has also admitted that expenses to the amount of £1, 5s. 9d. have been incurred by the pursuer in maintaining them.

The case, however, involves another question—a difficulty arising from the position adopted by the pursuer in claiming decree in the form set out in the prayer of the petition, even as amended. I am of opinion that we should not grant a decree for future aliment at a specific rate if the circumstances of the parents continue such as to make it applicable. The prayer of the petition contains elements of a hypothetical nature which, in my view, make it not a proper subject for a decree, and there is no authority for granting a decree in such terms. The duty of a parochial board to give relief arises only as circumstances occur to give rise to it. They have no standing relation to the objects of relief which entitles them to assume that they will have a continuing duty to aliment them, and it will depend, as has been indicated, on the circumstances of the two parents whether they will have a right to claim relief from one or both of them.

I propose therefore that we should confine our decree to the sum of £1, 5s. 9d. already expended, with interest thereon from the date of the action, and that we should refuse the rest of the prayer of the petition.

LORD ADAM—I concur. It appears to me that the pursuer has forgotten the true nature of his claim; that it is a claim for relief against those who are liable for the maintenance of the children. Being an action of relief, it follows that the expenses must have been incurred before the action is brought, and it equally follows that no continuing decree for the amount which may in the future be expended in aliment can be granted. I agree that the only competent conclusion is the first—that is to say, for the expense already incurred.

LORD M'LAREN and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel upon the appeal, record, and whole process, together with the minute of amendment for the pursuer and respondent, and the minute of amendment for the defender and appellant, Sustain the appeal: Allow the amendments in said minutes to be made at the bar, and the same having been done, recal the interlocutor of the Sheriff-Substitute dated 27th March 1891, and the interlocutors subsequent thereto: Find that by minute the appellant has admitted the paternity of the children named on record: Find that it is admitted that at the date of the action the sum of £1, 5s. 9d. had been expended by the pursuer on the aliment of the said children and that the appellant is liable therefor: Decern against him for said sum, with interest thereon at 5 per cent. per annum from date of petition: Find neither party entitled to expenses in Sheriff Court: Find appellant entitled to expenses in this Court," &c.

Counsel for the Pursuer—Comrie Thomson—F. T. Cooper. Agents—Henry & Scott, W.S.

Counsel for the Defender—Salvesen—Gloag. Agents—Ronald & Ritchie, W.S.

Tuesday, November 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TULLY *v.* INGRAM & MACKENZIE AND OTHERS.

Agent and Client—Employment—Privity of Contract—Reparation—Professional Negligence—Donation.

An uncle informed his nephew that he had bought a house which he intended to present to him, and that he proposed to consult a certain law-agent as to the titles. The nephew acquiesced in the uncle's choice of the law-agent, but did not interfere actively in the transaction or employ the law-agent. The transaction was completed without a search for encumbrances being made, and after the death of the law-agent the nephew was evicted from the property by a bondholder.

In an action at the nephew's instance against the representative of the law-agent—*held* that as the pursuer had not employed the law-agent, he had no title to sue.

Question, whether the representative of the deceased law-agent could in any view have been made liable, in respect that on the discovery of the burden neither notice thereof nor any opportunity of clearing it off had been given.

Question, whether a partner who had been assumed by the law-agent after the transaction could be made liable.

William Tully, farmer, Portpatrick, sued Ingram & Mackenzie, solicitors, Stranraer, and James Mackenzie, sole surviving partner of that firm, and Mrs Ingram, widow and executrix of the deceased partner Alexander Ingram, for £150 as damages for loss sustained by him through the alleged professional negligence of the firm in connection with the purchase of house property in Portpatrick.

The pursuer averred that in May 1873 he purchased from James Rodger, Stranraer, certain subjects situated in Portpatrick for £200; that the late Alexander Ingram was instructed by his (the pursuer's) uncle Mr Paterson, acting on behalf of the pursuer, to act as agent for the pursuer, which Ingram did; and that the transaction was concluded in the firm's office on 18th July 1873. Before the transaction was concluded Mackenzie entered into partnership with Ingram; he was thoroughly cognisant of

the whole transaction, retained the title-deeds in his possession, and, subsequent to the death of Mr Ingram in 1877, carried on the firm's business on his own account. The firm of Alexander Ingram failed to obtain searches for encumbrances over the property, and the result was that in 1889 the pursuer was evicted from the subjects at the instance of a previous bondholder, and suffered the loss sued for.

The defender Mrs Ingram averred that when intimation, requisition, and protest was made by the creditor in the bond no notice was given to her, nor did the pursuer intimate to her the claim made against him.

The defender Mackenzie averred that he had no knowledge whatever of the transaction in question; that although he entered into partnership with Mr Ingram on 1st July 1873, the partnership was not declared to the public till six months later; that he did not come to Stranraer until the 14th July 1873; and that previous to that he had no knowledge of Mr Ingram's business.

The defender Mrs Ingram pleaded, *inter alia*, (2) that "the deceased Mr Ingram not having been employed by the pursuer, the pursuer had no title to sue."

The defender Mackenzie pleaded, *inter alia*, (2) that he was not liable, as he was not a partner of the late Mr Ingram at the date of the transaction referred to.

In the proof allowed by the Lord Ordinary, John Paterson, farmer, deponed—"The pursuer is my nephew. He assisted me for a good many years on the farm. In April 1873 I purchased the property in question from Mr Rodger as part of an arrangement for Mr Tully's services to me in the past. Mr Rodger and I arranged the purchase ourselves. After some bargaining we agreed that the price should be £200. Shortly after making the purchase I told Mr Tully about it. I told him the price I had paid, and that I had bought the property for him. I also said that Mr Rodger was to pay for the transfer, and that he was to get whoever he liked to prepare it, and that I thought it would be wise to get Mr Ingram to revise the title-deeds, and see that they were properly executed. I did not say anything more to him. We afterwards went to see Mr Ingram. I told Mr Rodger that the disposition was to be in favour of Mr Tully. The property was middling old. Its rental was about £11. Mr Rodger told me his agent was Mr John Adair. Adair never acted as my agent or Mr Tully's either before or since. I may have met Mr Adair after the purchase, but if I did, I do not remember it. If I said anything to him about it, it would be that the transfer was to be made in the name of Mr Tully. I knew Mr Ingram, and had known him for a considerable time. When I called for him after the purchase, I told him I had bought the property from Mr Rodger for Mr Tully, and that Mr Adair was to make the transfer, and he (Mr Ingram) was to get the title-deeds and see that they were properly executed. Mr Ingram said he would, and that he would have a search made. Mr Ingram was to act for Mr Tully. That was stated. . . . I paid Mr Rodger £200. I never got possession of the titles, and Mr Tully did not get them either so far as I know. In 1889 Mr Tully got notice of a bond on the property, and was called on to pay it up. There were some papers served on him to that effect. I went to see Mr Mackenzie after Mr Tully had received the papers. Mr Tully accompanied me. This would be immediately after the bond was called up in 1889. That was the first time I heard of any bond being on the property."

The pursuer deponed—"I am a farmer at Colfin with my uncle Mr Paterson. For some years before 1873 I was working with him on the farm. I lived in family with him, and got no wages. My uncle was not married at that time. He has married since, but has got no family. I remember him telling me in 1873 that he had bought the two houses in question in Main Street, Portpatrick, belonging to James Rodger, for me, and that he was going to have the title-deeds or disposition made out in my name. He also said that he would go to Mr Ingram and ask him to see that the title-deeds were correct. I was quite agreeable to what he proposed, and said so to him. I said I thought it was all right, and that he could not get a better man than Ingram. Mr Ingram was known as a highly respectable agent in Stranraer. My uncle afterwards told me that he had been to Mr Ingram. I was not present when the price was paid. I got the receipt for the £200 granted by Rodger from my uncle."

J. M. Adair, solicitor, Stranraer, deponed that he received instructions from Paterson to prepare the conveyance to the subjects in name of the pursuer. The disposition was drawn on the 18th of May and signed on the 19th May, and was sent on 21st May 1873 to Mr Ingram along with the other titles.

The defender Mackenzie deponed that under his agreement with the deceased Mr Ingram the partnership between them commenced on 1st July 1873, but that he did not come to Stranraer or take any active part in the business until the 14th July; that it was further agreed that the partnership should not be disclosed for the first six months, and that Mr Ingram should have power to render service to any person free of charge.

Mr Ingram died in 1877, and the defender Mrs Ingram in 1880 employed Mr Peter Adair, S.S.C., Edinburgh, to wind up his affairs. Prior to Mr Adair's appointment Mr Mackenzie had acted for Mrs Ingram.

The business ledger of Ingram & Mackenzie contained the following entry:—

"*Mr John Paterson, Farmer, Colfin.*

"1873

"July 15. Writing Mr John M. Adair, in reply that you will settle the price of the subjects in Portpatrick, purchased for Mr Tully on Friday. Nil*

* In pencil."

On 15th July 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds the defenders Mrs Ingram and James Mackenzie liable, conjunctly and severally, to the pursuer in the sum of £150 in name of damages, the pursuer being, however, bound, as a condition of payment, to grant to the defenders an assignation of his whole right and interest in the surplus price of the property mentioned in condescendence 8, and being also bound to make payment to the defenders of the business charges due to the late firm of Ingram & Mackenzie in connection with the transaction libelled: Appoints the defenders to lodge in process the draft of such an assignation as they propose, and also their account of the business charges aforesaid: Finds the pursuer entitled to expenses, &c.

"*Opinion.*—The pursuer in this case alleges that in the year 1873 he employed (through his uncle Mr John Paterson) the now dissolved firm of Ingram & Mackenzie, writers, Stranraer, to act as his agents in connection with the purchase of some house property in Portpatrick, and his complaint is that in breach of their professional duty the firm, or one of its partners, allowed him to pay the price of the property without obtaining a search for encumbrances, the result being that in the year 1889 he was evicted from his purchase at the instance of a previous bondholder (who held a catholic security over, *inter alia*, the subjects of the purchase), and has thus suffered damage to the extent, as he alleges, of £150.

"The firm of Ingram & Mackenzie consisted of the late Mr Alexander Ingram, who died in 1877, and Mr James Mackenzie, who still survives. The present action is directed against the dissolved firm and Mrs Ingram (Mr Ingram's executrix, and Mr Mackenzie as now representing the firm); and the questions I have now to decide are, I think, these—(1) Was Mr Ingram, who carried through the transaction, employed by or on behalf of the pursuer, and did he fail in his duty as a law-agent? (2) Was the transaction a firm transaction, so as to affect Mr Mackenzie, who took no personal charge of it, and was not known at the time to be a partner of the firm? (3) Has the pursuer's claim to redress been affected, at least as regards Mrs Ingram, by his (the pursuer's) failure to give notice to her personally of the proceedings under which he was evicted from the property?

"I confess I do not think there is much doubt as to the employment. It was maintained for the defence that the true employer was the pursuer's uncle, who, it appears, was making the pursuer a present of the property, and who certainly carried through the transaction, including all communications with Mr Ingram. But if I am to believe their evidence—and I see no reason to doubt it—the uncle and nephew, before the transaction was settled, agreed that Mr Ingram should be employed 'to revise the titles,' and that it was in pursuance of this agreement that Mr Paterson, the uncle, went to Mr Ingram and put the matter into his hands. This, I think, established sufficient privity of contract as between the pursuer and Mr Ingram or his firm.

"Neither do I see much room to doubt that Mr Ingram failed in his duty in omitting to require or procure a search for encumbrances. Indeed, it was not disputed that that must be so, unless it could be shown that he (Mr Ingram) was employed on some exceptional footing. But the defenders suggest that the employment was exceptional in this respect. They say that Mr Paterson's object was to give the pursuer a vote in the county—that he went to Mr Ingram simply as Liberal agent, so as to make sure that the vote would be good, and that Mr Ingram accordingly, while agreeing to see to the title, made no charge, and undertook no responsibility.

"I have not, however, been able to hold that this is proved. The circumstances no doubt give the suggestion a certain probability, and it is no doubt the fact that Mr Ingram, although he lived two years afterwards, rendered no account for his trouble, and indeed no such account has even yet been rendered either to the pursuer or his uncle. But on the other hand, everything, including the correspondence with the seller's agent, was conducted in the usual manner. The seller's agent, who it was at first intended should act for both parties, was on Mr Ingram's employment superseded, and of course relieved of responsibility. The various attendances in connection with the transaction were entered in the books of Mr Ingram and Ingram & Mackenzie, and although no account was rendered, the materials existed for rendering it as in other cases. Moreover, the pursuer's uncle is quite emphatic to the effect that although Mr Ingram proposed to treat the matter as political, and to charge only a trifle, he (Paterson) intimated distinctly that he wished the matter to be treated as an ordinary piece of business, to be charged for in the regular way.

"I may add that even if it had been proved that the employment was gratuitous, that would not, in my opinion, have foreclosed the question as to Mr Ingram's responsibility. I doubt much whether, when a law-agent undertakes, either gratuitously or otherwise, the protection of a client's interests in such a matter, he can escape responsibility for professional negligence except upon clear proof of an agreement to that effect.

"The position of Mr Mackenzie is, however, peculiar, and it is with considerable hesitation that I have come to hold him liable. He became a partner of Mr Ingram as from 1st July 1873, but he did not enter on his duties until 14th July, and it was part of the agreement of partnership that for the first six months the partnership should not be disclosed. Acordingly on 18th July, when the transaction now in question was settled in Mr Ingram's office, Mr Mackenzie had been only three days in the place, and was not known to the pursuer or to Mr Paterson as

having any interest or responsibility in the matter. Moreover, it was part of the agreement of partnership that Mr Ingram should be at liberty, notwithstanding the partnership, to render personal services to any client free of charge. If, therefore, there had been sufficient evidence that the transaction in question was one of that character there would probably be little doubt that, the partnership being still latent, Mr Mackenzie would have been free.

"But, as I have already said, I do not think it is proved that Mr Ingram agreed to act in the transaction gratuitously or on exceptional terms, and therefore the question just seems to be, whether there is anything which can displace the fact that Mr Mackenzie was a partner of the firm, sharing its profits and also its losses, at the date of the settlement and for some eighteen days previously. I confess I have not been able to find anything, and therefore I do not see how, if Mr Ingram was liable, Mr Mackenzie can escape.

"It remains to consider as to notice, and on this matter I heard a good deal of argument. I am, however, satisfied that the pursuer's claim to redress has not been barred by any omission on this head. It may be that when a law-agent has failed to see that his client gets a good and unencumbered title, and the client is subsequently threatened with eviction, it is the client's duty to give the law-agent notice, so that if so advised he may purge the encumbrance or remove the defect. But assuming that this is matter of obligation, I think the pursuer here was entitled to assume that Mr Mackenzie, the surviving partner of the dissolved firm, represented the firm for purposes of winding-up. And accordingly, as notice was unquestionably given to Mr Mackenzie, I am on the whole of opinion that Mrs Ingram and Mr Mackenzie are conjunctly and severally liable.

"As to the amount of damage, I do not think it is proved that the property which was the subject of the pursuer's purchase fetched less than its value when sold by the bondholder. The damage therefore must, I think, be taken at the sum of £150, being the sum received for the property. But the pursuer must, as a condition of receiving this sum, assign to the defenders all claim competent to the surplus (originally £20) in the hands of the bondholder. He must also, I think, make payment to the firm of Ingram & Mackenzie of their charges in connection with the transaction, for which charges the pursuer admits his liability."

The defenders reclaimed.

Argued for Mrs Ingram—The basis of the present action was employment, but the pursuer had failed to show that Ingram was employed by him or that he had any communication with him. Paterson was the employer of Ingram, who in the matter was acting as a political agent and not as a man of business. No remuneration was asked or received by Ingram from Paterson. The pursuer's position was that of donee; no privity of contract existed between him and Ingram—*Robertson* v. *Fleming*, 4 Macq. 167. The pursuer was personally barred through his failure to intimate to Mrs Ingram that the bond had been called up—*Campbell* v. *Clason*, December 20, 1838, 1 D. 270; Ersk. iii. 1, 14. Intimation to the defender Mackenzie was not intimation to Mrs Ingram, seeing that he was not winding-up her late husband's private affairs. At the time of the alleged fault Mackenzie was not a partner of the firm, and when fifteen years after notice by the debtor in the bond was given, the partnership had for many years been dissolved by Ingram's death.

Argued for Mackenzie (who adopted the argument submitted for Mrs Ingram so far as applicable)—If there was any professional negligence in this case it occurred before he became a partner of the firm. The revising of the deeds took place on the 23rd May, and the defender did not become a partner until the middle of July. This was not the case of the employment of a member of a firm whose negligence would involve the firm; the employer here only knew Ingram in the matter, and he dealt with him. Any services rendered by Ingram were shown by the books to have been gratuitous; no charges were made and no accounts were rendered.

Argued for the respondent—If the evidence of the pursuer and his uncle was to be believed, it was proved that the employment of Ingram was by the pursuer. The only contradiction to this was from Ingram's books, but they were so irregularly kept that they proved nothing. Although at the time of this transaction the pursuer's interest was only contingent, yet it became perfected by Paterson handing over the property to him. There was here a completed antecedent agreement, which was committed to writing. But for the blundering of the agent here the donation would have been effectual—*Webster* v. *Young*, February 20, 1851, 13 D. 752. Mackenzie was a partner on the day of settlement, that was the day on which the search should have been exhibited, and as it was not, Mackenzie was a partner in the negligence of the firm. He being a partner intimation to him of the notice under the bond was notice to the firm and notice to Mrs Ingram, for whom he was then or had recently acted, the pursuer gave all reasonable notice—*Currie* v. *Colquhoun*, June 17, 1823, 2 Sh. 407; *Rae* v. *Meek*, August 8, 1889, 16 R. (H. of L.) 31; Bell's Prin., sec. 224a (new ed.), and sec. 359; Lindley on Partnership, pp. 205-8 and 275-6.

At advising—

LORD PRESIDENT — Various questions have been raised in this case, and some of them of great importance, but I have come to be of opinion that the case admits of decision upon one ground in fact.

The liability sought to be established is the liability of a law-agent, and that liability must arise out of a contract of employment. Now, the first question is, who is the person who employed the law-agent, and from whom did the law-agent accept the employment? On that question of fact we stand certainly at this disadvantage, that

we are deprived by the force of events of the evidence of Mr Ingram, the gentleman said to have been employed, and we must therefore make the best we can of the existing sources of evidence, having regard, however, to that regrettable deficiency. When one looks at the facts of the case one is struck with this—*prima facie*, Paterson, and not Tully, was here the employer. He bought the house, he paid for the house; he, and he alone, saw and personally directed and dealt with Mr Ingram. Accordingly it is necessary in order to the establishment of any privity of contract on the part of the pursuer of this action that he should make out that that *prima facie* view does not represent the substance and ultimate truth of this transaction. I have come to the opinion that he has failed to make out that he stood to the late Mr Ingram in the relation of employer at all.

It is important to observe the ground upon which the Lord Ordinary has come to the conclusion that Mr Tully has a right to sue this action by reason of his being the employer. He says this—"It was maintained for the defence that the true employer was the pursuer's uncle, who, it appears, was making the pursuer a present of the property, and who certainly carried through the transaction including all communications with Mr Ingram. But if I am to believe their evidence—and I see no reason to doubt it—the uncle and nephew before the transaction was settled agreed that Mr Ingram should be employed to revise the titles, and that it was in pursuance of this agreement that Mr Paterson, the uncle, went to Mr Ingram and put the matter into his hands. This, I think, established a privity of contract as between the pursuer and Mr Ingram or his firm." Now, it appears to me that the words in this passage of the Lord Ordinary's judgment, upon which its whole vitality depends, are the words "agreed" and "agreement." But I confess I think that an analysis of the evidence shows that that is an over-statement of what passed between the uncle and nephew respectively. If these words "agreed" and "agreement" mean anything which is to give effect to the pursuer's case, he must make out that that agreement was that Paterson should go and employ Ingram on the instructions of Tully.

Now, this important fact is to be observed as regards the evidence. Unquestionably the man whose evidence one looks to as a primary source of information in this case is Tully himself; and I do not find that Tully in his evidence gives any account of the proceedings which can found the view which the Lord Ordinary states. It is not unimportant to observe that in making the conjecture that the motive of Paterson in giving this house to Tully was out of regard for services which had been rendered to Paterson during a course of years on his farm, Tully does not say in one word, or in any form of words, that there was any arrangement or agreement come to that he should receive remuneration either in the form of a house or in the form of money. He says, on the contrary, that the first knowledge he had of the benevolent intentions of his uncle was when his uncle told him that he had bought the house in question. "I remember him," he says, "telling me in 1873 that he had bought the two houses in question in Main Street, Portpatrick, belonging to James Rodger, for me, and that he was going to have the title-deeds or disposition made out in my name." Now, I pause to observe upon that sentence that it seems to negative the idea of there having been any antecedent right, as a result of an agreement, in Tully to get the house or a disposition of the house. This sentence as it stands undoubtedly contains the view that Paterson intimated his intention of carrying through the titles, "and that he was going to have the title-deeds or disposition made out in my name," as if all that was to be done at the hands of the uncle and not of the nephew.

What is said in the evidence of Tully as regards employment? If the case of the pursuer were well founded, one would expect that the uncle would from this moment drop out of the proceedings except as an intermediary between the nephew and the agent. But so far from that being the case, the evidence proceeds in the same strain, the nephew telling what the uncle told him, and the nephew merely assenting to what he was told. He says—"He also said that he would go to Mr Ingram and ask him to see that the title-deeds were correct. I was quite agreeable to what he proposed, and said so to him. I said I thought it was all right, and that he could not get a better man than Ingram." Now, it seems to me that taking that evidence the proper word to express the attitude of Tully to the proceedings of Paterson is rather the passive word "assented" or "acquiesced" than "agreed." There is certainly nothing in the circumstances to impose any duty upon Paterson to act on behalf of Tully. Paterson seems merely, from a benevolent intention actually carried out, to have informed his nephew of what was in the course of being done, and the nephew seems to have assented to all his uncle's proceedings. He entirely assents to the employment of Ingram, and of course no one could be more competent to act on their behalf.

Now, that being the evidence of Tully, is there anything in Paterson's statement which gainsays that view? I confess to find nothing at all. It is true that the evidence is permeated by the idea—quite a natural one to be in Paterson's head—of the joint interest of donor and donee in the completion of the title; but I cannot find anything either in what he says or in what Tully says to show that Tully stepped forward to assist, and either gave himself his consent or required his consent being given in order to Paterson going on with the transaction. When we turn to the facts of the case, that is entirely borne out by the sequel, because Paterson, and Paterson alone, saw Ingram and dealt with him in the sequel as he undoubtedly did at the moment of the first employment.

Well, then, what is there from the side

of Mr Ingram? To a great extent the evidence is a blank. But there is no fact which could be appealed to, no act of Mr Ingram's which could be appealed to on the part of the pursuer to substantiate or even countenance the idea that Mr Ingram took Tully to be his employer, or took anyone else but Paterson to be his employer, the one with whom he dealt, and—it is not unimportant—so far as the evidence goes, the only one of whom he had any personal acquaintance. As I have said, we must not merely implicitly take every word which is stated by the pursuer and his uncle in this case, but we must test the language employed, which sometimes is vague and intricate, by surrounding facts. And I think in what I have said that I have shown your Lordships that we do not require to do more than to take implicitly, and even literally, every word Tully says in order to show that he stood entirely extraneous to the relation between Paterson and Mr Ingram, except in the sense that he was ultimately to be presented with the disposition, which was the result of his uncle's employment of Mr Ingram.

Now, if that be the result of an analysis of the evidence, then I confess I think that the pursuer is entirely out of court. He has not made good to us the only proposition of law which would have helped him in that state of the facts, and that is, that if an agent is employed by A to draw a disposition of a house in favour of B, that that gives B a right of action in case of any miscarriage of the contents. I do not think that any proposition in law short of that would serve the pursuer in the emergency in which he is placed owing to the state of the evidence; and I think that proposition is one which we cannot sustain. Nay, I do not think that in the end it was seriously argued by Mr Dickson that he could ask us to accept that without accepting certain elements of the knowledge and assent of the donee, which to my thinking only come to be of importance or avail when they come by presumption or direct evidence of the donee being the employer in the contract.

Now, that affords a complete ground of judgment, because it deprives the pursuer of this action of any title to sue. In arriving at my judgment, which is in favour of both defenders, I am content to take that ground alone. It goes to the root of the case of the pursuer as against Mrs Ingram and Mr Mackenzie.

But I do not think it would be right to conclude without observing that even if this part of the case were to be made good by the pursuer, and even if he could make out that he was the employer, he would still have serious difficulties to encounter.

The Dean of Faculty and Mr Chisholm, on behalf of Mr Mackenzie, have presented a most formidable argument, resting upon no contract of employment between Mackenzie and Paterson, that the new firm did not then exist; and it is contended that inasmuch as Paterson—or for that matter either Paterson or Tully—employed Mr Ingram before ever Mr Mackenzie was a partner, that it was impossible for Ingram to delegate that employment or to give any right to the subsequently assumed partner which could affect any previous employer; and that the reason which supports that conclusion would avail as a defence to the said subsequently assumed partner against any claim of liability on the part of the employer. I mention that argument merely for the purpose of saying—although I do not express my opinion upon it—that I think it is clearly formidable to the pursuer.

Another point was taken on behalf of Mrs Ingram, which I mention for the same purpose. She is concerned to show now that she received no notice at the time when this burden was found to affect the property. She says, with certainly a measure of support in authority, that when a burden is found to affect a property which it was the duty of an agent to have discovered, it falls to the client to give notice to the agent or to his representatives that this burden has been found to affect the property so that it may be cleared off or taken out of the way. The agent has a manifest interest to have early notice of that, because he might be able to point out defects in the burden, or for that matter he might then and there clear the property of the burden and take it over himself. The fact here suggested was that Mrs Ingram did not receive such notice, unless the notice to Mr Mackenzie was to be held as notice to her. I think that upon that point Mrs Ingram has a very formidable argument in law. As I have said, I refer to that merely as indicating that while I propose to your Lordships that our judgment should be in favour of the defenders upon the single ground to which I have adverted, I am by no means otherwise than much alive to the gravities and difficulties of the pursuer's case which he would have to encounter even if your Lordships were to agree with the Lord Ordinary on that point. I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders.

LORD ADAM—This action is brought by the pursuer against the surviving partner of the firm of Ingram & Mackenzie, and also against the widow of the late Mr Ingram, as in his right, to have it found that Mr Ingram was guilty of negligence in the discharge of the duty which he had undertaken to the pursuer connected with the purchase of a small property in Portpatrick, in so far as he failed to see and to obtain searches, the result of which was that that property was evicted from the pursuer.

I concur with your Lordship on the ground of judgment you propose. It is to my mind very clear and satisfactory. I think there is a clear ground of judgment in fact upon which we may proceed, because I am also agreed with your Lordships that the questions which remain behind are of great importance, and if we had to consider them—which I do not think we require to do in the view which

your Lordship takes of this case — we should have had to take much more time for their consideration.

I agree with your Lordship that there is no evidence here that the pursuer ever employed the late Mr Ingram to do the work in the performance of which Mr Ingram is said to have been negligent; and without proof of that employment it is impossible that the pursuer can succeed. Of course I do not mean to say that it requires to be proved that the pursuer personally employed Mr Ingram. That can be done through an agent or a person having authority from the pursuer personally; and there may be cases in which it may be held that a party has undertaken to act as an agent for another without personally communicating with him. But in my view of the evidence and the facts of this case, I think that it is free from any such construction. Now, my view of the truth of this case is just exactly that which Mr Tully, the pursuer, himself states at the beginning of his evidence—[*His Lordship here read the passage in the pursuer's evidence quoted above*]. I think that the pursuer has no good ground of action against the defenders after all that we know of the facts and of the real evidence in this case.

What does this evidence disclose? It seems to me to disclose very clearly that there was a benevolent intention on the part of the uncle to make a free gift of this property to his nephew. As your Lordship pointed out, he bought the property before Tully knew anything about it. He only went to Tully after that and informed him of his benevolent intention, but so far as I can see, until this disposition was obtained and delivered over to Tully, he had no right to this title at all. To my mind it was Mr Paterson the uncle's transaction from the beginning, until Mr Paterson obtained the disposition from the seller and handed it over to Tully. Now, what would a proposed donee do in such circumstances except what took place in this case? The pursuer says his uncle told him—"I am going to give you this property." Then he says—"It was he that was going to get the disposition." His uncle says—"I think of going to employ Mr Ingram to see that it is all right." What does the nephew say? All he says is—"I think it is a very good idea." That word he uses which the Lord Ordinary has interpreted as "agreed" is not "agreed." He says—"I am quite agreeable." That is the only agreement that ever took place between uncle and nephew. When the uncle proposed to employ Mr Ingram, the nephew said—"I think he is a very good man, I will 'agree.'" Is there any agreement in that? I think if the Lord Ordinary in his note had said that the pursuer "was agreeable" that Mr Ingram should be employed, he would have expressed the truth of the case, but he would have shown at the same time that the ground upon which he proceeded was unfounded in fact. I think if we take the pursuer's own evidence to be true—and I think it is true—I think it puts the pursuer out of court, for where is there any indication of action, or employment by the pursuer of Mr Ingram. The pursuer is a mere passive instrument in the hands of his uncle. His uncle might, before delivering the disposition to him, have changed his mind. If he had changed his mind and had never made over the property to the nephew, would Mr Ingram have had an action upon such a statement as that against the pursuer Tully for payment of his account connected with this transaction? I do not see a vestige of ground for that at all. Mr Tully's answer would be—"You were employed by Mr Paterson, my uncle; I had nothing to do with it."

That brings us to the principle which is to be applied in determining this case, and it is the same which prevailed in the case of *Fleming* v. *Robertson*, to which we were referred, because undoubtedly here in one sense Mr Ingram was employed by Mr Paterson for behoof of the nephew as it turned out. But we see from that case that the fact that A has employed B to do something for the benefit of C, does not confer on C a right of action against B for any loss which he may have sustained through B's negligence, and for the plain reason that there is no privity of contract between B and C. That is exactly what this case comes to. There is employment by Paterson of Ingram, as Paterson wished to have the benefit of Ingram's services. But these are just the elements which occurred in the case of *Fleming*, and the House of Lords laid it down distinctly that in such a case as that there is no claim for neglect of duty or negligence by the party who suffers against the person who actually committed the delict, because there is no direct employment of the latter by the former. I think that the facts of the present case supply quite a sufficient ground for its decision.

LORD M'LAREN—The question argued in this case is by no means one of novelty in our law, because in more than one case the question has been agitated—To what extent a person taking benefit under a deed may have a right of action against the agent who prepared the deed in respect of some blunder in the title, or that less has been secured by the deed than the granter intended? The criterion of liability as laid down by, I think, all the noble Lords who took part in the decision of *Robertson* v. *Fleming* was this, that in order that a person taking a benefit should have a right of action founded on professional negligence he must be able to show that the agent was employed by him or with his authority. The Lord Ordinary on this subject appears to me to have taken apparently the correct view of the question involved when he puts the questions — Was Mr Ingram, who carried through the transaction, employed by or on behalf of the pursuer? And—Did he fail in his duty as a law-agent? But then his Lordship goes on to affirm that the circumstances establish a sufficient privity of contract.

I agree with your Lordship that we should not be warranted in accepting that view of the facts of the case after the fuller discussion and exposition of these points that we have heard. I think it is natural in such cases to consider first what would be the professional usage or the natural course of the transaction as between man and man. When two persons are entering into a commercial agreement, or an agreement by which some benefit is exchanged against another, then the ordinary course of business is that the agent of the one party draws the deed and the agent of the other revises it, so that each person should have the benefit of professional assistance directed towards his own interest exclusively. But, on the contrary, if a person is going to make a gift to a relative or friend it is not in accordance with the ordinary practice, nor would it occur to one as a natural and reasonable measure, that there should be two agents employed, or that anyone should act at all as professional adviser of the recipient of the benefit. In such a case the person making the gift employs his agent to prepare the deed of gift, as in the case of a testator who employs his own agent to make his will, and never thinks of communicating with or intimating his intention to his legatees. If a father makes a settlement on his daughter in the event of her marriage, supposing that it is not to be put into her contract with her husband, but to benefit the daughter, her father would never think of asking her to name an agent in the preparation of a deed. Or supposing the father to give instructions to an agent, would the agent ever imagine that he had a claim against the daughter because the father had told her of his intentions?

I am putting here illustrations which of course admit of being only answered in one way, but they are really not very remote from the case in hand, because I see no evidence here of any communication between Paterson and his nephew on the subject of agency which would be different from what would take place between a father and his son or daughter when making a gift. Paterson told Tully of his intention, and mentioned that it would be necessary to have the titles revised by Mr Ingram, and Tully assented to this. But in order to make an agent responsible it is not enough that as between the donor and the donee there may be an assent to employment. It is necessary to show that he was employed on the authority of the donee. On that point I agree with your Lordship that the case has entirely failed, and I therefore am of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied from the conclusions of the action.

LORD KINNEAR—I agree with your Lordship, and I have nothing to add to what has been said.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—C. S. Dickson—Wilson. Agents—Smith & Mason, S.S.C.

Counsel for the Defender Mackenzie—D.-F. Balfour, Q.C.—Chisholm. Agent—D. Milne, S.S.C.

Counsel for the Defender Mrs Ingram—H. Johnston—Sym. Agent—P. Adair, S.S.C.

Tuesday, November 3.

FIRST DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

HILLHOUSE *v.* WALKER.

Process — Appeal — Competency — Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*A. S., July* 11, 1828, *sec.* 5.

An appeal for jury trial from a Sheriff Court having been sent to the roll, the respondent, when the case came out for hearing, objected to the competency on the ground that the appeal had not been taken within fifteen days of the interlocutor allowing a proof.

Held (following *Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660) that the Court were bound to determine the question of competency although it had not been raised in the Single Bills, and the appeal *dismissed.*

Robert Hillhouse brought an action in the Sheriff Court at Dumbarton against William Walker, concluding (1) for interdict against the defender collecting from his (the pursuer's) customers or the general public any empty aerated water bottles bearing his name or registered trade-mark; (2) for payment of £200 as the estimated loss from the defender's actings.

The pursuer averred that the bottles which he made use of in his business were of a superior quality, specially manufactured for himself, moulded with a private registered trade-mark, and that they were not sold to customers but only lent to be returned empty. He further averred that the defender through his vanmen had collected and appropriated a large number of these bottles.

The defender admitted that in the course of his business he had uplifted bottles not supplied by himself, including bottles belonging to the pursuer, but he averred that it was the custom of trade to uplift in exchange for full bottles whatever empty ones were offered.

On 16th February 1891 the Sheriff-Substitute (GEBBIE) granted interim interdict.

"*Note.*—The pursuer and defender are manufacturers of aerated waters which they supply to the trade. The pursuer uses bottles of his own, impressed with his trade-mark, and holds a certificate of his trade-mark from the Patent Office, Trade-Marks Branch, dated 11th August 1889. In supplying the trade the pursuer lends his bottles so marked, which he afterwards collects from his customers, and the com-