GEMMILL, ... Appellant.
M'ALISTER, ... Respondent (*a*). 1863. *Feb.* 23*rd.*

Solicitor and Client—Professional Duty.—When a law agent acts professionally in a transaction for three adverse parties, and more especially when he has a separate adverse interest of his own in the matter to be arranged, the Court will view with a jealous eye all his proceedings.

If in such a case he evince an undue partiality to his own interest, and any of the parties consequently suffer, he is bound in compensation for the loss.

Per the Lord Chancellor : Here the law agent prepared the *mortgage deeds.* He knew well the agreement between the parties, and he knew that the money resulting from those mortgages ought in all justice to be applied in conformity with the agreement. The contest arises from an endeavour on his part to depart from that agreement.

Parole Evidence.—Though not admissible to the effect of adding to or altering the terms of a written agreement, parole evidence may yet be well received to show the instructions given to the law agent for the preparation of the instrument.

Writ or Oath of Party.—Remarks of Lord Wensleydale on cases in which other evidence than that by writ or oath of party may be received.

A short statement of this case may be given as follows, passing over certain facts which are set out in the opinions delivered by the Law Peers :—

In December 1857 the firm of Dickie and Company, in conjunction with the above-named Respondent M'Alister, accommodated one M'Farlane, a builder, by putting their names to two bills of exchange (one for 128*l.* and the other for 272*l.*) to be discounted for his benefit. They had previously assisted him. It was agreed that the Dickies and M'Alister should be

(*a*) See this case as given in the Second Series, vol. 24, p. 956.

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liable in the proportion of three-fourths and one-fourth respectively. It was also agreed that to each party incurring this responsibility M'Farlane should grant real security by way of mortgage over land upon which he was then erecting houses in Glasgow.

In the management of this affair a single solicitor, the above Appellant, Mr. Gemmill, was employed and acted for all; and the chief question was whether he had or had not failed in the performance of his professional duty; for it appeared that he had himself a claim against the Dickies anterior in point of time to the interposition of the parties on behalf of M'Farlane.

At a meeting in his office Mr. Gemmill read over to them a memorandum of agreement, drawn up by him, which they all signed, and of which a copy is given underneath (*a*).

Mr. Gemmill prepared the mortgage deeds, but subsequently took an assignation in his own favour from the Dickies.

(*a*) Agreement between Andrew M'Farlane, James M'Alister, and John Dickie and Company. Whereas the said John Dickie and Company granted their bill to the said James M'Alister for the sum of 128*l.*, dated the 22nd day of April last, payable four months after date, which the said James M'Alister discounted, and the proceeds thereof were paid over by the said John Dickie and Company to the said Andrew M'Farlane, who accordingly became bound to retire the said bill when it came due: And whereas the said Andrew M'Farlane having required further accommodation from the said second and third parties, upon the conditions after mentioned, the said John Dickie and Company granted their bill to the said James M'Alister for the sum of 272*l.* sterling, dated this day, payable four months after date, which the said James M'Alister having discounted, the proceeds thereof have now been delivered over to the said Andrew M'Farlane; all which transactions are hereby declared and acknowledged by the parties respectively: And whereas the said transactions were entered into by the parties on the understanding and conditions after specified: Therefore the parties have agreed and do hereby agree, as follows, viz.:—First, the said John Dickie and Company shall be bound to retire the said bill for 128*l.* when it becomes due, and they shall also be bound to retire the said bill for 272*l.*,

Soon afterwards the Dickies became bankrupt, and M'Alister was compelled to pay one of the bills (that for 128*l.*), and he was charged by Mr. Gemmill, to whom it had been endorsed, to pay the other, (namely, the bill for 272*l.*)

In respect of the first bill M'Alister instituted an "action of relief;" as to the second he brought a suspension of the charge; and both proceedings having been conjoined, issues were sent to trial to determine by the verdict of a jury whether Mr. Gemmill, acting for three adverse parties, and having a separate

when it becomes due to the extent of 172*l.* thereof, thus making their individual claim against the said Andrew M'Farlane 300*l.* sterling, to which amount they are hereby declared creditors of the said Andrew M'Farlane, for which he has now granted for their behoof the bond and disposition after mentioned; second, the said James M'Alister shall be bound to retire the said bill for 272*l.*, when it becomes due, to the extent of 100*l.* thereof, to which extent he is hereby declared a creditor of the said Andrew M'Farlane, for which he has now granted to the said James M'Alister the bond and disposition in security after mentioned; third, on the other hand, and in implement of his part of the said transactions, the said Andrew M'Farlane has, of the date hereof, granted the following bonds; (first,) bond of corroboration and disposition in security by the said Andrew M'Farlane for the sum of 293*l.* 16*s.* 6*d.*, contained in a former bond, and the said sum of 300*l.*, for which amount the said John Dickie and Company are declared his creditors as aforesaid, amounting together to 593*l.* 16*s.* 6*d.*, in favour of the said John Dickie and Company, and John Dickie and George Parkin, the sole individual partners of the said Company, and to the survivor of them, as trustees or trustee for behoof of the said Company-firm of John Dickie and Company; (and, second,) bond of corroboration and disposition in security by the said Andrew M'Farlane for the sum of 109*l.* 3*s.* 7*d.*, contained in the former bond, and the said sum of 100*l.*, for which amount the said James M'Alister is declared a creditor of the said Andrew M'Farlane as aforesaid, amounting together to 209*l.* 3*s.* 7*d.*, in favour of the said James M'Alister; and which two bonds extend over property belonging to the said Andrew M'Farlane, situated in Bishop Street, Glasgow, as more fully described in the said bonds themselves; and, lastly, the parties bind themselves respectively to each other duly to implement and perform the whole premises as before written.

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interest of his own, was bound to make good to M'Alister the loss he had undoubtedly sustained (*a*).

(*a*) The issues were as follow:—1. Whether the Defender, on or about the 8th day of May 1858, acting as the Pursuer's agent, undertook to the Pursuer to obtain an heritable security from Andrew Macfarlane, wright and builder in Glasgow, over certain subjects belonging to him in Bishop Street, Glasgow, in such form that the same should be available to the Pursuer as a security for payment of the contents of a bill for 128*l.*, dated 22d April 1858, drawn by the Pursuer on Messrs. John Dickie and Company, mill-sawyers at Rockvilla, near Glasgow, and also of the bill for 272*l.*, No. 11 of process, of which the Pursuer was the drawer to the extent of 172*l.* thereof; and whether the Defender wrongfully failed in his said undertaking, and is resting-owing to the Pursuer the amount of the said bill for 128*l.*, with interest at the rate of 5 per cent. per annum from 27th August 1858, and is bound to relieve the Pursuer of the said bill for 272*l.* charged on, to the extent of 172*l.* thereof?

2. Whether the Defender, acting as the Pursuer's agent, on or about 8th May 1858, undertook to take from the said Andrew Macfarlane an heritable security over the said subjects, in such form that the same should be available as a security to the Pursuer for payment of the contents of the said bill for 128*l.*, and also of the said bill for 272*l.* to the extent of 172*l.* thereof; and whether the Defender, in place of taking a security in such form, on or about said date, wrongfully, and in violation of his said undertaking, prepared and obtained from the said Andrew Macfarlane a bond of corroboration and disposition in security by him over the said subjects, in favour of the said John Dickie and Company, and thereafter obtained from John Dickie and Company an assignation thereof in his own favour, and is resting-owing to the Pursuer the amount of the said bill for 128*l.*, with interest at the rate of 5 per cent. per annum from 27th August 1858, and is bound to relieve the Pursuer of the said bill for 272*l.* charged on, to the extent of 172*l.* thereof?

3. Whether it was agreed between the said John Dickie and Company, Andrew Macfarlane, and the Pursuer, on or about 8th May 1858, and previous to the granting of a bond of corroboration and disposition in security, dated on or about 8th May 1858, by the said Andrew Macfarlane in favour of the said John Dickie and Company, that the security constituted by the said bond of corroboration and disposition in security should be held and applied, *inter alia*, in payment of the said bill for 128*l.*, and of the said bill for 272*l.*, to the extent of 172*l.* thereof, and to the extent of these sums, should not be assigned by the said John Dickie and Company; and whether the Defender thereafter wrongfully, and

At the trial the first witness examined was M'Alister, the Pursuer, who was examined as to what had occurred at the meeting in Mr. Gemmill's office. But here an objection was taken by Mr. Gemmill's Counsel, that the course of examination pursued had a tendency to control or qualify by parole evidence the terms of the written agreement. The presiding Judge overruled the objection; which ultimately formed the subject of a bill of exceptions tendered.

The jury returned a verdict for M'Alister, and upon a motion by Gemmill for a new trial, which motion was heard along with the bill of exceptions, the Lord President, on the 17th May 1862, made the following cogent observations.

It appears that M'Alister and the Dickies interposed to assist M'Farlane in raising money; and further advances having been required, the defender, Gemmill, had a meeting with the parties, and became in a sense agent for all of them. This was a somewhat peculiar and delicate position; and a party so circumstanced is bound to exercise great care and circumspection in what he does. It was agreed that M'Alister should interpose along with the Dickies in reference to the additional advances to be made to M'Farlane, on the footing that of the whole sum M'Alister should be liable for 100*l.*, and the Dickies for the remaining 300*l.* The securities were framed by Gemmill, and the result has been that the Dickies were unable to fulfil their part of the obligation, while M'Alister had to pay the 128*l.* bill, and is charged for payment of the other bill for 272*l.*, the holder of which is Gemmill. The first issue is, in effect, whether Gemmill was employed to do certain things, and failed to do them; the second, whether he agreed to obtain a certain form of security, and took another; the third, whether it was agreed by these three parties that the securities were to be held and applied only in payment of the

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and in the knowledge of the said agreement, took an assignation in his own favour to the said bond of corroboration and disposition in security, and is resting-owing to the Pursuer the amount of the said bill for 128*l.*, with interest at the rate of 5 per cent. per annum from 27th August 1858, and is bound to relieve the Pursuer of the said bill for 272*l.* charged on, to the extent of 172*l.* thereof?

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debt. An objection was taken to the evidence, which was repelled; and I confess I. cannot see any force in it. The question is, Was Gemmill employed to get the security? The evidence objected to was competent and necessary for ascertaining that fact.

On this reasoning the First Division pronounced an Interlocutor as follows:—"Refuse to grant a new "trial, and appoint the verdict to be applied, and "judgment to be entered up." On the same 17th May their Lordships disallowed the Bill of Exceptions.

Upon a motion to have the verdict applied, the Second Division pronounced the following Interlocutor, dated 23rd May 1862:—

Apply the verdict found by the jury in the cause; and in respect thereof, in the Suspension, suspend the diligence complained of, and decern; and in the ordinary action decern against the Defender for payment to the Pursuer of the sum of 128*l.* libelled on, with interest thereof, as concluded for, with expenses.

Hence the Appeal to the House. Mr. *Rolt* and Mr. *Anderson* for the Appellant (among other arguments adverted to in the opinions of the Law Peers) contended that the judgment complained of was erroneous, because an averment of non-liability on a bill of exchange can be proved only by the writ or oath of the party. They cited Thomson on Bills (*a*). Secondly, they insisted that parole evidence had been erroneously admitted at the trial to contradict or qualify the written agreement; upon this point they cited Dickson on Evidence (*b*).

The *Solicitor-General* (*c*) and Sir *Hugh Cairns* for the Respondent M'Alister, did not address the House, the Law Peers proceeding at once to deliver the following opinions:—

(*a*) p. 280. (*b*) p. 92.

(*c*) Sir Roundell Palmer.

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Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, it must be a matter of vexation to your Lordships to find in a case so clear as the present, where in truth there is hardly a controversy upon the facts, and where the conclusions of law and justice are so plainly evident, that there should have been a litigation of so long a period of time, so involved, and I will say so mistaken in many particulars, as to occasion the eleven Interlocutors (*b*) which are now brought before us by this Appeal.

My Lords, this litigation arose in this very simple form. The Respondent, Mr. M'Alister, and the firm of Dickie and Company were mutually desirous of giving some accommodation to a gentleman of the name of M'Farlane, who was a builder in Glasgow. They had previously given to him accommodation of a similar kind. They accordingly determined to draw and accept two bills of exchange, one for 128*l.* and another for 272*l.*, the proceeds of the discount of which should represent the money that M'Farlane would receive. It was then mutually agreed between the lenders of the money and M'Farlane, the receiver of the money, that their relative advances to M'Farlane by the two bills, amounting together to 400*l.*, should be thus constituted,—it was agreed that 300*l.* should be regarded as an advance made by Dickie and Company, and that 100*l.* should be treated as a loan made by the Respondent, M'Alister, and then it was agreed that M'Farlane should give specific securities for those two sums of money, namely, a specific security for the 300*l.* in favour of Dickie and Company, and a specific security for the 100*l.* in favour of the Respondent, M'Alister.

(*a*) Lord Westbury.

(*b*) The litigation was of four years' duration, generating no less than eleven distinct Interlocutors.

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It was at the same time agreed that the antecedent debts due from M'Farlane to those two lenders should be added to that security. Now the antecedent debt due from M'Farlane to Dickie and Company was 293*l.* 16*s.* 6*d.* The antecedent debt that was due to M'Alister was 109*l.* 3*s.* 7*d.* Accordingly a bond and disposition, that is to say, a mortgage of heritable property belonging to M'Farlane, was given to Dickie and Company by M'Farlane for the sum of 593*l.*16*s.*6*d.* and another bond and disposition for the sum of 209*l.* 3*s.* 7*d.* was given by M'Farlane to the Respondent M'Alister.

The dedication and appropriation of those two securities, and the money they represented, were made by an agreement between the parties dated the 8th day of May 1858, which was also the date of the two bonds and dispositions I have mentioned.

By that agreement, my Lords, it was expressly provided that the 300*l.* which was to be advanced by Dickie on account of the bill should be the subject of a particular security to them, and in like manner as to the 100*l.* that was to be advanced by M'Alister; and on the perusal of that agreement it is quite clear, although it is not so expressed in the recitals in the bonds, that the mortgages were given specifically on account of the 300*l.* that was to be paid by Dickie and Company in part of the two bills, and on account of the 100*l.* to be paid by M'Alister as his contribution to those two bills. And, whoever had knowledge of the agreement, which was the parent of the mortgages, knew well the purpose of those mortgages and the agreement under which they were produced, and the contract which governed altogether the ownership of the mortgages, and the application of the monies to be received thereon.

Now, the present Appellant was most particularly aware of the nature of this contract, for he was the law agent who prepared that agreement. He was the law agent who prepared the bonds and dispositions. He knew well the agreement between the parties, and he knew that the money resulting from those mortgages ought in all justice to be applied in conformity with the contract, namely, in liquidation of those two bills.

My Lords, the contest before you arises from an endeavour of the present Appellant to depart from that agreement. He procured to himself an assignation from Dickie and Company of the bond and disposition of 593*l.* He received that entire sum of 593*l.* on the 18th of April 1859. The moment he received that money he took the 593*l.*, 300*l.* of which had, by a contract to which he was privy and which he had prepared as law agent, been dedicated to the payment (or rather the partial payment, namely, save as to 100*l.*) of the two bills of 128*l.* and 272*l.* Notwithstanding that he had that money in his pocket appropriated by agreement, and was bound by every moral consideration to apply it to the payment of those bills, he proceeded to sue the Respondent upon the bills for 272*l.* On that the Respondent applied for an interdict to suspend the charge on the ground of the existence of the agreement. When that note of suspension was originally presented the money had not been actually received by the present Appellant; but the agreement existed, and upon proof of the agreement the *Lord Ordinary* thought it right not to treat any part of the bill as paid or discharged, but to suspend for the present the proceedings upon that charge. And, accordingly, the First Interlocutor which is now brought up to this House, but which was not

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carried by reclaiming note to the Inner House, is the Interlocutor by which the "*Lord Ordinary* having considered the note of suspension, answers, and productions, on consignation of the sum of 100*l.* passes the note." The note appended to that Interlocutor by the *Lord Ordinary* gives the reason for his so doing, namely, that he deemed it right to suspend the charge for the present upon proof of the agreement to which I have already referred.

Now, that Interlocutor is brought up by the present Appeal, and it is argued, and I think it must be admitted to be correctly argued, that it is competent to the Appellant to bring up that Interlocutor. But, my Lords, it is I apprehend not competent to your Lordships in the face of the statute to consider that Interlocutor by itself, or to deal with that Interlocutor in the shape of a reversal of it, unless you find it necessary to reverse any of the subsequent Interlocutors. It is undoubtedly true that when you bring up an Interlocutor upon the merits you may bring up an antecedent Interlocutor of the *Lord Ordinary*, although it has not been carried by reclaiming note to the Inner House. But it does by no means follow that you can get a reversal of the Interlocutor so brought up, if the House is of opinion that the Appeal fails with regard to the subsequent Interlocutor.

My Lords, both parties proceeded to make up the record upon the merits of the question at issue after that Interlocutor was pronounced, and your Lordships will find, upon referring to the revised reasons for suspension, that the ground for giving relief to the present Respondent, which I have already stated to your Lordships, is there most distinctly set forth.

My Lords, I must admit that it is matter of great regret that in a case so plain it was deemed necessary

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by the Court of Session that issues should be directed, and I must add to that an expression of regret that the nature of jury questions appears to be so little understood by parties in Scotland, as that issues of the extraordinary character of these now appearing should have been directed. But we are bound, I apprehend, to give credit to the statement of the learned Judge by whom those issues were passed, that the issues were agreed upon between the parties. That is distinctly stated by Lord *Deas*. And the issues were tried, and a verdict was found for the Respondent upon those issues.

My Lords, the next point we come to in the Appeal is the exceptions to the admissibility of certain evidence, and also to the charge of the learned Judge. My Lords, I have seldom seen anything more entirely misapprehended than the ground upon which this part of the Appeal is founded. My Lords, the production of the evidence excepted to was no attempt to alter or to add to the agreement by parol testimony; but the parol testimony was admitted upon this inquiry, What were the instructions and directions given to the present Appellant as the law agent by the parties as to the nature of the agreement that he was to prepare? The contention at the Bar has been that because a certain agreement was actually prepared and executed by the parties, the production of that shall estop and prevent any inquiry as to what the parties have desired and directed the law agent to prepare. My Lords, an arrangement of that kind cannot for a moment be listened to. Neither can the objection which is raised to the charge of the learned Judge, which partakes of the same nature. I think that upon these points, as well as upon the first, your Lordships will entirely concur with the unanimous opinion of the

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Court below. And as to the point of real justice, there can be no possible doubt whatever.

My Lords, we have heard a good deal of the doctrine of retention, and of the claim of Mr. Gemmill to apply the security to other deeds. But, my Lords, the doctrine of retention, which is very similar in the law of Scotland to the doctrine of lien in the law of England, can have no application to a case in which the nature of the security and the destination of the money to be raised and secured by that security have been already agreed upon, and are regulated and controlled by an express contract between the parties, of which contract the individual claiming the right of retention was perfectly cognizant at the time when he took an assignation of the security in respect of which he now claims a general right of retention.

My Lords, I think that it is impossible to justify the irregularities which have taken place in some of these proceedings. The utmost that we can do is to concur with the Court below, and to dismiss this Appeal; and having regard to the nature of the case which is raised by it, I cannot but think that your Lordships will agree that the Appeal should be dismissed with costs.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I so entirely concur with the opinion which has been expressed by my noble and learned Friend on the woolsack, that I have very little indeed to add to what he has said, after the full and copious statement which has been given of his reasons.

In this case two questions are involved; the first a question upon the suspension of the action for 272*l.*, and the second upon the subsequent action which was brought by M'Alister by direction of the Court to try the question of the misconduct of the Defendant, the

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present Appellant, in not procuring a satisfactory security for the bill, and in not paying himself, as he ought to have done, out of the money he received.

I will take the second of those questions first. It appears to me that the case was clearly disposed of. The issues were tried. And though the issues were perhaps not the best that could be framed for that purpose, I take it to be clear, not only from the report of Lord *Deas*, but also from the report of the *Lord President*, that those issues were settled with the concurrence of both parties; and ultimately there was only a single point to be disposed of by the Court. And therefore, although those issues do not appear to me to be the most proper for the purpose of disposing of the whole question, the parties must now be bound by them. Those issues, I think, raised sufficiently the question.

Then comes the question as to the propriety of the exceptions that were taken to the summing up or direction of Lord *Kinloch*. I cannot see any objection to those directions. The principal exception is, I think, the third, in pages 70 and 71:—"It was objected by the Counsel for the Defender that this question is incompetent, because it is calculated and intended to adduce parol evidence to prove the terms of the agreement which was entered into at the meeting in question by M'Farlane, Dickie and Company, and the witness in reference to the advances to be made to M'Farlane, which agreement was reduced to writing in a deed executed by these parties."

An objection was taken to the general question, What passed at that meeting? I am clearly of opinion that that was a perfectly lawful question. It was not confined to the terms of the agreement, but the question was as to anything that passed upon that occasion. There might have been in the course of

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that conversation something to show that there was a particular direction from the Respondent to the Appellant to take care of his interest, and to take care that he should be paid out of the other securities. It did not involve any question as to altering the terms of the agreement entered into by the three parties. Then, in the next place, an objection was taken to the summing up of Lord *Kinloch*. The objection seems to me to be without foundation. That direction of the learned Judge was, "that if the jury were satisfied on the evidence that, anterior to the framing of this memorandum, the Pursuer had employed the Defender as his agent to obtain for him security against all possible liability on the bills, on which he was an obligant with Dickie and Company, and the Defender had undertaken so to do, it was competent to the jury, if they saw sufficient cause for it in the evidence, to regard the framing of this memorandum as a step taken in the course of this employment, and any error in framing the memorandum as not inferring liberation to the Defender from the professional responsibility charged on him."

My Lords, I think there was no impropriety whatever in that direction by Lord *Kinloch*. If the jury, looking at the evidence of the conversation that took place at the time of the agreement that was entered into, and the other evidence in the case, saw sufficient cause for taking that view of the transaction between the parties, there was no reason why they should not come to that conclusion.

Then it was contended on the part of the Appellant that Lord *Kinloch* ought to have directed the jury upon two points. The first point is, that the agreement of the parties in regard to the bills mentioned in the issues, and the heritable securities which it was agreed should be granted, having been reduced into

writing, the jury could not legally give effect to parol evidence as establishing an agreement in regard thereto inconsistent with the terms of that deed. But one does not at all see why they should not do so, if the parol evidence was quite independent of the deed.

It seems to me, therefore, that there is no objection to the summing up of Lord *Kinloch*. I concur, therefore, entirely in the opinions of the learned Judges in the Court below, which were delivered at considerable length and with very great clearness, that there is no ground for the exceptions to the directions and the summing up of the *Lord Ordinary*. I equally agree with them that there was nothing in the course of the trial which made it necessary to summon another jury for the purpose of trying the case. The case therefore, as it appears to me, is most satisfactorily disposed of, as regarded the action of the Respondent for misconduct.

With respect to the bill, I certainly have had some doubt in my own mind whether or not the law of Scotland goes to the extent of permitting such a defence as this in a proceeding upon the bill itself. The learned Counsel at the Bar have quoted no case to satisfy me that it is not competent to make such a defence. I can easily conceive the rule for which they have contended to apply very reasonably to a case where an action is brought upon bills in the ordinary course, signed by parties, and as to which when paid the payment is denoted by a receipt. Therefore when a person sets up a case that the bill was not duly signed, or was not duly received, there being no receipt produced, it is extremely reasonable to say that he shall be bound by the bill, unless he can show by the writ or oath of the party that he is not liable. But this is a defence of a different nature.

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It is a defence arising from the position in which this Defender stood towards the parties. And that depends upon a variety of facts. It is a complicated defence, and to say that in such a case the non-liability can be proved only by the writ or oath of the party seems to me unreasonable. All I can say at present is that no case has been cited precisely of the same nature.

Upon the whole I think the judgment of the Court is right, and I therefore concur with my noble and learned friend that the judgment should be supported, and that the Appeal should be dismissed with costs.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, I must confess that during the course of the very able argument on the part of the Appellant I have entertained very considerable doubt as to the regularity of some of these proceedings; but having listened to the reasons which have been given by my noble and ~~learned~~ ~~friends~~ in support of the Interlocutors, I am glad to be able to concur in the opinion that the Interlocutors ought to be affirmed.

Interlocutors affirmed, and Appeal dismissed with Costs.

DEANS & STEIN—SIMSON, TRAILL, & WAKEFORD.