JOHN LANG, Writer, Appellant.—*Keay—John Campbell.* No. 43.

STRUTHERS and Others, Respondents.—*Adam.*

Reparation—Agent and Client.—Held, (affirming the judgment of the Court of Session,) that a law agent was liable for loss arising from an heritable security being ineffectually completed, although drawn on the employment of the granter of the deed, and not of the lender of the money.

May 28, 1827.

2D DIVISION. Lord Mackenzie.

SIR JAMES COLQUHOUN conveyed to Henry Bell certain heritable subjects, at Helensburgh, in Dumbartonshire, by a feu-charter containing this clause:—'Declaring always, as it is 'hereby expressly provided and declared, that it shall not be 'competent to, nor in the power of the said Henry Bell, or his 'foresaids, to subfeu, sell, or dispose of any part of the said 'piece of ground hereby feued out, or buildings to be erected 'thereon, to be holden of him or his foresaids, or of any other 'interjected superiors; but allenarly, to be holden of and under 'the said Sir James Colquhoun and his foresaids, in all time 'coming; without prejudice, nevertheless, to the said Henry 'Bell, or his foresaids, to grant securities upon the foresaid pro-'perty, or to exercise any other right of ownership which may 'not be inconsistent with the manner of holding hereby pre-'scribed.'

On this property Bell erected hot and cold baths, and other buildings, and in this speculation Archibald Newbigging, merchant in Glasgow, had an interest. These parties being desirous to obtain a loan of L.1200, entered into a transaction with Young and others, the tutors and curators of Jean Struthers and others, who were minors, by which it was agreed, that the latter should advance the money on receiving a security over the property feued by Bell. Accordingly, Mr Newbigging employed Mr John Lang, writer in Glasgow, his ordinary agent, to frame the deeds necessary for this purpose, in consequence of which he prepared an heritable bond and disposition in security by Bell, to James Young and William Struthers, as tutors and curators for Jean Struthers, and to Jean Struthers and others themselves, conveying in common form the above feus, (under a right of redemption in favour of Bell and Newbigging,) with power to the Struthers to bring the subjects to sale, and to draw the price, if payment of principal and interest should not be duly made. In framing the deed, Lang expressed the obligation to infeft, and the tenendas clause, in these terms:—'I,

May 28, 1827. 'the said Henry Bell, bind and oblige myself, and my foresaids, 'on our own charges and expenses, to infeft and seise my said 'disponees and their aforesaids, in the said lands, baths, offices, 'buildings, and pertinents above disponed, to be holden of and 'under the said Sir James Colquhoun and his aforesaids, and 'immediate lawful superiors thereof, for payment of the feu-'duties, and casualties of superiority, and under the conditions 'specified in the feu-contract and disposition of said piece of 'ground, granted to me by the said Sir James Colquhoun, and 'that either by charters of resignation or confirmation, or both 'ways, the one without prejudice of the other. For effectuating 'which infeftment by resignation, I, the said Henry Bell, make 'and constitute,' &c. An indefinite precept of seisin was then inserted, which was followed by seisin and registration. The bond, so far as it contained an acknowledgment for the money, and an obligation for repayment, was granted also by Newbigging, who accordingly subscribed it along with Bell.

Thereafter, Lang prepared another heritable bond, by Bell to Newbigging, for L.2000 over the same subjects, and in the same terms, which was also completed by seisin and registration.

The bond to the Struthers, with the seisin, remained for a few months in the hands of Lang, who then delivered them to Newbigging. In 1811, these deeds were returned to Lang by the tutors, as their agent, and remained with him until 1818, when they were delivered to the tutors. In 1819 Newbigging became bankrupt, and was sequestrated, having previously disponed, for value, Bell's bond for L.2000, to himself and others, as trustees for Mrs Bogle. The particular manner of holding under which this conveyance had been made, having been observed by their agent, he applied to, and obtained from Sir James Colquhoun, in January 1821, a charter of confirmation, of the conveyances and infeftments in their favour.

The subjects, thus burdened by these two bonds, were, in October 1821, sold by Newbigging's trustee for L.1800, and the purchaser brought an action of multiplepoinding of the price.

The Struthers being advised that the confirmation obtained by Bogle's trustees, had made the L.2000 bond a security preferable to the one in their favour for L.1200, and the fund in medio not being sufficient to pay the L.2000 bond, did not make appearance, but intimated to Lang, that, as they held him responsible, he might do so if he thought fit; and they then raised an action against him for payment of the L.1200, with

interest, or at least for indemnity 'of all loss, damage, and ex- May 28, 1827.
'pense which they had sustained, or may sustain, in consequence
'of their security being postponed in and through the said John
'Lang having improperly omitted, or neglected, to render said
'heritable security in favour of the pursuers legally valid, and
'effectual, and preferable to all posterior securities over said
'subjects,' with expenses.

This action came at first before Lord Alloway, who found Lang liable; but thereafter, on its being explained that he had appeared in the multiplepoinding depending before Lord Mackenzie, Lord Alloway remitted the process to him; and the processes having been conjoined, Lord Mackenzie 'found, that 'in consequence of the insufficiency of the heritable security 'executed by the defender, the pursuers have lost the preference 'which they would otherwise have had upon the price of the 'piece of land libelled, and subjects thereon, by virtue of which 'preference they would have drawn full payment of the debt of 'L.1200 libelled on, with interest; whereas they will now draw 'nothing from the said piece of land, and subjects thereon. 'Therefore, finds the defender liable to the pursuers in pay-'ment of the said debt and interest thereon, of which ordains 'the pursuer to give in a precise state, as far as relates to the 'interest already due. But finds, on receiving said payment, 'the pursuers are bound, in case the defender shall desire it, to 'assign over to the defender their rights to the said debt and 'interest thereon, in order to his operating his relief from any 'other fund of the debtor, if any there be,' and found expenses due. To this judgment the Court, on the 2d February 1826, adhered.*

Lang appealed.

Appellant.—The appellant was employed by Newbigging, and did all he was desired to do. He had no authority to take confirmation, and was not bound to act beyond his instructions—a mandatory must act intra fines mandati. No consideration of utility, or benefit to his employer, will warrant a deviation from instructions. Much more is this clear with a third party who did not employ the agent. The appellant occasionally had done trifling matters of business for the respondents, but was not their ordinary agent, and in this matter was not employed

* See 1 Shaw and Dunlop, No. 281, for the opinions of the Judges.

May 28, 1827. by them. The deeds, shortly after their execution, were delivered up to Newbigging, and when the tutors of the respondents replaced them in the appellant's hands, they gave him no directions to obtain confirmation, but after some years received them back in the same state they were when so deposited. But a law agent, even if bound to go farther than the express instruction of his employer, is not under any obligation to take so expensive a step as confirmation, unless money be placed in his hands for that purpose. Even if the appellant had erred in framing the deed, or in not obtaining confirmation, he is not liable if he entertained an incorrect view of a matter attended with difficulty. It is not required of a law agent that he possess the highest degree of skill which any member of his profession can possibly attain; and if he exercises a reasonable degree of skill and prudence, he will be exonerated. But the First Division of the Court of Session had entertained great difficulty in a similar case, Rowand and Campbell; a hearing in presence having been ordered, and the Judges divided in opinion. In a case, therefore, like the present, where it is not clear that the appellant was wrong; or rather, where it is, on sound legal principles, clear that he was right; and where it is the customary practice for conveyancers in his neighbourhood, to draw similar deeds in the shape he adopted, it is impossible to make him liable. Besides, it is important that, de facto, no money was advanced by the Struthers' tutors, and this the appellant was ready to prove, but was not permitted.

Respondents.—The appellant was employed, for a pecuniary remuneration or hire, to frame a deed of security for the respondents. He had been their agent previously, and continued to be so. It is of no importance who conveyed the instructions. His duty was, to see that a deed was drawn and executed in such a shape and manner as to be a perfect security. It matters not that Newbigging gave no directions as to confirmation. The appellant, as a professional man, knew, or ought to have known, that a confirmation was necessary, and that without it all that had been done was null and void. If he neglected taking that step, either from oversight or ignorance, he is responsible to the person for whose behoof he framed the deed. A conveyancer is employed because ordinary persons are ignorant of his art, and rely on his skill and accuracy. They cannot direct him; but by accepting the employment, he undertakes to do what is needful for their safety. As to having money in hand before obtaining confirmation, there was no need of a charter if

the deed had been properly framed. He might have framed the security with a double manner of holding, or might have granted a precept that the subject might be held feu of the granter. But having so shaped the deed, that it admitted only a public infeftment under the superior of the lands, if money had been required to purchase a charter of confirmation, he should have asked his employer for it; but he remained silent; and knowing the security could be defeated, allowed the respondents to believe they were perfectly secure. The appellant cannot shelter himself under the cover, that the highest degree of skill is not expected from a professional man. No extreme degree of skill was necessary. The most ordinary elementary book would have put him right. For oversight or neglect he has no excuse; and ignorance of the rules of business afford no defence against the claims of the party injured. The respondents were not aware of the defect. If the appellant had done his duty, there would have been no defect existing; value had been given for the bond. That value is declared received. The deed is probative—has been followed by seisin—interest was regularly paid for eight years; and therefore the pretence of no value is unfounded, and at all events cannot be listened to from the appellant. May 28, 1827.

The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed, with L.100 costs.*

Appellant's Authorities.—Clyne, Jan. 16, 1823. (2 Shaw and Dunlop, No. 118.)—Stewart, Nov. 12, 1794. (15027.)—Skinner, May 31, 1823. (2 Shaw and Dunlop, No. 338.)—Bell's Abstract of Deeds, p. 148—2 Stair's Inst. 3, 14.—2 Bank. Inst. 3, 9.—2 Ersk. Inst. 8, 34.—Campbell, Jan. 15, 1663. (1302.) 1693, c. 13.—Rowand, June 30, 1824. (3 Shaw and Dunlop, No. 141.)—Bell's Com. vol. 1. p. 369.—Grant, Jan. 1, 1791. (Bell's Cases, p. 319.)—MacLean, Nov. 15, 1805. (App. Reparation, 2.)—Burrow's Reports, vol. 4, p. 2060.—Campbell's Reports, vol. 3, p. 17.

Respondents' Authorities.—1457, c. 71.—1503, c. 91.—Craig, de Feudis, 2, 4, 16, 19.—Spottiswoode, tit. 5, § 1.—Bankton's Inst. 2, 3, 46.—Erskine's Inst. 2, 3, 20, —2, 7, 9, et passim.—Russel on Conveyancing, p. 224, 237.—Bell's Abstract of Deeds. p. 148.—Bell on Purchaser's Title, p. 26.—Morison's Synopsis, voce Reparation. (1343.)—Lillie, Dec. 13, 1816. (F. C.)—Douglas, July 3, 1817. (F. C.)—Currie, June 12, 1823. (2 Shaw and Dunlop, No. 382.)

RICHARDSON and CONNELL—A DOBIE, *Solicitors.*

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* This appeal was heard by the Master of the Rolls.