

to be affirmed. I should propose to your Lordships, therefore, that the former part of the decision of the Court of Session should be reversed, and that this part of the decision of the Court of Session should be affirmed. July 14. 1830.

The House of Lords pronounced this judgment:—‘ It is declared that the respondents are not entitled to a deduction, as at the 10th of November 1813, of one year’s interest of the consolidated amount of the debt, at the rate of 12 per cent, as part of the charge of remittance of such consolidated amount of debt to Great Britain; and it is therefore ordered and adjudged, that so much of the interlocutor complained of in the said original appeal as is inconsistent with the above declaration be reversed; and it is farther ordered and adjudged, that the said cross-appeal be dismissed, and the interlocutors complained of be affirmed: And it is farther ordered, that the cause be remitted back to the Court of Session, to do therein as may be just and consistent with the said declaration and this judgment.’

*Appellant's Authority.*—Campbell, Feb. 15. 1809, (F. C.)

*Respondents' Authorities.*—Rees' Encyclopædia, *voce* Usance; 1. Kelly's Cambist, 22. 29.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—  
Solicitors.

NATHANIEL STEVENSON, Appellant.—*Spankie*—*A. McNeill*. No. 30.

MICHAEL ROWAND, Respondent.—*Knight*—*Hunter*.

*Reparation—Agent and Client.*—Held, (affirming the judgment of the Court of Session), that a law agent, employed to prepare a security over a land estate, having inserted an obligation in the bond to infest a me, and neglected to get it and the sasine confirmed, whereby the security became unavailing, was liable in reparation to the client.

THE respondent, Mr Rowand, having got himself involved in pecuniary obligations to the extent of about L.1000 for Mr Campbell of Lochend, entered into an arrangement, by which, with a view to his relief, an apparent loan to the above amount was to be made by a Mr Wardrope to Mr Campbell, who was to grant an heritable bond over his estate in favour of Mr Wardrope, and he again was to assign this bond to Rowand. The appellant, Mr Stevenson, a writer in Glasgow, was employed by Rowand to carry this transaction into effect, by preparing and July 14. 1830.  
2D DIVISION.  
Lord Cringletie.

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getting executed the heritable security. After some correspondence with Mr Campbell's agent, (Mr Martin, who resided in Edinburgh, and who was at the same time making a separate loan to Mr Campbell), in the course of which he offered to send the title-deeds to Mr Stevenson, but which that gentleman did not require, an heritable bond was prepared by Mr Stevenson, in which he inserted the following obligation by Mr Campbell, viz: 'To  
' infest and seise the said Henry Wardrope and his foresaids, on  
' our own expenses, in the lands and others above disposed, to  
' be holden from me of and under my immediate lawful superiors  
' thereof, in the same manner as I hold the same myself, and for  
' payment of the same feu-duties as I pay, or am bound to pay  
' therefor.' This was followed by procuratory of resignation, and precept of sasine, for infesting Mr Wardrope and his assignees, in terms of the above obligation. The bond was executed by Mr Campbell, and sasine taken thereon at one and the same time with infestment on a bond for the loan by Mr Martin. An assignation by Mr Wardrope in favour of Mr Rowand was then executed, and the deeds were thereupon delivered by Mr Stevenson to Mr Rowand, who retired the obligations for which he was bound on account of Mr Campbell, and remitted to him a small balance in cash.

About three years thereafter, two other parties lent money to Mr Campbell on the security of his lands; and he having become bankrupt, and his estates being sequestrated, it was found, that if Mr Rowand's security was effectual, the lands were insufficient for the payment of these subsequent lenders. In the meanwhile, no confirmation had been obtained of the bond and sasine held by Mr Rowand; and the validity of his security, as in competition with the subsequent lenders, was on this ground challenged. The trustee on the sequestrated estate consulted Mr Professor Bell, who gave this opinion:—'I cannot hold the obligation to infest, as expressed in this deed, to be conclusive in characterizing as a public infestment only a seisin which has been  
' taken on an indefinite precept, granted, as the bond bears, 'to  
' the end that the said H. Wardrope may be immediately infest.'  
' I take this precept to be perfectly sufficient as a warrant for  
' an immediate base infestment, and that therefore Mr Ward-  
' rope's security is unexceptionable.' The question having been then brought before the Court, the Lords President and Balgray delivered opinions to the same effect, while Lord Hermand differed from them. But, after advising petition and answers, and a hearing in presence, Lord Hermand came to be of the opinion of

Lords President and Balgray, while these Judges arrived at the opinion which had been originally formed by his Lordship; and, in consequence, Mr Rowand's security was postponed to that of the other lenders. July 14. 1830.

The estate being insufficient to pay any part of the debt, Mr Rowand raised an action of relief, both of the debt and of the expenses he had incurred in the competition, against Mr Stevenson, on the ground that it was his duty, as a professional conveyancer, to have prepared a security unexceptionable in point of form.

In defence Mr Stevenson stated,—1. That the title was strictly correct in form; and that although the Court had arrived at the conclusion that a confirmation was necessary, yet he had not been employed to prepare such a deed, and he had apprised Mr Rowand that it would be prudent to have the title rendered complete, but he had declined to have this done. And, 2. That the deeds had been prepared under circumstances of much urgency and haste, occasioned by the anxiety of Mr Rowand, who was desirous in a concealed manner to have them prepared and executed. And, 3. That as the question had been attended with great difficulty, (as appeared from the conflicting opinions of the Judges), he ought not to be made liable.

To this it was answered,—1. That he had been employed, and had undertaken to obtain a security over the lands, effectual according to the forms of the law of Scotland; that in order to accomplish this, a confirmation was as much necessary as a sasine; that there could be no doubt that if he had neglected to take sasine he must have been liable; and it was not true that he had ever represented that any thing farther than what he had done was requisite to render the title complete. 2. That the statements as to urgency and haste were not correct; and at all events, as Mr Stevenson had undertaken to give a security valid in form, this could afford no relevant defence: and, 3. That the only difficulty which had existed arose from Mr Stevenson deviating from ordinary style, and introducing, in place of the usual obligation to infest a me vel de me, an obligation of a peculiar kind; and although he had thus created a difference of opinion among the Judges as to the effect of such a novel clause, he could not on that account be relieved of his professional responsibility.

Lord Cringletie, after issuing the subjoined note,\* and hearing parties, reported the question to the Court on Informations.

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\* 'The Lord Ordinary certainly thinks that the manner in which the bond was prepared, in obliging the disponer to infest the disponee, holding only of the disponer's superiors, was very ill judged. If he entertained a doubt whether he could make

July 14. 1830. On advising them, their Lordships allowed Mr Stevenson to put in a condescence of what he alleged, and his mode of proof as to what took place between him and Mr Rowand in relation to the confirmation; and thereafter, considering the condescence irrelevant, decerned in terms of the libel, with expenses. He then offered to refer to the oath of Mr Rowand, not that he had recommended him to obtain confirmation, but to take infestment on the assignation; and the Court, holding this to be irrelevant, refused to sustain the reference.\*

Mr Stevenson appealed, and endeavoured to draw a distinction between this case and that of Struthers, (ante, II. 563.)

LORD CHANCELLOR.—My Lords, There is a case which was argued a short time ago at your Lordships' bar, in which Mr Stevenson was the appellant and Mr Rowand the respondent. The general nature of the case was of this description. Mr Rowand employed Mr Stevenson, who was a writer, a professional gentleman, to lay out for him a sum of L. 1000, to be lent to Mr Campbell at Lochend, on the security of land which was his property. Mr Stevenson lent the money, prepared the instruments, and handed these instruments over to Mr Rowand, his employer. Some time afterwards, Sir John Campbell, and Captain Patrick Campbell, lent farther sums of money to Mr Campbell, which was secured on the same property; and afterwards, Mr Campbell falling into difficulties, sequestration was issued against him. The property became vested in the hands of trustees, and the value of the property being much deteriorated, and not being equal to the payment of all the debts, the parties began to consider their respective rights; and Sir John Campbell and Captain Patrick Campbell, on the investigation which took place, were led to conclude, that the security Mr Stevenson had effected for Mr Rowand on this property had been inaccurately completed, and that, therefore, his priority was at an end, and that they would have a preference in ranking on this estate. In consequence of this, certain proceedings took place in the Court in Scotland; and the Court ultimately decided in favour of the claimants, Sir John Campbell and Captain Patrick Campbell, as against Mr Rowand, in consequence of which Mr Rowand lost his security; and Mr Rowand has instituted the present proceeding for the purpose of recovering compensation against Mr Stevenson,

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' that obligation to include the holding of and under Mr Campbell, it was his duty to have  
' put the question to Mr Martin, who would have solved the doubt. But the Lord Ordinary does not see there could be any reason for doubting the competency of a base infestment in an ordinary landed estate. At present it appears to the Lord Ordinary, that  
' it was the defender's bounden duty to have expressly told Mr Rowand, that his title and  
' security was not complete till he obtained a charter of confirmation from Mr Campbell's superior. But the Lord Ordinary will hear parties on this.'

\* 5. Shaw and Dunlop, 903.; 6. Shaw and Dunlop, 272.

- the professional gentleman employed; on account of the losses he had thus sustained. July 14. 1830.

This, my Lords, is an outline of the case. The question turned upon the nature and the form of the security. According to the law of Scotland, all real property is supposed to be held of some superior. The instrument in this case, which was an instrument for the purpose of effecting the security, was an heritable bond, and the terms of the obligation were these :—‘ The property so disposed in security is declared in the said bond to be holden a me in manner following ; to be holden from me, of and under my immediate lawful superiors thereof, in the same manner as I hold the same myself, and for payment of the same feu-duties as I pay or am bound to pay ;’ so that it appears by the terms of this obligation, that the property disposed in security was to be holden from him under the superior lord. This obligation was followed by the ordinary procuratory of resignation, and by an instrument of sasine in general terms, not pointing out the manner in which the property was to be holden under that instrument of sasine. Mr Wardrope, in whose name the money was lent, who was a partner with Mr Rowand, and in whose name the security was to be taken, was infest, and the instrument of sasine was in the ordinary way entered on record. It appears, therefore, under these circumstances, according to these instruments, that the property was to be holden of the superior lord ; and that the infestment under that general instrument of sasine was an infestment by which Mr Wardrope, who may be considered in this case as representing Mr Rowand, was to hold the property of the superior lord.

But, my Lords, in order to complete such a security, it was necessary there should be a charter of confirmation from the superior lord in order to give efficacy to the infestment ; for the infestment was without warrant so far as the superior lord was concerned, and it appears that no application whatever was made by Mr Stevenson for the purpose of procuring this charter of confirmation. According to the ordinary mode in which conveyances of this kind are executed, the terms of the obligation are, ‘ to be holden a me vel de me.’ If the obligation had been in these terms, then the infestment would have operated as a valid infestment to constitute a base holding, which, as to third persons, would have been operative, whatever might have been the effect of it with reference to the superior lord.

When the case came into the Court below, in the contest between Mr Rowand on the one side, and Sir John Campbell and Captain Patrick Campbell on the other, it was contended on the part of Mr Rowand, that as the instrument of sasine was in general terms, and as it proceeded from Mr Campbell, it created at all events a base holding. On this ground the case was argued in the Court below. The Court was at first divided in opinion ; and it was not until after consideration, and much discussion, that they came to the opinion, that, looking to the terms of the obligation, the holding was to be con-

July 14. 1830. sidered a holding of the superior lord, and that therefore it was defective, inasmuch as there was no charter of confirmation. They considered, and I think properly considered, that as the instrument of sasine was in general terms, it must be construed in reference to the terms of the obligation; and as the terms of the obligation pointed out a holding under the superior lord, and under the superior lord only, that construction must be put upon the instrument of sasine; and that the infeftment must be considered an infeftment under the superior lord, and not being confirmed, and there being no warrant from him, it must be held to be defective.

My Lords, I beg to state, that the construction put by the Court of Session on this instrument is, in my opinion, the right construction. But in this case it is argued, and fairly argued, that that was a nice point—a point on which the Judges of the Court of Session were divided for a considerable time; that they did not come to a conclusion upon it until after much consideration; that Counsel of eminence at the bar had entertained an opinion that the security was valid; and that therefore it would be extremely hard that Mr Stevenson should be made answerable for such a mistake. My Lords, I apprehend the rule to be this, that a solicitor called upon to perform duties in his character as a solicitor, is not to be held responsible for every mistake in point of law which he may commit. Every person is liable to error, to mistakes in difficult and doubtful points of law; and if the question had turned solely on the construction of this instrument, I should be of opinion that Mr Stevenson was not liable. But, my Lords, the true distinction is this:—In this particular case, it appears that Mr Stevenson, without any sufficient reason, departed from the ordinary and beaten course, from the usual and established forms of conveyancing. The usual and established form of conveyancing in cases of this nature is, that the holding should be in the form I have stated—that the property should be disposed to be held a me vel de me. If the instrument had been drawn in that form, there would have been no question in the case. But if Mr Stevenson, either from inadvertence or from want of knowledge, chose to depart from the usual form, and to adopt another, raising unnecessarily a nice and difficult question, he must take the consequences upon himself. Had he turned out to be right, indeed, all would have been well; but having, from inadvertence or negligence, and without necessity, raised this question, it appears to me that he is responsible in point of law for the consequences of this act. Under these circumstances, I should recommend to your Lordships to confirm the judgment which the Court of Session have in this case pronounced, declaring that Mr Stevenson is liable to make good the loss sustained by Mr Rowand in consequence of his act.

I will take notice of two points which have been insisted upon by Mr Stevenson in his defence. It was stated at the bar that he was not in possession of the title-deeds, and that therefore he could not

see whether subinfeudation was or was not prohibited ; that this might have been prohibited, and there might have been a clause of irritancy. Now, without considering, and it is not necessary for the present inquiry to consider, what would have been the effect of such a prohibition, for it is unnecessary for the determination of the present case, it is sufficient to state, that it appears that Mr Martin, who acted as agent of Mr Campbell, the borrower of the money, was in possession of the title-deeds, and offered the inspection of those title-deeds to Mr Stevenson. He had an opportunity, therefore, of examining them if he had thought proper to apply for them ; and not having examined the title-deeds, he cannot rest his defence on the possibility of any supposed clauses, or any supposed prohibitions, contained in these title-deeds. July 14. 1830.

My Lords, it has been again stated, that at the time when these deeds were delivered by Mr Stevenson to Mr Rowand, he stated to him in distinct terms that they were not complete,—that they required confirmation,—and that he afterwards, I believe on more than one occasion, called to the recollection of Mr Rowand that the conveyance was not perfect, and that something further was required to be done. My Lords, in looking into the evidence, and considering the whole of the case in this respect, it appears to me that that part of the case admits of no doubt—that it is perfectly clear what was intended between the parties at the time. It does not appear that Mr Stevenson represented to Mr Rowand, that it was necessary that a confirmation should be obtained from the superior for the making the title good in Mr Wardrope ; but that, as the money was lent in Mr Wardrope's name, and the security was taken to Mr Wardrope, preparations were made for transferring the title from Mr Wardrope to Mr Rowand, and, until this were done, Mr Rowand's title was not complete. I am quite satisfied on looking into the documents, and I was quite satisfied from what I heard at the bar, that when it was stated that a communication had been made by Mr Stevenson to Mr Rowand that the title was not complete until something further was done, that such statement related not to the confirmation of the title by the superior lord, but to the conveyance by Mr Wardrope to Mr Rowand ; about which Mr Rowand was not at all solicitous, because Mr Wardrope was his partner, and he was perfectly satisfied of the solvency of Mr Wardrope. This is an explanation which is quite satisfactory to my mind, as far as it relates to that part of the case. Your Lordships perceive, therefore, that, as I before stated, a nice and technical point of law was without necessity raised by the neglect or the want of knowledge of Mr Stevenson ; that in consequence of that circumstance Mr Rowand has lost his security ; and I apprehend, under these circumstances, Mr Rowand is entitled to recover from Mr Stevenson the loss he has sustained.—I feel myself, therefore, called upon to recommend to your Lordships to affirm the decision of the Court below.

July 14. 1830.

The House of Lords accordingly 'ordered and adjudged, that the interlocutors complained of be affirmed.'

*Appellant's Authorities.*—(3.)—M'Lean, Nov. 15. 1805, (No. 2. App. Reparation); 4. Burrow's Reports, 260.; 3. Campbell's Reports, 17. Grant, Jan. 1. 1791; (Bell's Cases, 319.)

*Respondent's Authorities.*—(1.)—Ogilvie, Nov. 17. 1680, (13,956.) Drummond, Nov. 10. 1680, (13,958.) Scott, Jan. 3. 1696, (Ib.) Johnston, Dec. 9. 1709, (13,959.) Wood, Nov. 28. 1710, (13,960.) Robertson, July 27. 1725, (13,963.) Rae, July 29. 1741, (Ib.) Goldie, Jan. 4. 1757, (13,965.) Mason, Feb. 14. 1787, (13,967.) Lillie, Dec. 13. 1816, (F. C.); aff. May 25. 1819. Duguid, July 3. 1817, (F. C.) Currie, June 17. 1823, (2. S. & D. 407.) Struthers, Feb. 2. 1826, (4. S. & D. 418.); aff. May 28. 1827, (ante, II. 563.)

RICHARDSON and CONNELL—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 31. JAMES M'GAVIN, (Trustee on JOHN STEWART and Company's Estate), Appellant.—*Lushington—Hunter.*

JAMES STEWART, Respondent.—*Keay—Jarvis—Shaw.*

*Process—Proof.*—1. Circumstances in which it was held, (reversing the judgment of the Court of Session), that a question, whether a Company had been dissolved and goods sold to a partner or not, should be submitted to a jury, and the parties examined before the Jury Court, notwithstanding that the dissolution had been publicly advertised, and the invoices and bills of lading set forth that the goods were the property of the partner.

2. *Pactum Illicitum.*—Question raised, whether a commercial transaction between parties in Great Britain and America, pending war, or on the eve of war between these countries, was pactum illicitum?

July 14. 1830.

1ST DIVISION.  
Lords Gillies and  
Meadowbank.

In 1803 the respondent, James Stewart, entered into partnership with his brother John, and James White, as manufacturers of cotton goods in Paisley, under the firm of James and John Stewart and Company. He had previously been in the United States of America, and soon thereafter returned to that country. The Company shipped goods to him there for their joint behoof,—the invoices stating them to have been shipped by the Company 'on account of Mr James Stewart, merchant there.' During his residence in that country, he obtained the privilege of an American citizen, with the view, as he stated, to the protection of his person in the event of war taking place with Britain, which was threatened in consequence of the Orders in Council. Although the invoices were expressed in the above terms, the bills of lading granted by the masters of the ships frequently bore,