authorities for the principle contended for by the respondents, satisfies my mind, that the liability must be limited to cases where, from the nature of the transaction, it may reasonably be inferred, that the agent was employed by both parties; and where there is no express employment by both, this inference must be drawn from the circumstances of each particular case.

The respondents also relied upon the doctrine of the *jus quæsitum tertio*, as enabling them to sue the defender for his alleged negligence. But, as I understand this doctrine, it is applicable to the present case to a certain extent only. Thus, although the pursuers were not aware of the intention of Hamilton to give the bond, yet, he having employed the defender to prepare it for the pursuer's benefit, they would have been entitled to have demanded it from the defender, when it was deposited with him after its execution, for the right to it was absolutely vested in them. But the law of *jus quæsitum tertio* does not, with the right to the thing itself, create an incidental duty to be performed by the defender to the pursuers, for the non-performance of which he would be responsible to them. Now, in this it is most important to ascertain to whom the defender was liable for the alleged negligence, because, as was pointed out in the argument, his duty would be totally different, according to the person from whom his employment proceeded. If his duty was to the pursuers, he was bound to regard their interests alone, and he ought to have completed the bond, although it might be to the prejudice of a previous security granted by Hamilton. But if his only obligation was to Hamilton, by whom he was employed, then he was bound to respect Hamilton's prior engagement to Ballantine, and to do nothing which should supersede his rights, by obtaining for persons who had a subsequent security a priority over him.

But all these considerations were excluded by the form of the issue, for it was clearly the opinion of the Lord Justice Clerk, that the affirmative of it was established by the simple proof that Hamilton employed the defender to draw the bond, and that the instrument was for the benefit of the pursuer. And it appears to me, that, under these circumstances, we are precluded from the presumption suggested by my noble and learned friend, the LORD CHANCELLOR, that the Judge at the trial explained to the jury, that the defender was employed by Hamilton, on behalf or on account of the pursuer. I think, for the reasons which I have given, it was essential in this case, that the employment of the defender for and on behalf of the pursuers should have been distinctly raised. The issue in its present form either means something less than this, or it is altogether ambiguous, and in either view is incorrect and improper.

I therefore agree with my two noble and learned friends who think that the interlocutor ought to be reversed.

LORD CHANCELLOR.—I wish to say, by way of explanation, that I never had any doubt as to the competency of the appeal against the framing of the issues. What I said was solely as to the competency of the appeal upon the bill of exceptions that was tendered at the trial.

LORD CHELMSFORD.—I do not know, my Lords, that, in the observations which I have made, I have adverted to any opinion expressed by my noble and learned friend on the woolsack as to the competency of the appeal contrary to the one I have expressed. I merely said, that my noble and learned friend had shortly adverted to that preliminary objection.

Mr. Roundell Palmer.—Will your Lordships allow me to say a word with regard to the form of the order? The amount of damages and expenses decreed to be paid under the order, which, as I understand, your Lordships propose to reverse, have been actually paid. If your Lordships' judgment be for the reversal of that interlocutor, it will provide for that in the usual way.

LORD CHANCELLOR.—Certainly. Upon the question of relevancy the interlocutor will be affirmed. Then the other interlocutor appealed against will be reversed, and it will be remitted to the Court of Session with directions. I think that the form of the issue ought to be specified by the House. My noble and learned friends will perhaps be good enough to state the form of the issue which they would propose.

LORD CRANWORTH.—I think that it would be quite sufficient to remit the case with a declara-

tion as to the question which the issue ought to raise, and the Court ought to frame such an issue as will raise that question.

LORD CHANCELLOR.—I should strongly recommend the House to state what the issue ought to be. If the words of my noble and learned friend are approved by the rest of your Lordships, that will satisfy me, but I think the House ought to frame the issue.

Mr. Attorney General.—I hope the House will not depart from the ordinary course of remitting the case to the Court of Session to adjust the issues, because it would be very material to give us the opportunity at the bar of being heard upon the form of the issue, if that now be dictated.

LORD CHANCELLOR.—There has been a very long discussion as to what the form of the issue ought to be; whatever my noble and learned friends recommend as the proper form of the issue, I shall quite agree in.

LORD WENSLEYDALE.—What I proposed was, an issue to raise the question whether the appellant was sole agent for one party, or joint agent for both parties, because the result might be very different according to the finding upon that.

LORD CRANWORTH.—With deference to my noble and learned friend, there would be no need for that form of issue. The issue might be altered in this way: As it stands now, it is "whether the defender was employed by the said Robert Hamilton to prepare and complete for behoof of the pursuers." Instead of that, I should suggest, that the proper form would be "whether the defender was employed by, or by the authority of, the pursuers." That would raise the very question, because the only important consideration in the question, whether he was employed by Hamilton also, would be whether any duty that he would have had imposed upon him, if he was employed solely by the pursuers, was modified by the circumstance, that he was also employed by Hamilton. I do not think there is any necessity for any special issue upon that subject. But it appears to me, that the ordinary course is as suggested at the bar. This House does not frame the issue. That has never been done; it only declares what point the issue ought to have been framed to raise.

LORD CHELMSFORD.—I believe my noble and learned friend is right in that respect, that it would be sufficient for us to indicate what point we think ought to have been raised by the issue, and distinctly presented to the jury.

Mr. Attorney General.—Your Lordships have done that in the most definite manner.

LORD CHANCELLOR.—If my learned friend will specify in words that which he proposes, I will put it to the House.

Mr. Roundell Palmer.—I have a copy of my LORD CRANWORTH'S words, which I took down from his Lordship's mouth, that the declaration should be, that the issue ought expressly to have raised the question, whether the appellant was or was not employed by, or by the authority of, the respondents. Those were his Lordship's words.

Mr. Attorney General.—Your Lordships do not mean to dictate those particular words as the words to be included in issue?

LORD CRANSWORTH.—Certainly not.

Mr. Attorney General.—Because authority is a conclusion that may result from a great number of things.

LORD WENSLEYDALE.—I think it should be to the knowledge of the defenders.

Mr. Attorney General.—That, again, would raise a question. It is the uniform practice of this House to remit to the Court below to adjust the issues in conformity with its order. You lay down the rule, and the Court of Session apply it.

LORD CRANWORTH.—The case will be remitted back to the Court of Session with a declaration, that the issue ought to have raised the question whether the defender was employed by, or by the authority of, the pursuers. I think that it would be sufficient.

LORD CHANCELLOR.—It will be remitted to the Court of Session with a declaration, that the issue ought to have expressly raised the question whether or not the appellant had been employed by, or by the authority of, the pursuers.

LORD WENSLEYDALE.—I should put in, employed as their law agent.

LORD CRANWORTH.—I think that it is unnecessary.

One of the interlocutors (ordering draft issues) *appealed against affirmed, the others reversed, and cause remitted with declaration and directions.*

For Appellant, Deans and Rogers, Solicitors, London; John Galletly, S.S.C. Edinburgh.—*For Respondents*, Webster and Wardlaw, London; Cheyne and Stuart, W.S., Edinburgh.