ROBERTSON . . . . . APPELLANT.
FLEMING, ET AL., ... RESPONDENTS.

1861.
March 11th, 12th, 14th, and May 30th.

Solicitor and Client—Liability to Third Parties.—Per the Lord Chancellor (*a*): I never had any doubt of the unsoundness of the doctrine that 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. There must be privity of contract between the parties.

Per Lord Wensleydale: It is said that by the law of Scotland, when an agent is employed by anyone 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. I cannot think that any such proposition is made out to be part of the law of Scotland.

Per Lord Wensleydale: 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 of the suit in distinct terms.

Per Lord Wensleydale: By the law of England, the right of action depends entirely upon the question, between whom the relation of principal and agent, client and attorney, subsists.

Lang v. *Struthers* (*b*) and *Donaldson* v. *Haldane* (*c*) commented upon by the Law Peers.

(*a*) Lord Campbell. (*b*) 2 Wils. & Shaw, 563.
(*c*) 7 Cla. & Finn. 762.

ROBERTSON v. FLEMING.

"*For behoof of*"— *Issue.*—The words "for behoof of" mean "for the benefit of," and are not in an issue equivalent to the words "by the authority of." The Lord Chancellor diss.

Per Lord Cranworth: This House does not frame the issue; it only declares what point the issue ought to have been framed to raise.

Competency of Appeal.—Appeal allowed where, although the Court below pronounced no Interlocutor on a bill of exceptions tendered, they nevertheless applied the verdict by decerning against the Defender.

Stoppage of Proceedings below.—The mere presentation of an appeal, though certified, does not suspend proceedings in the Court of Session. To produce that effect there must be the usual order to answer or some equivalent order issuing from the House.

THE Appellant, Robertson, a law agent in Glasgow, was alleged by the Respondents to have been employed by them, or rather "for their behoof," in his professional capacity to complete a transaction which by reason, as they averred, of his "negligence, want of skill, or other fault," was not completed, or was inadequately completed; insomuch that injury or liability arose to the Respondents, who by their summons against him of the 28th April 1858 sought indemnification.

The defence to this action was chiefly a denial of the alleged employment.

It appeared that the Respondents were persons in humble life residing at Stonehouse in the county of Lanark. They were three in number. The first was a small farmer, the second a weaver, and the third a widow.

At Stonehouse there was a grocer named Hamilton, who, desiring to raise money, applied to the "English and Scottish Life Assurance and Loan Association,"

carrying on business in Glasgow as money-lenders. This body agreed to advance 250*l.* to Hamilton on condition that he would insure his life with them for 500*l.*, assigning to them the policy; and besides paying interest at six per cent., that he would also obtain three cautioners or sureties to be answerable to the company in the event of any default. Hamilton applied to the three Respondents to be his sureties. They agreed to incur this responsibility, and joined in a bond to the company, being aware, as they said, that Hamilton had certain leasehold property worth 350*l.*, which, if properly secured for their benefit, would suffice to keep them safe. Hamilton agreed to complete the necessary security over this property; and here it was that the Appellant, Robertson, was employed by Hamilton "for behoof of the Respondents."

Hamilton granted the required security, namely, a bond of relief and assignation in favour of the Respondents, the cautioners or sureties, who averred that "it was prepared by Robertson, the Appellant, act-" ing for their behoof, and that when executed it was " left with Robertson for their behoof," in order that he might take the proper steps to render it effectual. They further averred that Robertson charged and received from Hamilton the usual professional remuneration for preparing this security, and they asserted that they relied on Robertson "to make it complete." Robertson, however, omitted to intimate the assignation to the landlord, and he omitted to inform the sureties that intimation was necessary to perfect their right. He omitted, also, to take the steps prescribed by the 20 & 21 Vict. c. 26. The sureties further complained that, while chargeable with these acts of omission or negligence, he, by his conduct, had induced them to believe that all had been done to

ROBERTSON v. FLEMING.

render the security complete. When, indeed, the information was too late to be of use, he announced the disorder of Hamilton's affairs, and in a few days thereafter, that individual absconded, and was sequestrated as a bankrupt (*a*).

The defence of Robertson was that he had not been employed by the Respondents, and that he had not acted as their solicitor at all in the business.

By their pleas in law the sureties insisted that Robertson, having made default, was bound in reparation.

The chief plea in law of Robertson was, that, "not "having been employed by the sureties, and not "having acted as their agent, he was not liable as "concluded for."

The Second Division of the Court of Session directed the following issues for trial:—

It being admitted that on the 12th day of December 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*l.*, with interest at six per cent., as specified in the said bond, which sum of 250*l.* had been advanced to the said Robert Hamilton by the said association:

Whether the Defender (*b*) was employed by the said Robert Hamilton to prepare and complete, for behoof of the Pursuers (*c*), 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?

A verdict was returned for the sureties, and the damages were assessed at 198*l.* 16*s.*, the amount which they had paid to the assurance company.

(*a*) *i.e.* made bankrupt. (*b*) *i.e.* Robertson, the Appellant.
(*c*) The sureties.

At the trial the Appellant's Counsel excepted to the ruling of the *Lord Justice-Clerk*, who had admitted as evidence the discharge of the assurance company, which was objected to on the ground that it was not properly stamped. The Judges of the Second Division, however, disallowed the bill of exceptions; but afterwards granted a rule to show cause why a new trial should not be had.

In moving for a new trial the Appellant, Robertson, by his Counsel insisted, 1st, that the verdict was contrary to evidence; 2ndly, that there was no privity of contract between him and the sureties; and 3rdly, that there were no facts sufficient to establish his employment "for their behoof."

This motion failed of success. The Second Division on the 17th June 1859 refused a new trial.

Thereupon Robertson, by his Counsel, tendered the following exceptions:—

The Counsel for the Defender excepted to the judgment of the Court discharging the rule to show cause why a new trial should not be granted, as being founded upon error in law; 1st, in respect that in pronouncing the said judgment, the Court held that the facts laid before the jury in evidence at the trial were relevant and sufficient in law to establish employment of the Defender for behoof of the Pursuers to complete the assignation referred to in the issue, while the Defender contended that the said facts were not relevant or sufficient in law for said purpose; and, 2ndly, in respect that it being the case in point of law, upon the facts proved before the jury at the trial, that the assignation referred to in the issue was not legally capable of being effectually completed, and that, therefore, there could not legally be a failure of duty on the part of the Defender by not completing it; or at least, that the effectual completion of the said assignation for the protection of the Pursuers, under the instructions of Robert Hamilton, mentioned in the issue, the employer of the Defender, would have been a fraudulent or illegal act on the part of the said Robert Hamilton, who had previously granted an onerous assignation in absolute terms in favour of Andrew Ballantyne, referred to in the evidence, and that, therefore, it was not in law the duty of the Defender, in the circumstances aforesaid, to complete the said assignation upon the instructions of the said Robert Hamilton;

ROBERTSON v. FLEMING.

and the Defender having contended before the Court that the law was as aforesaid, the Court, in pronouncing the said judgment, refused to give effect to the said law, and the said judgment set aside the said law, and was contrary thereto, and the Counsel for the Defender tendered the foresaid exceptions.

These exceptions the Court refused to sign; but on the 21st June 1859 their Lordships, on the motion of the sureties, applied the verdict, and in terms thereof made a decree against Robertson for payment to them of 198*l.* 16*s.* with interest; and found them moreover entitled to their expenses.

On the 30th June 1859 Robertson presented his Appeal to the House; but on the same day the sureties presented a cross petition, alleging that the Appeal was incompetent. Both the Appeal and the petition against it were referred to the Appeal Committee, so that no order was issued on the Respondents to answer the Appeal, and consequently nothing was done to prevent the cause from proceeding in the Court below, although a certificate from the Clerk of the Parliaments was produced to show that the Appeal and the petition against it had both been referred to the Appeal Committee.

Accordingly, on the 9th July 1859, the Second Division appointed a taxation of costs, and on the 16th July 1859 ordered Robertson, on the auditor's report, to pay to the sureties 239*l.* 18*s.* 7*d.* of expenses.

Against these two orders Robertson presented a supplemental Appeal to the House, and the sureties presented a cross petition, objecting to the competency thereof, and both were referred to the Appeal Committee to consider and report.

On the 12th August 1859 the Appeal Committee reported that "all objections as to the competency of "the said Appeals should be reserved for the hearing "at the bar of the House."

Mr. *Roundell Palmer*, Mr. *Anderson*, and Mr. *J. C. Smith*, for the Appellant, contended that the Appeal was competent against an Interlocutor applying the verdict of a jury; and they cited *Irvine* v. *Kirkpatrick* (*a*); *Melrose* v. *Hastie* (*b*); and *Bartonshill Coal Company* v. *McGuire* (*c*).

On the merits they insisted that without privity of contract there could be no liability; and that the judgment below must be reversed.

The *Attorney-General* (*d*), the *Lord Advocate* (*e*), and Mr. *A. B. Bell* for the Respondents mainly relied on *Lang* v. *Struthers* (*f*), where it was held by this House, affirming a judgment of the Court of Session, that a law agent was liable for loss sustained by a lender of money arising from the imperfect completion of a security, although prepared on the employment of the grantor of the deed, and not of the lender of the money. This case was an irresistible authority ruling the present. Besides, the allegation in the present case that the employment was "for behoof of" the sureties, constituted a sufficient averment of the necessary privity.

The further arguments are fully discussed and considered in the following opinions delivered by the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*g*):

I think our decision ought 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

(*a*) 7 Bell App. Ca. 116.
(*b*) 1 Macq. Rep. 698.
(*c*) 3 Macq. Rep. 300.
(*d*) Sir Richard Bethell.
(*e*) Mr. Moncrieff.
(*f*) 2 Wils. & Shaw, 563.
(*g*) Lord Campbell.

ROBERTSON *v.* FLEMING.

Lord Chancellor's opinion.

is certainly open to the Appellant, and if the objection 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 2nd, 3rd, 4th, 5th, and 6th articles of the condescendence (*a*), there are sufficient allegations showing

(*a*) Cond. II. That the said loan was negotiated through the Defender, acting for the said Robert Hamilton, entirely for behoof of the said Robert Hamilton, and the amount thereof was received by the said Robert Hamilton, and applied to his own purposes. It was accordingly a condition of the Pursuers interposing their security, and joining in the bond, that the said Robert Hamilton should give them a bond of relief, with an assignation in security to certain leasehold subjects in Stonehouse belonging to him under a tack or lease for nine hundred and ninety-nine years, as from the term of Martinmas 1834, entered into on the 9th and 12th days of February 1835, between Robert Lockhart of Castlehill and Robert Craig, merchant in Stonehouse, and which tack or lease and subjects, had come to belong to the said Robert Hamilton, and to the said tack or lease itself; and without such condition the Pursuers would never have entered into the transaction at all. The Defender was all along perfectly aware that the Pursuers had undertaken the obligations they did for behoof of Hamilton on the condition and footing which have been now explained.

Cond. III. Accordingly, of even date with the Pursuers' signing the said bond and assignation in security, Robert Hamilton executed a bond of relief, with an assignation in security of the leasehold subjects, and tack or lease thereof belonging to him, in favour of the Pursuers. This deed proceeds upon a narrative of the bond and assignation in security in favour of the English and Scottish Law Life Assurance and Loan Association, and sets forth that, although the Pursuers had, by the bond last mentioned, become bound for payment of the sums thereby due, yet the whole of the sum of 250*l.* had been received by him and applied to his own use, and no part thereof received by the Pursuers or applied to their use or behoof, and that he only was the true debtor therein. It farther sets forth, that it had been stipulated and agreed between the Pursuers and him, Hamilton, that he should grant to them a bond of relief and assignation in security to the said leasehold subjects. On such narrative and statement, he

the employment of the Defender on behalf of the Pursuers, the duty of the Defender to the Pursuers, bound himself to relieve the Pursuers accordingly, and in security of his personal obligations to that effect in the Pursuers' favour, he assigned and conveyed to them in security, but with power of sale, all and whole his right, title, and interest in and to the foresaid leasehold subjects, viz., a piece of ground in the village of Stonehouse, which was the subject of the said tack by Robert Lockhart to Robert Craig, and which had come to belong to him by the series of writs set forth in the bond of relief and assignation. This bond of relief and assignation would have been sufficient to secure the Pursuers from all claims or loss under their and Robert Hamilton's bond to the English and Scottish Law Life Assurance and Loan Association, if it had been duly completed by intimation and possession, or by registration, as after mentioned.

Cond. IV. The Defender had introduced Robert Hamilton to the said association with reference to the loan wanted by him, and had proposed to the said association that the security over the leasehold property (of which a valuation had, with that view, been obtained by the said Robert Hamilton and submitted to the said association), should be taken direct to the association, but this proposal had been declined by the association. Of this, however, the Pursuers were not informed either by the said Robert Hamilton or the Defender, nor were they informed by either Hamilton or the Defender that any prior security existed over the said subjects, nor had they any knowledge whatever of these circumstances. The bond of relief and assignation in security in favour of the Pursuers was prepared by the Defender, Mr. Robertson, 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 in order that he might forthwith get the same duly intimated to the landlord or proprietor of the said leasehold subjects, and do whatever else might be necessary or proper towards rendering the said bond of relief and assignation a good, valid, and available deed of security to the Pursuers. This was the arrangement and understanding of all concerned, viz., the said Robert Hamilton, the Pursuers, and the Defender. The Defender charged and received from the said Robert Hamilton the usual professional fees for preparing the said bond of relief and assignation in security.

Cond. V. The Pursuers are persons of little education, and quite unused to such transactions as that in question, and they trusted to the Defender, who had acted for them in the matter, to make their security complete. The Defender had, in another case in Stonehouse, intimated the assignation to the landlord, and had the assignation recorded in the landlord's cartulary, and the assignee's

ROBERTSON
v.
FLEMING.

Lord Chancellor's opinion.

and a breach of that duty, whereby they were 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 case, I have

name entered in the rental book as tenant liable for the rent. But he neglected to do this in the present instance, and he never informed the Pursuers that he had not done so, or advised them on the subject, although he knew, or was in the circumstances bound, and must be held to have known, that the Pursuers relied on his doing whatever was necessary to make the said bond of relief and assignation a good, valid, and complete security to them. He never told the Pursuers nor advised them that intimation of their bond of relief and assignation was necessary to be made to the landlord, or that it required to be otherwise recognized by him, or that it was necessary for the Pursuers to obtain and enter into possession of the said leasehold subjects, so as to render their assignation to the tack or lease thereof good, valid, and complete. Again, when the statute 20 & 21 Vict. passed, as it did in August 1857, a clear and distinct mode of completing the Pursuer's security was afforded. The Defender, however, neither then completed the said security himself in terms of said Act, nor delivered it to the Pursuers, in order that they might take the necessary steps for having it completed by themselves or others, nor did he bring the matter in any way whatever under their notice, in order that they might take measures for duly protecting their interests. But the Defender continued to retain the bond of relief and assignation in security in his possession, and the Pursuers continued to rely, and, in the circumstances, were entitled to rely, on its being made by him as secure and effectual as it was capable of being made. By his whole acts and conduct in reference to the said bond of relief and assignation, the Defender led the Pursuers to understand and believe that it had been made a good, valid, and complete security to them, and it was perfectly capable of having been made completely and entirely effectual.

Cond. VI. Of this date, the Defender handed the bond of relief and assignation in security to the Pursuer Mr. Summers, telling him at the same time that he feared or suspected that Robert Hamilton's affairs were in a state of confusion. In point of fact, Hamilton in a few days afterwards absconded. A petition was then presented for a sequestration of his estates, the first deliverance in which bears date 24th March 1858. Sequestration was awarded on 5th April following, and Mr. Thomas Hamilton, inspector, Stonehouse, was thereafter elected and confirmed trustee.

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 Pursuers. 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 be established only by showing 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 Respondent's Counsel, that 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 their

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

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 *Lang* v. *Struthers* (*a*) 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 the 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

(*a*) 2 Wils. & Shaw, 567.

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

by the Judges of the Court of Session, when it was strenuously urged for 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 cases 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 Wilson & Shaw, 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 circumstance constituted a *crassa negligentia*, although it might be true that there might be some difference of opinion among lawyers as to the effect of the course actually adopted

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

by him" (*a*). The Interlocutor complained of was affirmed, with 100*l.* 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"(*b*).

The same very learned author, in his "Principles of the Law of Scotland"(*c*), 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."

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 to prove that the pursuers themselves 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 a case to go

(*a*) Where the Lord Chancellor found this opinion of Sir John Leach does not appear. It is not in the report of Messrs. Wilson and Shaw, vol. ii. p. 567, cited by his Lordship. Sir John Leach was not a Peer, and therefore one does not see how he could have spoken from the woolsack. It is probable that he gave an explanation privately, and that some note has been preserved of what he said. See *infrà*, p. 196, where Lord Cranworth says that "the grounds on which the House acted in *Lang* v. *Struthers* cannot be ascertained."

(*b*) 1 Bell's Comm. 461. (*c*) Sect. 154.

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

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 the "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.

There was again an opportunity of moving for a new trial for a defective or erroneous direction. But

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

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 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 section 6 of 55 Geo. 3. 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

ROBERTSON v. FLEMING.

Lord Chancellor's opinion.

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 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 argument 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 (*a*), 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 Ballantyne. 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

(*a*) It would appear that Lord Wensleydale is here referred to; see *infrà*, p. 199.

ROBERTSON
v.
FLEMING.

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.

Lord Chancellor's opinion.

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's opinion.

Lord CRANWORTH:

My Lords, on the first point made by the Appellant namely, as to the relevancy of the condescendence, 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 approving of 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 act professionally, under which, when done, C would derive a benefit, if, then, B is guilty of negligence towards his employer, so that C loses the contemplated benefit, B is, as a matter of course, responsible to C,

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 (*a*), that if the security was stipu-

(*a*) The Lord Ordinary's Note to his Interlocutor of 4th Feb. 1859, was as follows :—

The Defender objected to any issue being granted in this case on the ground of the action being irrelevantly laid. The Lord Ordinary could not adopt this view, which implied that if all the statements of the Pursuers were proved, the action would still be thrown out; he, therefore, proceeded with the adjustment of the issue.

The Defender then contended that employment of the Defender by the Pursuers, or under their authority, ought to be put in issue. But it appeared to the Lord Ordinary that if it was made out that the security in question 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 Pursuers for professional negligence. The principle in such a case seems the same with that under which the agent who prepares an heritable bond is liable to the lender for a professional blunder, though his entire employment may have proceeded from the borrower, and he never may have in any way come into contact with the lender.

The Defender maintained that the issue should at least set forth that the Defender knew of the stipulation by the Pursuers for the security. It did not occur to the Lord Ordinary that this required to be specially inserted.

Finally, the Defender objected to the question on employment being put so generally, as whether he was employed "to prepare and complete" the security, without setting forth the precise way in which the Pursuers alleged that he ought to have completed it. It appeared to the Lord Ordinary that the general terms employed were those proper to be used in the issue. It was a different question what the Pursuers would require to state and make out at the trial.

lated 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 the 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 "for behoof of," though they may mean merely "for the benefit of," yet may also mean "on behalf of" or "on account of," and that it must be assumed, as 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

ROBERTSON
v.
FLEMING.

Lord Cranworth's opinion.

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. 1st, whether the Defender had been employed to prepare this security; 2nd, whether the employment extended to the completion of the security; 3rd, if so, whether there was failure on his part; and, 4th, 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 to be done by him 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 this the *Lord Justice-Clerk* deemed sufficient. The opinions delivered by the other Judges rest on the same foundation.

On these grounds I have come to the conclusion that the words "*for behoof of*" were not intended to raise,

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 showing what was understood to be the meaning of the words "*for behoof of.*"

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 shows 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, a law agent in respect of damage occasioned by his neglects 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.

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

In Erskine (*a*) 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.

These 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 Morrison (*b*).

The facts of that case are as follows:

A. 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.

(*a*) Book 3. tit. 3. s. 37. (*b*) Morr. 3527.

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 7 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 the law Mr. Bell refers to three decided cases ; the case of Grant, decided on the 8th of July 1758, and reported in Morrison, 2081 ; the case of *Lang* v. *Struthers* (*a*), 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 *Lang* v. *Struthers* is reported in 2 Wils. & Sh. 563, and that in Haldane's case will be found in 7 Cl. & Finn. 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 before he acts in executing

(*a*) 4 Sh. & Dun. 418.

ROBERTSON
v.
FLEMING.

Lord Cranworth's opinion.

the process of any court is obliged to give a bond with cautioners, to the Lord Lion, conditioned for duly executing the office of messenger to all the lieges, and for payment of damages occasioned by his defaults.

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 hands of Henderson, one of the messengers, who had given bond in the usual way to the Lord Lion.

Henderson, instead of executing the caption regularly, seized and secreted Forbes, and carried him about from place to place, till, in order to obtain his 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 *Kaimes*, 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 the person employing him; not 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 true construction, a bond indemnifying against the wrongful acts of the messenger, not only the party

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 Lion, 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 in point of form be brought in the name of the trustee to whom the bond was given, that would be 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 anyone except his employer.

The next case, that of *Lang* v. *Struthers*, occurred in the year 1826, and is reported in 4 Shaw & Dunlop, and, on appeal to this House, in 2 Wilson & Shaw, 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 on 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 1,200*l.* 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 1,200*l.* 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

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 bonds, obtained priority over the bond given to the tutors and curators of the minors. 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 his 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 showing 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 1811 till 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

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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* (*a*). There Donaldson, the law agent of Archibald Dunlop, a distiller at Haddington, obtained for him, from Henry Haldane, a sum of 2,000*l.* 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 represented his interest in the loan and the security. Dunlop, before Haldane's

(*a*) 7 Cl. & Finn. 762. See this case noticed in Pulling's Law of Attorneys, 3rd edit., pp. 423, 427.

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 2,000*l.* 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 so, as that advice was wrong, he must be held responsible for it.

Surely, my Lords, neither of these cases support the proposition 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

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 show that Lang was acting as the law adviser of the lenders as well as of the borrower. And in the latter case, *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 (*a*). 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 the 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 act 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

(*a*) Book 3. tit. 3. s. 37.

ROBERTSON v. FLEMING.

Lord Cranworth's opinion.

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 (*a*), 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 authority of the Respondents.

Lord Wensleydale's opinion.

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 500*l.* on his life, and also to obtain a loan from the same company for 250*l.* 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, and the premiums of assurance on the policy.

Hamilton at the same time gave a bond of relief to the Pursuers, and assignation on 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 Pursuers sought to recover the amount of damages sustained by them in consequence of that neglect.

The first question is, Whether the suit, in the

(*a*) The Interlocutor first appealed from was merely ordering a draft of issues. The record was held relevant.

ROBERTSON v. FLEMING. — *Lord Wensleydale's opinion.*

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, 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, *à 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 sue 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

ROBERTSON v. FLEMING.

Lord Wensleydale's opinion.

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 *Lang* v. *Struthers* (*a*), 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 by Lord *Glenlee* are different from those used 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 *for 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 for 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, by themselves or their agents, 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

(*a*) 4 Sh. & Dun. 118.

ROBERTSON v. FLEMING.
Lord Wensleydale's opinion.

did. The remark of Lord *Gillies*, in *Goldie* v. *Goldie's Representatives* (*a*), 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 Defender, 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

(*a*) B. & M. 1489, 8th July 1842.

ROBERTSON *v.* FLEMING.

Lord Wenslcydalc's opinion.

the jury, and their attention directed to the true question, whether the relation of principal and law agent was created between the Pursuers and Defender, 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. If 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 for breach of duty arising from that relation might be created. But to what extent that relation was created is another question.

ROBERTSON v. FLEMING.

Lord Wensleydale's opinion.

It could hardly be to attend solely to the Pursuers' interest, for no other law agent being employed, it is unlikely that such should be the intention of the parties. If it was, 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 Pursuers.

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 inclusive, 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

ROBERTSON *v.* FLEMING.

Lord Wensleydale's opinion.

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 said 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 said Pursuers?

Lord Chelmsford's opinion.

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 upon appealing from the final Interlocutor, on the 15th section of the 48 Geo. 3. c. 151. And he contends that by the 17th section of the 59 Geo. 3. 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

ROBERTSON v. FLEMING.

Lord Chelmsford's opinion.

exceptions cannot succeed, or that if it could the appeal would still be incompetent by the proviso in the 6th section of the 55 Geo. 3. c. 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 in point 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. 3. 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* (*a*) and *Bartonshill Coal Company* v. *McGuire* (*b*).

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 the case in review before your Lordships sufficiently for his purpose upon the Interlocutors approving the form of the issues. For, as was said by my noble and learned friend, Lord *Cranworth*, in *Melrose and Company* v. *Hastie and Company* (*c*), "Although the statute (*d*), 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

(*a*) 2 Macq. 359.
(*b*) 3 Macq. 305.
(*c*) 1 Macq. 711.
(*d*) 55 Geo. 3. c. 42. s. 6.

ROBERTSON v. FLEMING. — *Lord Chelmsford's opinion.*

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:—1st, the relevancy of the alleged ground of action in the condescendence; 2nd, the frame of the issues.

In considering the question of relevancy, it must be assumed that it was necessary for the Pursuer to state an employment for the Defender and not merely for his benefit; because if it were enough to allege 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 article of the 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,"

ROBERTSON v. FLEMING.

Lord Chelmsford's opinion.

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* (*a*), the language of my noble and learned friend Lord *Brougham* in the case of *Leys, Nasson, and Co.* v. *Forbes* (*b*).

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 statement of facts on the part of the Appellant. In the original plea the Defender was charged with gross negligence "in 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

(*a*) 3 Macq. 339. (*b*) 5 Wils. & Sh. 403.

ROBERTSON
v.
FLEMING.

Lord Chelmsford's opinion.

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 shown 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 Pursuers for professional negligence." His 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 shown than that the securities were for the benefit of the Pursuers, and 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," 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 show 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 *Lang* v. *Struthers*, and 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 this 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, when 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

ROBERTSON
v.
FLEMING.

Lord Chelmsford's opinion.

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 Pursuers' 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 nonperformance of which he would be responsible to them. Now in this case it was 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 Ballantyne, 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 Pursuers. 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 Interlocutors ought to be reversed.

The 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 should be for the reversal of that Interlocutor, it will provide for that in the usual way.

The LORD CHANCELLOR: Certainly; upon the question of relevancy the Interlocutor will be affirmed. Then the other Interlocutor appealed against will be re-

ROBERTSON
v.
FLEMING.

versed, and it will be remitted to the Court of Session with directions. I think that the frame 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 it would be quite sufficient to remit the case with a declaration as to the question which the issue ought to raise, and the Court ought to frame such an issue as will raise that question.

The LORD CHANCELLOR: I should strongly recommend the House to state what the issue ought to be. If the words of my noble and learned frienda re 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 were now to be dictated.

The LORD CHANCELLOR: There has been a very long discussion as to what the frame of the issue ought to be. Whatever my noble and learned friends recommend as the proper form of 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.

The 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 the issue.

Lord CRANWORTH: Certainly not.

ROBERTSON v. FLEMING.

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 would be sufficient.

The 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 is unnecessary.

JUDGMENT.

It is *Ordered* and *Adjudged*, That the Interlocutor of the 14th January 1859 (*a*) be affirmed; and that the rest of the Interlocutors complained of be reversed; and it is declared that the issue in the proceedings mentioned ought expressly to have raised the question whether the Defender (Appellant) was or was not employed by or by the authority of the Pursuers (Respondents). And it is further *Ordered*, That the cause be remitted back to the Court of Session to do therein as shall be just and consistent with this judgment, declaration, remit, and order.

DEANS & ROGERS—WEBSTER & WARDLAW.

(*a*) Ordering drafts of the issues.