[1*st July* 1833.]

No. 30. CHARLES CLARK, Appellant. — *Dr. Lushington — Murray.*

JAMES SIM, Respondent. — *Stoddart.*

*Agent and Client — Reparation.* — Circumstances in which an agent who was employed by the lender of a sum of money, to be secured over an heritable subject, and also by the borrowers, to prepare the necessary deeds, but without any special instructions as to the form of the security, having constituted a real security, but neglected to insert a personal obligation on the borrowers or a power of sale in favour of the lender, it was held (affirming the judgment of the Court of Session) that he was liable for the loss sustained by the lender from the want of these clauses.

1ST DIVISION. Lord Newton.

THE respondent James Sim raised an action in the year 1828 against Thomas Kidd and five others as a committee of management of the Associate Burgher Congregation in Cupar Angus, and also against the appellant Charles Clark, a writer there, setting forth, that in 1811 the committee entered into a minute of sale with Clark, by which they feued from him a small piece of ground for the purpose of erecting a chapel or meeting-house on it; that during the year 1815, and before the chapel was finished, but after the work was considerably advanced, the pursuer was applied to by the committee to advance a sum of money to them in loan, to enable them to complete the chapel; that the pursuer having agreed to lend them the sum of 200*l.*

for this purpose, the parties waited on Clark, and requested him in his character of agent to get the necessary deeds completed; that at this time Clark had not granted to the society or committee any feudal title to the piece of ground, they having hitherto possessed it only in virtue of the minute of sale; that Clark, having accepted the employment, was bound to have prepared regular deeds in favour of the committee, for the purpose of feudally vesting in them, for their own behoof and that of the congregation, the subjects, and should therefore have caused them to execute a regular bond in favour of the pursuer, in order that he might have had not only the personal security of the committee and congregation, but also the ground and the chapel erected thereon, in real security to him for the money which he advanced; that in place of doing so, however, Clark executed a deed, purporting to be a feu disposition by him in favour of the committee, which was subscribed by Clark alone, and contained the following clause:— "And as we have been accommodated by James Sim, "farmer at Whiteley, with the sum of two hundred "pounds sterling to enable us to build the said church, it "is hereby declared, that after the feu duty payable for "said ground, which is declared a prior and preferable "burden, the said sum and the legal interest from the "date hereof, and which shall be payable to the said "James Sim, his heirs and assignees, (but the principal "sum of which cannot be demanded till two years from "this date,) shall also remain a real burden affecting "the said subjects, and as such is appointed to be en-"grossed in the infeftment to follow hereupon:" That this deed contained no personal obligation on any one for

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the repayment of the 200*l.* and annual rents; whereas, to secure the pursuer against loss or damage, a regular bond ought to have been granted by the committee of management, binding themselves not only personally, but, as authorized by the congregation, binding the whole members; that Clark infeft the committee, and officiated as notary, although he was the grantor of the deed; that the congregation had deserted the church; that the principal sum and considerable arrears of interest were now due; that the pursuer had vainly required payment of his loan from the committee or the members of the congregation, and that it had been thus through the culpable negligence or ignorance of Clark, in not preparing proper deeds containing personal obligations on the committee of management, and, as the representatives of the congregation at large, binding the whole members thereof for the payment of said loan and interest, and conveying to the pursuer, by a valid deed or deeds containing all the usual and necessary clauses, the piece of ground and chapel or meeting-house themselves in security, that the loss and damage to the pursuer had arisen, and the said Charles Clark was thereby, in the event of the pursuer not making good his claim from the said committee of management in regard of their non-liability or inability, liable and bound to indemnify the pursuer for such loss and damage. He therefore concluded against the committee for repayment of his loan with interest since 1820, and in case of failure to recover from them, then against Clark, both for these sums and such expenses as he had or should incur in endeavouring to make his claim effectual against the committee.

Clark alleged that he was employed by the committee alone; that they had informed him that if he made the loan a real burden on the disposition, the respondent would be satisfied that he had done so; that after the disposition had been delivered to the committee they employed him to act as notary, and that he accordingly took infeftment in favour of the committee. He therefore pleaded, 1st, that he was not liable for the money; and, 2d, that there was no objection to his acting as notary in giving infeftment.

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A proof was allowed, the respondent having undertaken to prove that the appellant was fully instructed to prepare deeds securing the personal responsibility of the congregation, as well as to constitute the real burden. Two witnesses, who were members of the committee, deponed that the respondent, "in lending the money, "insisted upon a bond over the property in addition "to the personal responsibility of the members, and "this was agreed to be given to him;" "that the de-"ponent was present in the house of David Ritchie, "vintner in Cupar Angus, when the respondent paid "down the money, and the papers were laid down by "the appellant; that he does not recollect the exact "words used by the respondent at the time, but they "were to this import:—that he hoped Clark would "or rather had taken care that all the papers were "right, as he had no other agent in the business; that "there was no other agent present at the time, and the "deponent is not aware of any other agent having been "consulted." Another witness, M'Lauchlan, gave testimony at variance with this statement.

The Lord Ordinary sustained the defences and assoilzied the defender, with expenses.

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Sim reclaimed to the First Division of the Court*, who (2d December 1831) altered the Lord Ordinary's

* The following are notes of the opinions of the Judges adverted to by the Lord Chancellor: —

*Lord Balgray.* — This agent should have put Sim in possession of an heritable security executed according to the ordinary course of practice, and conferring on the lender of the money the usual facilities for its recovery. He has not done this, but on the contrary has produced a very odd species of deed; it purports to be a feu disposition, executed and signed by himself alone. He advances no money; it is another person, Sim, who does so; and he introduces a statement as if on the part of the disponees, beginning "as we have been accommodated by James Sim with "the sum of 200*l.* sterling." The same clause then proceeds to say, "which sum shall be payable to James Sim, his heirs," &c. I should like to ask, payable by whom? There is nothing but the church bound to pay it by the deed. The agent should have explained to the parties, that, however much they wished to save expense in framing deeds, it was essential for the facility and security of a lender to have a personal obligation as well as heritable security, and without explicit instructions he should not have deviated so far from the course of practice as to leave the lender destitute of any personal obligants. I see no evidence that Sim was to be satisfied with a security so defective as this, which leaves him, if he has any individual personally bound to him, to seek them out, and prove the obligation by a proof led aliunde of the deed. It is quite possible that the motive of all parties might have been economy, and that this was the cause why such a deed was executed. But although this is a favourable circumstance for the agent, he has executed a deed which is professionally so much blundered that he has incurred personal responsibility to Sim. I am, therefore, for altering the interlocutor.

*Lord Craigie.*—I concur. A professional man, who is instructed by a lender of money to execute the necessary deeds for his interest, is not to be deterred by the expense from framing the requisite deeds and giving an effective security. Even if the lender and the borrowers expressed an earnest desire that as much economy as possible should be observed in framing the security, it was the duty of the agent to explain, especially to Sim, a rustic, what deeds were necessary in order to confer upon him the usual facility and security possessed by a lender of money under a heritable bond. When I look to the whole proceedings in this case I see so much looseness and blundering on the part of the agent, resulting in the injury of Sim, that I would alter the interlocutor and subject Clark as personally responsible.

*Lord Gillies.*—I take a very different view from either of the Judges who have spoken. The question arises in a penal action against this agent Clark, and it is, whether such prejudice has arisen to Sim from Clark's negligence of duty or ignorance of business as will justify us in subjecting Clark in damages. This is a question which we cannot decide against him upon vague or general views; there must be clear and explicit

interlocutor, and decerned in terms of the libel, but found him entitled, on payment of the debt, to an

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grounds to rest upon. Now what are the grounds in this case? Sim agreed with the committee to lend them 200*l.*; this was a transaction between themselves, to which Clark was no party. He appears to me to have been merely told that such a loan having been agreed on, the lender desired that it might be made a real burden upon the committee's infeftment in the disposition which Clark was about to grant in their favour. Clark did accordingly grant a heritable right to the committee, burdened with a sum of 200*l.*, and they were infeft under such burden. The sasine is perfectly valid; so far, then, Clark did what he was employed to do, and I think he was not employed to do more. The personal obligation of the committee could be so easily obtained, by their granting a bill or bond or letter to Sim, that he might do very well what he appears to have done by concurring in an economical arrangement profitable solely to the committee, and applying to Clark to lay a real burden on the infeftment in their favour, while he dispensed with the preparation of any formal personal bond. The preparation of such a deed would have been a source of professional emolument to Clark to which he could have had no objections if his instructions warranted its execution. But it is said he was bound to have suggested to Sim the expediency of such a bond, and that he is personally liable for not having prepared it. Under the circumstances, I do not think so; but even if it were so, what is the injury to Sim from the want of it? Are not the committee personally liable to Sim for this loan, as much as if they had granted a bond? They, as disponees, accept a disposition and infeftment, which narrates the loan to them, and declares it a real burden on the property disponed; they enter into possession of the church which was built with the loan, they occupy it for fourteen years, and they do not dispute the advance of the money. It cannot, therefore, be doubted that they are personally liable to repay Sim; and if they could have paid him under a charge of horning under a registered bond, they will equally do so under the decree recovered by Sim in this action. Thus Sim has his real security, and he has the personal security of those parties, who are as much bound as if they had granted a bond. I therefore conceive that this agent, who appears to have done his duty faithfully and honestly, and to have been laudably desirous to waive his own personal profit, is not liable in damages to Sim. The utmost which could have been required of him was to make a real security, and to have taken the bond or obligatory letter of the committee besides. The real security exists, and Sim has all these parties personally liable to him also. I therefore concur in the interlocutor of the Lord Ordinary.

*Lord President.*—At first my opinion was the same with that expressed by Lord Gillies, but, on looking at the evidence of Simpson and Kidd, my views were changed. They severally depone, that when Sim advanced the money he said to Clark, "that he hoped Clark would or rather "had taken care that all the papers were right, as he had no other agent in

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assignation from Sim, so as to operate his relief as accords.*

Clark appealed.

*Appellant.*—The present is a penal action brought against the appellant for alleged neglect of duty, and before judgment can be justly pronounced against him, two points must be clearly made out:—First, that he undertook the duty; and, secondly, that he failed in the performance of it. But it has not been proved that he undertook any duty different from what he performed. The security required to be executed by him was not an ordinary piece of duty, such as is every day committed to the charge of a law agent or conveyancer; on the contrary, it is admitted that the piece of ground upon which the chapel was in course of being erected had been feued by the appellant to the committee by minute of sale in the year 1811, and, before the title deeds or feu rights had been made out, the committee, being the parties with whom he had formerly contracted, came to him in the year 1815, and requested him to interpose

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" the business." From that instant Clark was the agent of Sim the lender, and incurred the responsibility of acting in that character. Had he meant to repudiate this, he should have immediately informed Sim that he could not act as his agent, and then Sim could have obtained another. But Clark did nothing of this kind, and being liable to Sim as his employer, I think there was so great a deviation from the course of practice, and so gross a blunder committed to the prejudice of Sim, that Clark is personally responsible. It is true that the mere obligatory letter of this committee might not have been better for Sim than what he has at present; but a registrable bond, or a bill, would have given him access to summary diligence, which could have been enforced as soon as there was an appearance of the breaking-up of the congregation, and at a time when the committee could have more easily made good their relief against the congregation. I concur, therefore, with the majority of the Court, and would alter the interlocutor of the Lord Ordinary.

* 10 S. & D. 87.

an heritable or real security on the building and ground in favour of the respondent for the sum of 200*l.*: which was done by him without fee or reward, or any charge beyond what was necessary for completing the feu rights in the ordinary manner, according to the original bargain.



The security prepared by the appellant was a good security in law for every purpose for which it was intended. The appellant has uniformly denied that he ever was employed by the respondent, and never conceived that he was so. But it is not necessary to argue the question, whether he was agent or was not agent for both parties, or how far he might not have been liable in the ordinary case to the lender of money, if upon the employment of the borrower he had undertaken to prepare deeds which he did not properly execute, and whereby the lender was injured. The respondent in the Court below rested much of his argument on the case of Struthers against Lang*, in which it was found by the Court of Session that a law agent was liable for loss arising from an heritable security, from being ineffectually completed, although done on the employment of the granter of the bond, not of the lender of the money; and which decision was affirmed.† But the appellant does not question the authority of that case. The defence of the appellant is of quite a different nature from what was there urged, and founded on a different principle altogether; viz. that he executed properly and well every duty which he undertook, and that he cannot be made responsible for the performance of duties which

* 1826. 4 S. & D. 421, new ed.
† 1827. Ante, Vol. II. p. 563.

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he never was employed to discharge and never undertook to perform. As therefore the interlocutor of the Court below, altering the interlocutor of the Lord Ordinary, proceeds upon an assumption that the appellant failed in the performance of duties which were never devolved upon him, and which, if they had, it would probably have been impossible for him or any one else to have performed, the judgment of the Court below ought to be reversed.*

*Respondent.*—An agent is liable to his employers for any loss sustained by his neglect. It is also a settled principle that the agent is equally liable for the result of his conduct, whether he is employed by the borrower or lender. The only question is, did he prepare the deed in question? and that being answered in the affirmative, his liability is a necessary consequence. An agent is bound to have the necessary knowledge of his profession before he undertakes professional employment, from which he is to derive emolument; and if he through ignorance or carelessness occasions loss to his employer he is bound to relieve him of that loss. Accordingly the appellant having been employed to prepare the security in favour of the respondent, and having neglected to frame the proper deeds or to use the proper stamps, is liable to the respondent for the damage sustained by him in consequence.

The nature of the security required from the borrower, and which the appellant was employed to draw out, was a bond containing a personal obligation, and affording at the same time a real security over the property of the

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* *Authorities.* — Fraser v. Wilson, 1 S. & D. 316; 2 S. & D. 472, (affirmed); 2 Sh. App. Ca., p. 162; Erskine, b. 4. tit. 2. s. 20.

congregation. The appellant was the agent of the ender as well as the borrower, and was specially required by the respondent to attend to his interest in the transaction. The Court accordingly held, that as the deed was perfectly useless to the respondent, and as the whole property over which the security was intended to extend had been carried away by the appellant in payment of arrears of feu duty to himself, and sold for that purpose, without leaving any surplus, he was liable in payment of the debt due to the respondent.*

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LORD CHANCELLOR.—My Lords, if the question of fact, which in the judgment you are to pronounce is the only question for the consideration of this House, and which was disposed of in the Court below, had appeared to have attracted the full attention of their Lordships in coming to the decision at which they have arrived, and if all the five Judges who dealt with this question had been agreed in the conclusion of fact upon which their decree proceeds, I should, according to the observation which I made to your Lordships yesterday in a case differing most materially from the present, have been slow to express any opposite opinion. But your Lordships are left without any particular knowledge of the grounds upon which the interlocutor was pronounced by Lord Newton; his Lordship simply assoilzies the defender from the conclusions of the summons; and Lord Gillies, who agrees with him in assoilzieing the

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* *Authorities.*—Maclean v. Grant, Nov. 15, 1805; Mor. App. I. Reparation, No. 2; M'Millan v. Gray, March 2, 1820; Fac. Col.; Struthers v. Lang, Feb. 2, 1826; 4 S. & D. p. 418; Ante, Vol. II. p. 563; Rowand v. Stevenson, July 6, 1827; 5 S. & D. p. 903; 6 S. & D. p. 272; Ante, Vol. IV. p. 177.

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defender, does not go explicitly into the question of the evidence, or into the grounds upon which he forms his opinion, nor does it appear that he had distinctly his attention directed to the question of fact and the consequences of it. The other three Judges, so far from dealing with that question, do not appear to have ever had their attention called to it, any more than Lord Gillies and Lord Newton, who begin by assuming it to be decided one way. They say, if a client gives instructions to a professional man to prepare deeds for certain purposes, and that professional man errs in the preparation of those deeds, whereby his client is injured, then that he (the professional man) shall answer for the damages which the client has sustained in consequence of his error in the preparation of the deeds. That is the sum and substance of the opinions of these two learned Judges, Lord Gillies and Lord Newton, which I take to be a proposition as clear as any that ever was stated, and to require no proof whatever. But the question here is precisely upon the fact which their Lordships assume; namely, whether there were instructions given? or if there were not, whether there was such an employment of this gentleman, Mr. Clark—either by his being directly employed by the party himself, or by his acting for the party, and the party adopting him as his professional adviser,—so as to give the party giving or adopting the employment the right to damages, and to have indemnity against any error committed by him, if it shall be found or admitted that he has committed error?

Now, my Lords, the only one of the Judges in the Court, from which the interlocutor is brought, of the First Division, who appears to have addressed his mind

at all to this question, and to have examined the evidence, is the Lord President; and he relies upon the testimony of two witnesses, one a person of the name of Simpson and the other of the name of Kidd; and upon that evidence he holds that there is sufficient ground for fixing Mr. Clark with the responsibility as a professional agent. But I must observe, that his Lordship says nothing of the evidence of M'Lauchlan, which, is, in my view of the subject, much more important, and has a much more direct bearing upon the question than the evidence of Simpson and Kidd, even if you suppose both of them to have been wholly unprejudiced and unbiassed witnesses. That is the impression I have had upon examining the evidence of M'Lauchlan; for it leaves no doubt of the fact upon the mind, as the evidence of Simpson does, even if you believe every one of his assertions. Now, no observation is made by any one of the Judges upon a circumstance which appears to be very material in considering this question of evidence,—namely, the lapse of time that has occurred; which is important in two ways, both as affecting the testimony of the witnesses, and also as affecting the merits of the case in regard to the thing done, or rather the thing omitted to be done. Here much depends upon the precise form of expression supposed to be used in the conversation referred to by Simpson:—that Sim, the lender of the money, said to Clark, the present appellant, "he hoped he would, or rather had taken care that all "the papers were right, as he had no other agent in "the business," and, he trusted to him. There is a considerable difference between these two forms of expression, and the Lord President seems to have been aware of that; because he appears, first of all, to have

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been on that side, but at last he seems to have understood the words as if they were, "he hoped he would "see that all the papers were right," and not "that he "had seen that they were right;" for he says, from that time Clark became the agent of Sim, and he was bound, if he did not mean to act as his agent, to repudiate the agency, and to give notice to Sim to this effect. Such is the purport of the Lord President's observation; but it must be recollected that the words are, "he hoped "he would, or rather had seen that all the papers were "right." I do not mean to say that this makes any very decisive difference as to the responsibility, in whichever form the expression is taken; because, if he had said, "I hope you have seen that the papers are right," and the other party did not immediately put him upon his guard and say, "Yes, they are all right, but I have no "personal bond from the parties," the obligation would have been just the same as against him, according to the Lord President's view of the case, namely, that he was bound to have repudiated the agency, and not to have gone on acting upon it after he had made the observation. But I mention this circumstance to show that the same observation does not apply to the evidence of M'Lauchlan, and to show how much the lapse of time may affect the credit of the testimony given by the witnesses. But it is also very material as regards another part of the case, namely, the value of the omission said to have been made by Clark, because it is admitted on all hands that even if no instrument were given, there was still the personal responsibility incurred by the borrower; he was bound without any letter or without any bill. That is referred to by the Lord President; the mere borrowing of money made a personal

responsibility beyond all doubt, and upon that personal responsibility, and that alone, the decreet has gone which has been pronounced against these individuals.

But then, they say, it is very true that upon their personal responsibility there might have been an action and a decreet against them; but if they had been bound either by bond or by bill there would have been a registration of the instrument, and you might have obtained summary diligence according to the admirable and wholesome provisions of the Scotch law, which I am happy to say I have every reason to expect now will soon become the law of this country. Now, the question is, what is the nature of the difference? And here the lapse of time is most material, although no observation is made upon it by either of the Judges; the difference regards the risk the creditor runs during the delay necessarily consequent upon taking proceedings on their personal responsibility without bond. He may bring his action and then get his decree; but persons may be solvent in the beginning of an action and insolvent at the end; in which case, if you had had a bond you would at once have obtained the fruits of it by a summary diligence. Now, with what face does the party complain of this injury when he lies by for thirteen years from the date of the transaction before he brings this action, and eight years from the time when the payments were in arrear? For he sets forth in his own summons that it was in the year 1815 that the money was advanced by him, and that the interest is due thereon since September 1820, and he brings his action in the year 1828. I do not mean to say that these circumstances are decisive one way or the other; but until I have more fully considered the whole of this

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case I cannot recommend to your Lordships to do more than give time for further considering the whole facts of this case, and the whole evidence upon which we may discuss the conclusion at which the Judges arrived in the Court below.

I regret exceedingly that a question of this sort should have found its way here. It is a question of no great importance as regards the amount, which does not exceed 200*l.*, and it is among parties some of whom are not in very affluent circumstances. I regret it, not only on account of the trifling amount of the sum in dispute, but also because it has not proceeded in such a course as could give it a fair chance of the most satisfactory decision; I mean in a trial by a judge and a jury, where there would have been the examination of the witnesses vivâ voce. How it happens that the other course was taken which leads to the greatest obscurity with the longest delay, and which must be the least satisfactory to the suitor, instead of that in the shortest time and with the greatest possible security to justice, it is not for me to inquire. But in the circumstances I think it would be better to postpone the final consideration of this question.

Adjourned.

LORD CHANCELLOR.—My Lords, when the case of Clark v. Sim was last before your Lordships I expressed the great doubts which I entertained upon the question of fact, from which I was not relieved by finding a concurrence of opinion among the learned Judges in the Court below by whom the case had been decided, two of those learned Judges taking

one view of the case, and the other three taking the opposite view: I entertained at that time so much doubt, that I could not advise your Lordships then to affirm the judgment. I feel bound to say that I still think it a matter of some doubt. I am not, however, prepared to say that the majority of the learned Judges were wrong; but taking it upon the whole, I am not disposed to advise your Lordships to disturb that judgment. Considering, however, the doubt which rested upon the matter of fact, and the questionable nature of some of the evidence, as a sufficient excuse for the party bringing that case by appeal before your Lordships, I think there is not ground for imposing upon him the payment of costs. Having made observations on the case when it was before your Lordships, I feel it necessary now to say no more than that I feel it my duty, upon the whole, to move your Lordships that the interlocutor be affirmed, but that I shall not advise that the respondent should have his costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

RICHARDSON & CONNELL—M'CRAE, Solicitors.