

on, under the pretence that they are bishop's teinds. Mr Bonar maintains that these teinds are not bishop's teinds. The Crown answers that it is *res judicata* in a previous locality in 1817 that they are bishop's teinds. The heritor replies—(1) That that decree only affects the locality in which it was pronounced; (2) that the question now sought to be raised was not there decided. The Crown replies that these pleas were repelled by Lord Wood's judgment in 1846. I cannot say that I have any hesitation in agreeing with the Lord Ordinary's interlocutor. We are not deciding whether the decree of 1817 forms "*res judicata*," but that it was settled by final decree of 1846 that the decree of 1817 did constitute "*res judicata*." Some confusion has been introduced by the fact that there was an action of reduction in 1846. The plea of "*res judicata*" was raised in the locality, and subsequently the action of reduction was brought, and Lord Wood's judgment was pronounced on the conjoined process. A locality is partly a temporary process, but general questions may be raised in such a process, and, if decided, will regulate future localities. Had Lord Wood's judgment not stood in the way, I could not for my own part have distinguished this case from that of the *Duke of Buccleuch* (7 Macph. 95). But it is not necessary for us to proceed upon that ground.

LORD COWAN had no difficulty; whenever in one locality it was judicially determined what were the character of teinds in the hands of a certain heritor, then all future localities were to be regulated by that decision.

LORDS BENHOLME and NEAVES concurred.

Agent for Reclaimer—James Daigleish, W.S.

Agent for Respondent—W. H. Sands, W.S.

Friday, November 4.

## FIRST DIVISION.

WALLACE v. FISHER & WATT.

(*Ante*, v. 42.)

*Agent and Client—Responsibility of Agent for Neglect.* Circumstances in which agents were held not liable to their client for the expenses incurred in an action, which he had lost through an alleged omission on their part in carrying out a business transaction between him and two other parties, in consequence of which one of the latter was held free of the engagement.

This was an action brought by Mr Wallace of Auchinvole against his law agents, Messrs Fisher & Watt, writers in Glasgow, in order to recover a sum of £616, with interest, being the expenses incurred and paid by Mr Wallace in a previous unsuccessful action against Mr George Cadell Bruce, civil engineer (see 5 Scot. Law Rep. 42). This action Mr Wallace alleged was lost by him, and these expenses incurred, through the unskilfulness or neglect of the defenders in the conduct of his business, and particularly through their having made an unauthorised alteration on a certain document, and having failed to get it validly executed by the said Mr Bruce.

The pursuer had let the coal in his lands of Shirva to a Mr Wingate for the space of fifteen years from 1860. Wingate, in 1862, became desirous of getting out of the concern, but was not al-

lowed to do so by Mr Wallace. Wingate then tried to obtain a partner in the adventure, and first proposed a Mr Dennistoun, who was objected to by Mr Wallace; he then brought forward the foresaid Mr Bruce, who was approved of by the pursuer. In order to carry out their arrangement, and have Mr Bruce assumed as a joint-tenant, Messrs Wingate and Bruce employed the present defenders Fisher & Watt, who then acted as agents for the pursuer, to prepare a minute of agreement between them, whereby Wingate was to acknowledge and declare that the lease he held from Mr Wallace stood in his person in trust only, for the joint use and behoof of himself and Bruce. The defenders accordingly prepared such a draft minute, and handed it to Wingate for revisal by him and Bruce. The draft was revised and adjusted by them, or their agents for them, then superscribed by Wingate and Bruce, and returned to the defenders, to be extended for signature. The only alteration made by Wingate and Bruce (or their agents was the insertion, on the margin, of a clause intended to be expressive of the pursuer's approval, in these terms—"by whom these presents are also signed in testimony of his approval thereof." On extending the draft, Messrs Fisher & Watt, or one or other of them, caused to be added to this marginal addition the words "but without prejudice to his legal rights." This they did without informing Messrs Wingate and Bruce, or their agents, and getting their approval, nor did they bring the alteration under the notice of the pursuer. According to special instructions, the minute of agreement, after being extended, was forwarded to the pursuer, on the understanding that he was to get it executed. It was signed by him and Wingate before the same witnesses, and the pursuer then forwarded it by Wingate to Bruce for his signature. The deed never returned into the custody of either the pursuer or the defenders. Matters remained in this state for two years, with the exception that the pursuer was, during the early part of that time, in communication with Bruce as to his taking out a new lease in different terms from the former one; and that in November 1862 the pursuer requested the defenders to recover the minute of agreement out of the hands of Messrs Wingate and Bruce. The defenders accordingly at the pursuer's request wrote twice, in November and December 1862, requiring Wingate to return the minute duly signed, but this they had reason to believe was only intended by the pursuer to bring his new negotiations with Mr Bruce to a head. In 1864, in consequence of Wingate having left the country and deserted the colliery, the pursuer raised an action against Wingate and Bruce, concluding for payment of arrears of rent, lordship, &c., due to him. On the said action being called in Court, the pursuer obtained decree in absence against Wingate, and a record was made up and closed between the pursuer and Bruce. After a proof, the Lord Ordinary (JERVISWOODIE), on 17th July 1866, pronounced an interlocutor assailing Bruce from the whole conclusions of the summons, and finding him entitled to expenses. In the note annexed to this interlocutor the Lord Ordinary states the grounds of his judgment to be that the defender had never executed the extended deed, and "never approved of, and is not shown to be a party to, the alteration of the minute of agreement which, as candidly stated by Mr Fisher, who was agent for the pursuer, the defender never saw and never approved;" and his Lordship held that he was not

bound by the draft as so altered. Against this interlocutor the pursuer reclaimed to the First Division of the Court of Session, and by letter, dated 22d October 1867, intimated to the defenders that he held that they were liable to protect him against loss through their failure in properly carrying out the transaction. The First Division, on 22d November 1867, adhered to the interlocutor of the Lord Ordinary, and found the pursuer liable in additional expenses.

The pursuer then raised the present action against the defenders, to recover the expenses incurred and paid by him in the above-mentioned action, in which he contended he had failed through their fault in having altered the draft after revival by Wingate and Bruce, and through their failure to get it duly executed and recovered from Messrs Wingate and Bruce. On 1st June 1870 the Lord Ordinary (ORMIDALE) pronounced an interlocutor finding the defenders liable to reimburse the pursuer in the expenses incurred by him in the action against Bruce, proceeding on these grounds—(1) That the defenders, as agents, failed in their duty, in respect that they did not get the deed executed after it was extended. (2) That they had no right, at their own hand, to add the clause above-mentioned to the draft after it had been revised by the parties. (3) That they had failed to inform the pursuer of the fact that this addition had been made.

The defenders reclaimed.

WATSON and TRAYNER for them.

FRASER and MONCREIFF in reply.

At advising—

LORD DEAS—The pursuer Mr Wallace is a writer to the signet in Edinburgh, and proprietor of the lands of Shirva in Dumbartonshire. He had let the coal on these lands in 1860 to a Mr Wingate for fifteen years with certain breaks. In 1862 Wingate proposed to assume a Mr Bruce as joint-tenant of the coal, and the pursuer approved of the arrangement. Wingate and Bruce then instructed the defenders, Fisher & Watt, to prepare a minute of agreement between them, stating that Wingate held the coal for the behoof of both. Such a minute was prepared, and the pursuer had nothing to do with it; he certainly took an interest in it, but was not a party to it. The expense of preparing it was charged to Wingate and Bruce and paid by them. The draft so prepared was handed to Wingate and Bruce, whose private agents added a clause of consent on the part of the pursuer, in the shape of a marginal addition. The draft was thus sent, as I have said, to the agents of Wingate and Bruce for revival, but when it came back there was no room for farther revival, except of the marginal note, and in doing so the defenders added the words "but without prejudice to his legal rights." The pursuer was quite satisfied, and ordered the deed to be extended for execution. The signatures of Wingate and Bruce had been put on the top of the first page of the draft, but at what time it is not certain. The deed was extended and handed to the pursuer by the defenders, signed by him and Wingate, and then sent by the hands of Wingate for signature by Bruce. The deed never came back into the custody of the pursuer or the defenders. Matters remained thus for two years, when Wingate went off to Australia, having made away with the deed. The pursuer then brought an action against Bruce as joint-tenant, and in that action failed, and was found

liable in expenses, on the grounds given in the Lord Ordinary's interlocutor of date 17th July 1866, and this Division of the Court adhered to that interlocutor when it was brought before them for review—the main grounds being that Bruce was not bound by the deed, as he had never signed it, and, from the alteration after revival, might at any time have refused to sign the deed. In consequence of losing that action, the pursuer brings this action of relief against the defenders, his agents, on the ground that the case was lost owing to gross carelessness on their part in connection with the draft minute of agreement. The Lord Ordinary, in a long and elaborate interlocutor, finds him entitled to such relief, and upon three grounds—(1) That the defenders, as agents, failed in their duty in not getting the deed executed: (2) that they had no right to alter the draft after revival; and (3) that they did not tell the pursuer that they had altered the draft, after revival, and without communicating with the parties. We must examine these three grounds in order. To the first ground the objection arises that the parties might have refused to sign the deed after it was extended, and it does not therefore seem fair to hold the agents responsible for non-execution; however, in this case there seems no ground for supposing that they would have refused if pressed, so that objection falls.

In the ordinary case it is certainly the duty of an agent who has drawn a deed to get it subscribed, but if the party himself offers to get it signed, and fails, it does not follow that the agent is liable for the consequences of non-execution, because he did not insist in getting it executed. In this case if the pursuer, being a professional man, undertook to get the deed executed, or if he interfered in such a way as to make the defenders think that he meant to see the deed executed, it would be enough to save the defenders from such an accusation of carelessness and gross neglect. In order to see whether the pursuer did conduct himself in such a manner as to afford an excuse to the defenders, it is necessary to look at the correspondence and the evidence upon the point in the proof, from which I think it appears that if he did not actually undertake to get the deed completed, he certainly led the defenders to conclude that he intended to do so.

It is very important to observe that the pursuer does not seem to have considered the minute of agreement as a final settlement. After the deed was extended and in his hands, and signed by himself, and Wingate, and forwarded to Bruce, he did not press for getting it signed. He wished on the other hand to leave things as they were; he was arranging for granting a new lease. This goes very deep into the matter of delay. We have it in evidence that while the deed was still unexecuted, he was, with the knowledge of the defenders, corresponding with Bruce, and trying to arrange the terms of a new lease. And that goes far to countenance Fisher's statement, that when he was instructed to write to Wingate for the return of the deed signed, it was not so much a wish to have the deed completed as a hope of re-opening negotiations that influenced the pursuer. The deed had certainly been sent by the pursuer to Bruce for execution, and he no doubt instructed the defenders to write for it, but it was not with the intention of getting the deed returned that he gave these instructions, and the defenders were quite aware of that; they knew that he wished to

induce Wingate and Bruce to take a new lease. They may have been a little careless in letting the matter drop, but according to the pursuer's own account, he was not very anxious about the deed, and that is enough to protect them from the accusation of gross neglect in not seeing that the deed was duly executed and completed. As regards the second ground, viz., that the defenders had no right to alter the draft after revisal, if this is taken by itself and not in connection with their not telling the pursuer that they had made the addition, there does not seem to be such gross neglect displayed. What was done is called an addition after revisal, but the draft was a different document when the pursuer was made a party to it, and the defenders, as agent of the pursuer, were bound to revise the marginal note. The addition could not have been made sooner than it was made. There is then nothing in this second ground when taken by itself, but it runs into the third ground, viz., that they did not tell the pursuer of the addition and the circumstances under which it was made. In discussing this, I assume that there was, strictly speaking, an irregularity in extending the deed without getting the draft re-revised by the agents of Wingate and Bruce. But the question is, was there so gross an irregularity as to give the pursuer a claim for relief? We have this at all events, the addition is made by the agents in the pursuer's interest, and under his general instructions to be very careful of his legal rights, and we have it from the pursuer himself, that he noticed the words afterwards, and considered them superfluous, but did not object to them. This surely does away with the imputation of gross fault in putting the words there, so far as the words themselves are concerned. The point of the case, therefore, apparently is, did they tell him that the words had been added after revisal, and if not, whether their not telling him was such a gross neglect as to give the pursuer a claim of relief—if they had told him no such question could arise. The pursuer says they did not tell him; but I think it will be seen that his evidence, all through, is not very clear. He is speaking of a matter which took place years ago, and which is a mere question of memory. He admits that he was always urging Fisher to look strictly after his legal rights. Then we have the fact that Fisher did make the addition, and if so, is there anything more likely than that he told the pursuer that he had done it? The probability seems to be, that Fisher's statement that he did tell the pursuer of the addition is the correct one, and this is the more likely, when all the circumstances are considered. In the letters which the pursuer wrote after the Lord Ordinary had pronounced an interlocutor adverse to him in his action against Bruce, he makes no suggestion that he was ignorant of the fact that an addition had been made after revisal, and yet that unrevised addition is the ground upon which the Lord Ordinary principally goes, and the pursuer in stating the whole of his objections to the interlocutor, would surely have made some observations as to that ground, if he had then heard of it for the first time. Taking what the pursuer admits, and the nature of the thing that was done, together, have we not almost express confirmation of what Fisher says, that he told the pursuer of the addition after revisal? The conviction is carried home to my mind that Fisher told the pursuer not only of the addition, but of its being done after

revisal. The only room for doubt is, whether he said that he had not told Wingate and Bruce subsequently. But is that a gross fault? If he did not tell them expressly, could they not see it? It was a mere amplification of what was there already. It might have been better if he had written and told them, but it was not a gross fault, or one of such a nature as to make him liable in relief to his own client, whom he had told of it. Generally we have it from the whole circumstances, that the pursuer never wished the deed to be executed and carried out. The main question is, whether the agents (the defenders), or the principal (the pursuer), are responsible for a delay such as this, where the principal had shown a disinclination to have the transaction carried through. Taking these things together, I cannot think that the defenders have been guilty of such gross fault as to expose them to liability. Keeping in view the principles which we went over thoroughly in the case of *Hamilton v. Emstie*, 27th Nov. 1868, 7 Macph. 173, and which are fixed in cases of this sort, I am of opinion that the failure in duty here is of such a slight kind as not to expose the defenders to such consequences as the Lord Ordinary has imposed on them. I therefore think that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied from the conclusions of the action.

LORD KINLOCH—I have considered this case with all the anxiety and attention demanded by its importance; and by the ability and elaborateness of the Lord Ordinary's interlocutor. I have arrived at the conclusion that the judgment should be altered, and the defenders assoilzied. I shall endeavour briefly to explain the grounds of my conclusion.

The ground of the action is professional negligence; and the damage caused by this negligence is alleged to have been the loss of an action brought by the pursuer Mr Wallace against Mr George Cadell Bruce, civil engineer. The action was brought for the rents of a certain coal field, in which Mr Bruce was said to be joint tenant with a Mr Wingate. And Mr Bruce was sought to be made liable on two grounds. (1) That he had subscribed a minute of agreement creating such joint tenancy. (2) That at all events he had approved and signed a draft of this minute, and that this, coupled with *rei interventus* following on it, was sufficient to infer responsibility. This action is said to have been lost through the professional misconduct of the defenders Fisher & Watt, (1) because they undertook to get the minute of agreement signed, and did not—in consequence of which there existed no completed minute to bind Mr Bruce; (2) because, after the draft minute was adjusted and signed by Messrs Bruce and Wingate, the defenders inserted certain words in it without communicating these to Mr Bruce; in consequence of which the Court held the draft minute not binding on that gentleman.

In regard to both the one point and the other, I am satisfied that there occurred no professional misconduct on the part of the defenders inferring the responsibility alleged.

The facts which appear to me necessary to be borne in view in order to the decision of the case are simply these. The pursuer Mr Wallace was landlord of the coalfield in question, and had granted a lease of it for fifteen years from Martinmas 1860 in favour of Mr Walter Wingate, ex-

cluding assignees and sub-tenants. It was represented to the pursuer that Mr Bruce was anxious to join Mr Wingate in this tenancy; and the pursuer intimated his willingness to receive him as joint tenant. The defenders Messrs Fisher & Watt, who were the pursuer's ordinary law agents in Glasgow, were employed to prepare the minute of agreement between Bruce and Wingate, at the expense of these gentlemen; and they drafted a deed expressing that Mr Wingate was to be considered to hold the lease for the joint behoof of himself and Mr Bruce. As originally drawn, the pursuer Mr Wallace was no party to the deed; it was exclusively the deed of Bruce and Wingate.

In returning the draft revised, Messrs Bruce and Wingate proposed that the pursuer, as landlord, should sign the minute in token of his approval; and in this view they had added on the margin of the draft these words after the name of the pursuer: "By whom these presents are also signed in testimony of his approval thereof." The minute, with this addition signed at the top by Messrs Bruce and Wingate, in token, it is said, of their approval of its terms, was left with the defender Mr Fisher, who, before extending it, added to the words so introduced the words "without prejudice to his legal rights." Mr Fisher apparently did not think it necessary to communicate the addition of these words either to the pursuer or to Messrs Bruce and Wingate; and extended the minute with the words added to those suggested by Bruce and Wingate. The minute as thus extended was signed by Mr Wingate and by the pursuer, and was taken away by Mr Wingate for the purpose of his obtaining the signature of Mr Bruce.

This took place in the month of May 1862; and on the 7th November of the same year, the deed not having re-appeared, the defenders wrote to Mr Wingate, saying, "The agreement between yourself and Mr Bruce being now signed, as we suppose, we request you will send it to us immediately, that we may have the testing clause filled in, and the deed completed." A renewed request to the same effect was made to Mr Wingate in a letter dated 1st December 1862. The deed was not sent back, and matters so remained when, in May or June 1864, Mr Wingate absconded, indebted to the pursuer in a considerable sum of rent.

It now became the interest of the pursuer to hold Mr Bruce, if possible, responsible for these rents; and the action already alluded to was raised by him against Mr Bruce. It was decided against the pursuer by an interlocutor of Lord Jerviswoode, affirmed by the Court, on the ground—"that the pursuer has failed to prove that the defender approved of the draft-minute of agreement referred to on record, as the same was ultimately framed and extended, or that the defenders ever subscribed or executed the same."

It is now contended that the defenders undertook a professional responsibility to the pursuer to get this minute signed and returned by Mr Bruce; and that it was through their professional negligence that he was prevented from succeeding in his action against Mr Bruce, in consequence of the want of a completed minute.

I consider this plea wholly untenable. The minute, it must be remembered, was substantially the deed of Bruce and Wingate. The pursuer Mr Wallace had nothing further to do with it than to give his approval as landlord to the assignation of the lease by Wingate in favour of himself and Bruce jointly. The deed was not one desired or

sought by the pursuer; or in which he had any material interest, or, indeed, any interest at all, until Wingate's failure in 1864 made it expedient to endeavour to extort the rents out of Bruce. It was not a deed to be returned to the pursuer, or kept as the pursuer's evident by himself or his agents. It was the deed of Bruce and Wingate, to be gone on with to completion, or not, as these gentlemen might think proper. If they did not proceed with the deed, and dropped the idea of a joint-tenancy, I see no ground whatever on which the pursuer, Mr Wallace, could have compelled the execution of the minute; and more especially no ground on which he could lay the burden of enforcing this execution on the defenders Fisher & Watt. It appears to me altogether opposed to the true relation of the parties, to suppose that Fisher & Watt undertook a professional responsibility to the pursuer Mr Wallace to get the deed signed and returned. It was for Bruce and Wingate to complete the deed if they thought proper. If they did not choose to do so, the pursuer could not lay on the defenders the consequences of the refusal. It might be very proper for the defenders, who had prepared the deed, and naturally fell to fill in the testing clause after it was executed, to ask it to be returned to them for this purpose. But when no response was made to their request, I am wholly at a loss to perceive any ground on which they can be held to have been bound to the pursuer Mr Wallace to get the deed completed and made effectual.

What the pursuer contends ought to have been done by the defenders was, to renew on Mr Bruce an urgent demand for the return of the completed deed. But suppose that they had done so, it does not in the least follow that Mr Bruce would have complied with the demand. In the circumstances, I think the strong probability is that Mr Bruce would have first delayed, and afterwards refused, its execution; as, in point of fact, he did ultimately refuse. Now, in order to make out any good claim against the defenders it would be necessary for the pursuer to show, not only that the steps proposed should have been taken, but that they would have been successful, and would have issued in the deed being executed. It is impossible for the pursuer to show this. In every point of view, therefore, I consider this ground of claim against the defenders to be without foundation. The defenders, as agents, undertook the preparation of the minute in question, in terms of their instructions. They were bound also duly to complete it by the insertion of the testing clause, if the deed was brought back to them for that purpose. But to hold them responsible to any one that the deed should be completed and effectual, and especially to hold them so bound to the pursuer, appears to me a very unwarrantable and a very extravagant conception.

But the pursuer further pleads, that the defenders committed professional negligence, or exercised a want of professional skill, by their insertion in the minute of the words "without prejudice to his legal rights," without communicating the insertion to Mr Bruce; and that to this professional culpability must be ascribed the loss of the action against Mr Bruce, which was laid in part on the signed draft as followed by *rei interventus*.

Here again the observation naturally occurs, that as the signed draft, even if unobjectionable would have been ineffectual without proof of *rei interventus*, it does not appear whether any effectual

case of liability would have been made out had no ground of objection lain against the draft; that is to say, it does not appear whether any sufficient *rei interventus* could have been proved to set up the draft as an obligatory instrument. But waiving this consideration, it is plain that the pursuer must establish that what occurred constituted professional misconduct on the part of the defenders towards him, the pursuer. The question now is not with Mr Bruce. It is with the pursuer, who alleges that in their character as *his* agents, the defenders did something amounting to professional culpability.

I conceive that nothing of this kind can be justly predicated of the defenders. In adding to the approval by the pursuer of Mr Bruce's adoption as tenant the words "without prejudice to his legal rights," the defenders were eminently acting in the interest of the pursuer, and doing what the pursuer himself wished done, namely, to take care that this adoption of a new tenant did not affect any accrued rights then existing in his own person. That the defenders did not communicate this addition to Mr Bruce by any formal letter, before sending him the extended deed (which shewed it on its face), does not, I think, constitute any professional negligence or want of skill on the part of the defenders, far less that gross culpability which would be necessary to sustain a claim of legal reparation. The defenders thought that the addition was so much a matter of course, and was so entirely inoperative to create a variance in the relations of the parties, that such a communication was unnecessary. To say "without prejudice to his legal rights" was what all must have understood, and what the nature of the case implied, without any formal expression. It did not in the slightest degree alter the position of the parties, or vary the obligations as they stood previously. The pursuer Mr Wallace expressly depones to this having been his own opinion. The addition did harm to nobody; perhaps good to none. It only put a clear expression on what was otherwise understood. So the defenders argue, and maintain that no professional culpability can be inferred from the proceeding. I agree with them to this effect, that no such culpability took place as can form the foundation of a legal claim. In a very strict point of view it may be said that an agent ought not to add a single word—not even such as may be necessary to complete the sense—to an approved draft. But something a great deal more than this would be requisite to infer the gross negligence, or want of ordinary professional skill, which must lie at the foundation of a claim of liability. I think to say that such occurred in a question with the pursuer, when the defenders, acting in the pursuer's own interest, added "without prejudice to his legal interests" to his approval of the lease, is, again, a very unwarranted and a somewhat extravagant conception.

It is true that in the action afterwards raised against Bruce it was found by the interlocutor of Lord Jerviswoode, affirmed by the Court, that the circumstance of this alteration in the draft minute, being unauthorised by Mr Bruce, was sufficient to exclude all liability on his part arising out of the signed minute: and this judgment we must now hold a well-founded judgment. But the judgment did not in the least settle the question now before the Court, whether this result is justly attributable to professional culpa-

bility on the part of the defenders. It might well be that the Court held Mr Bruce liberated by any addition, however slight that was, unauthorised by him, without entering on the question what was the nature of the alteration, or its effect on his interests: but it does not follow that in a question between the pursuer and defenders the insertion of the addition shall be held a piece of professional misconduct. This is a widely different question, depending for its solution on wholly different considerations. There are many cases in which it has been held that an act was illegal, so as to justify suspension of diligence, and the like; and yet that the agent under whose professional guidance the act was performed was not liable for the consequences. To bring home responsibility to an agent, it is indispensable to show that the act involved gross professional negligence, or want of ordinary professional skill: and I do not conceive such to be established in the present case.

It was thrown out in the course of the discussion that the defenders were at all events bound to make good to the pursuer the expenses of the former action, (to which the pursuer ultimately limited his claim), in respect that these expenses were occasioned by the defenders concealing from the pursuer the fact that the addition was made to the draft after it had been revised by Bruce, and so allowing him to carry on his suit on a false medium, which it is said he would not have done had the true state of things been disclosed to him. I am of opinion that this subordinate ground of liability also fails the pursuer. I do not think it clear from the evidence that the defenders did in point of fact conceal from the pursuer the circumstance of the addition being made after Bruce revised the draft. I am thoroughly satisfied that there is no ground for imputing to the defenders any false statement on this head; and that so soon as the matter came up they made no attempt to conceal how it really stood. But assuming the pursuer's statement as to the non-communication of the fact at the outset of the case, the question always remains, whether in what is alleged there was professional culpability involved. Supposing the circumstance not communicated, the immediate defence is that the fact was not mentioned, and did not even dwell in the mind of the defenders, simply because they thought that in the circumstances the fact was wholly immaterial. They considered the validity of the minute to be unaffected by the addition; and the minute as falling to be dealt with on the footing of being wholly unobjectionable. They did not anticipate, and could not be held bound to anticipate, that the Court would take so strict and—as the pursuer himself characterised it at the time—so narrow a view as what ruled Lord Jerviswoode's interlocutor. The point was one on which different opinions might be reasonably entertained; and all that can be said is, that the defenders entertained, as did the pursuer himself, a different legal opinion from that ultimately arrived at by the Court. Such is the argument of the defenders, and I confess it is satisfactory to my mind. I cannot see sufficient grounds for holding the alleged non-communication to involve professional culpability; and, without such culpability, there is no case established against the defenders.

I would only say, in conclusion, that I think the Court ought rigidly to enforce the rules of professional responsibility wherever it is established that there has been gross negligence, or a want of ordi-

nary professional skill. On the other hand, to make an agent liable for want of success, where no such culpability can be fairly charged on him, and he was acting not only in good faith, but with zeal for the interest of his client, would be against all equity, and against all sound policy.

LORD PRESIDENT—The damage concluded under this summons is only the expense of the action against Mr Bruce, in which the pursuer failed, but as regards the two first grounds of action they would go much farther and make the defenders liable for all the consequences of not getting the deed duly executed and completed. The first ground is, that the defenders are liable because they did not get a deed completed which would have bound Bruce as a joint-tenant; if this were so, the defenders ought logically to be liable for all the rents, lordship, &c., which the pursuer failed to recover from Mr Bruce. But it appears very evident that the defenders did not undertake to get the deed executed, and the pursuer himself did not wish to have it executed.

As regards the second ground of action, viz.—the altering of the draft after revival—in order to establish this as a good ground the pursuer must make out a great many things. He must make out clearly that the defenders never communicated the alteration, and the circumstances under which it was made, to himself or to the other parties to the deed. He must, moreover, make out that Bruce, possessing along with Wingate, would in consequence of that draft minute, with possession and *rei interventus* following on it, have been liable as a joint-tenant. I cannot say that I would hold that he would be so liable; very difficult questions would arise as to whether one who was merely a beneficiary, as Bruce was under that minute, would be liable as a joint-tenant.

Then there is another very important objection; every liability of this kind must arise from a failure to discharge a duty undertaken. The professional men here did not undertake to adjust a minute which, followed by possession and *rei interventus* would operate as a contract. Such a ground of action would lead to claims much more extensive than those in this summons. If the tenant was lost to the pursuer by the neglect of the defenders, they would assuredly be liable to the pursuer for all he lost through the failure of his tenant.

The last ground of action, if well founded, would justify this summons and go no farther. It is this, the pursuer was allowed by his advisers to raise an action, which was unsuccessful, without their telling him that they had caused to be altered after revival, and had not seen duly executed and completed, a deed on which his case rested. The pursuer says that if he had been told of this he would not have raised his action, but we have no evidence of that. Now, when the judgment in the former action was pronounced we thought the ground very narrow and very difficult, and yet the pursuer says he would have foreseen that the non-execution and alteration of the deed would be fatal to his action. I think it not the least surprising that the defenders did not specially call the pursuer's attention to the alteration after revival and non-execution of the deed, because they thought it of no consequence. Had they known of the importance of the alteration and non-completion, and not communicated it to their client,

that might have been ground for professional liability, but it was not so here.

On the whole matter, I am of opinion that the interlocutor reclaimed against should be recalled and the defenders assolvied from the conclusions of the summons.

LORD ARDMILLAN gave no opinion, having been absent in the Registration Court during the debate.

The Lord Ordinary's interlocutor recalled, and the defenders assolvied from the conclusions of the action, with expenses.

Agents for Pursuer—Hill, Reid, & Drummond W.S.

Agent for Defenders—P. S. Beveridge, S.S.C.

Saturday, November 5.

HOOD v. HOOD.

*Process—Sheriff-court—Competency—Amendment of Summons—Aliment—Contract of Separation, Held* that arrears of aliment were due to a wife on a formal, though voluntary, contract of separation, up to the date of the action, when the husband judicially revoked the contract; and that, the circumstances being suspicious, the husband must satisfy the Court of his *bona-fides* in revoking the contract and offering to receive back his wife, before they will finally dismiss the claim for future interim aliment. *Held*, farther, that an action for interim aliment only is competent in the Sheriff-court. Record allowed to be amended by the insertion of the word "interim," and of the grounds of separation and claim for aliment.

This was an appeal from the Sheriff-court of Forfarshire, at the instance of Mrs Margaret Phillips or Hood, against the Sheriff's interlocutors pronounced in an action for aliment brought by her against her husband, the respondent, William Hood, a guard on the Caledonian Railway at Aberdeen, afterwards a carter in Brechin, and now, since the date of the summons, residing in Brazil, or elsewhere abroad.

It appeared from the condescence lodged in the Sheriff-court that in April 1867 the appellant had been obliged to separate from her husband in consequence of his alleged ill-treatment of her, and of his alleged drunken habits. A minute or memorandum of agreement of separation between them was duly executed. This agreement set forth as the cause of separation, simply, "dissimilarity of temper and other circumstances," and in it the respondent agreed to permit his wife and children to occupy certain premises, and undertook to pay her weekly in name of aliment and support for herself and children, at the rate of nine shillings a week. The parties accordingly did live apart from the date of this minute of agreement, but Mrs Hood did not receive her aliment in terms of the agreement. Accordingly, on Nov. 4th 1868, she raised a summons in the Sheriff-court of Forfar, concluding for aliment under the deed of separation, up to the date of the action, under deduction of certain sums paid. In Nov. 1869 she was obliged to apply for a *meditatione fugæ* warrant against her husband, which was refused, and at the same time raised another action for aliment from the 4th Nov. 1868, in the same Sheriff-court.