Rennie.—Dear Sir—I hereby agree to see you paid the above instalments.—I am, Dear Sir, yours respectfully, James Smith." Founding upon this obligation, the pursuer now sues Mr Smith's trustees for a balance remaining due by Harkness to him (after deducting £1200 paid to acount) of £241, 9s. 6½d. One of the three tenements was not erected by the pursuer, except to a very small extent, and the balance now sued for includes the expense of the work which had been performed on the third tenement, in regard to which the first instalment never became due. The £1200 paid were the six instalments payable in respect of the other two tenements.

The defenders pleaded, *inter alia*, that even if the defenders should be held bound by the said letter of guarantee, it imported a guarantee for instalments only and not for the balance.

The Lord Ordinary (Jerviswoode) repelled this plea. He thought that the obligation, according to its fair construction, imported a liability for the balance as well as for the payments which are specially designated as "instalments;" and he referred to Bell's Principles (sec. 251), where it is said that "cautionary obligations are very strictly interpreted, though not so literally as to evade the true and fair construction of the engagement." The defenders reclaimed, and the Court to-day unanimously altered the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—I am disposed to differ from the view of the Lord Ordinary. I think there is here a distinction betwixt what are called "instalments" and what is termed "the balance" in the principal obligation. I can easily understand that Mr Smith may have had very good reasons for limiting his obligation to the instalments, which were specified and definite, and not extending it to a balance, the amount of which he did not know. On the other band, it was necessary for the builder to introduce into the obligation by Harkness a stipulation that the balance was to be paid on the completion of the work; because, as was stated in answer to a question by Lord Deas, there was no stipulation to that effect in his contract. If it had been intended to treat the balance as an instalment it should have been called the seventh or last instalment, or something of that sort. I see no reason why the law should be stretched in this case so as to extend the liability of the cautioner. On the third tenement no instalment ever became due, and the six instalments on each of the other two tenements have been paid; so that there is now no liability under the cautionary obligation.

The other Judges concurred, Lord ARDMILLAN observing that a balance may be a last instalment; but if it had been intended to treat it in this case as one for which the cautioner was to be liable, this should have been much more clearly expressed.

The defenders were therefore assoilzied with expenses.

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## *Saturday, March* 24.

### SMITH & GILMOUR *v.* CONN (*ante, p.* 155).

*Jurisdiction — Civil and Criminal — Advocation— Competency—Summary Procedure Act.* An advocation of a judgment pronounced by Justices, in a complaint under a Road Act held (alt. Lord Mure) incompetent in the Court of Session, the offence charged being, under section 28 of the Summary Procedure Act, of a criminal nature.

Counsel for Advocators—The Solicitor-General and Mr Millar. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

Counsel for Respondent—Mr Patton and Mr P. Blair. Agent—Mr Thomas Dowie, S.S.C.

This was an advocation of a judgment of justices in Ayrshire, dismissing, without inquiry into the facts, a complaint at the instance of the clerks to the Irvine Road Trustees, charging the respondent with an alleged contravention of section 12 of the Ayrshire Road Act of 1847, which enacts that "no house, or building, or erection whatever, other than a wall for the purpose of enclosure, not exceeding 7 feet in height, shall, without the consent of the trustees previously obtained in writing, be erected within the distance of 25 feet from the centre of any of said turnpike roads or highways." The respondent was proprietor of a house on the south side of the Crossbrae, in the town of Kilwinning, which was a turnpike road of about 31 feet in breadth, and the front wall of the house was therefore only about 15½ feet from the centre of the road; and the complaint stated that in March 1865 the respondent, without consent of the trustees, after having unroofed said house, and taken down nearly the whole of said front wall and said gable, and rebuilt the same adding 3 feet, "which erections and additions to said front wall and gable and part of the said roof were all within 25 feet from the centre of the said turnpike road."

The respondent appeared before the justices, and pleaded that the allegations set forth in the complaint did not constitute a contravention of section 12 of the Act libelled on; and the justices, by a majority of 4 to 2, sustained this plea and dismissed the complaint.

The complainers advocated, but the Lord Ordinary (Mure) dismissed the advocation as incompetent, on the ground that an appeal should have been taken to the Quarter Sessions. The competency of the avocation had been also objected to, on the ground that under section 28 of the Summary Procedure Act, the jurisdiction to review the justices' decision had been transferred from the Court of Session to the Court of Justiciary. The said section is in the following terms:—"And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament, authorising convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdicjion shall be deemed and taken to be of a criminal nature, where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required, or shall be authorised, to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment, or recovery of a penalty or expenses, or, in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil: Provided always that nothing contained in this Act shall be construed to affect the right of any party to proceedings taken under this Act to be examined as a witness therein, but such right shall remain as it would have been if this Act had not passed."

The Lord Ordinary expressed an opinion that this objection was not well founded, but the Court to-day sustained it, and in respect of it dismissed the advocation as incompetent in this Court. The offence charged was of a criminal nature in the sense of section 28, because it was one for which the justices were authorised on summary complaint, in default of payment of a fine, to grant warrant for imprisonment. The Court were not prepared to say that the justices had erred in their construction of the Road Act, but as they were not competent to judge in the matter no judgment was pronounced on this point. The judges were unanimous in thinking that the distinction created by the Summary Procedure Act was

most inexpedient, and were very desirous to find the means of avoiding its application in this case, but they held that they were tied down by its express language,

## HOUSE OF LORDS.

*March* 15, 16, *and* 23.

LORD ADVOCATE *v.* M'NEILL.

*Donation — Bill — Indorsation — Delivery.* Held (rev. Court of Session) that a bill cannot be validly transferred by indorsation without delivery, and circumstances in which held that delivery had not been proved.

Counsel for Appellant—The Lord Advocate Moncreiff), the Attorney-General (Palmer), the Solicitor-General (Collier), and Mr Agnew. Agent—Mr Angus Fletcher.

Counsel for Respondent—Sir Hugh Cairns, Q.C., and Mr Anderson, Q.C. Agent—Mr William Sime, S.S.C.

This is an appeal from an interlocutor of the First Division of the Court of Session.

The respondent, Mr Dugald M'Neill, is the executor of his mother, Mrs Margaret Campbell or M'Neill, who died on the 12th of May 1844, and also of his brother, Lachlan M'Neill Campbell, who died on the 2d May 1852. On the 4th of October 1852 he gave up in the Commissary Court of Argyllshire an inventory of his deceased mother's personal effects, accompanied by an affidavit of the same date, in which he described himself as his mother's executor, and declared her personal estate to be of the value of £198, 16s. 1d. Along with this inventory he recorded a document described as his mother's last will and testament, which is, however, invalid and ineffectual in consequence of an informality. He thereafter paid a duty of £2, being the inventory duty applicable to a testate succession of the amount sworn to by him. On the 14th of the same month the respondents gave up an inventory of the personal effects of the said Lachlan M'Neill Campbell, which was therein stated to be of the value of £6034, 8s. 6d., and upon this sum he paid a duty of £120. On the 14th of August 1855 the respondent presented to the Commissioners of Inland Revenue an application for return of £118 of the duty so paid, upon the ground that he had discharged debts dne by the deceased, and payable out of his personal estate, to the amount of £5892, 6s. 2d., leaving only £142, 2s. 4d. as the balance on which duty was exigible. In the course of a correspondence which ensued the Revenue officials discovered that a holograph will had been executed by Mrs Campbell subsequent to the invalid testamentary writing recorded by the respondent. This will is in the following terms:—"Drumdressaig, 20th January 1838.—My dear Dugald,—Circumstances has occurred that has prevented me executing a settlement of my money until that is in my power I now write you to say that all I have is yours—you making up Bella's money to three thousand three hundred—she having all my little trinkets, &c.—Your affect. mother, MARGT. M'NEILL." The person referred to as "Bella" is the respondent's sister, and the Commissioners of Inland Revenue being advised that he had so made up her money by the payment to her of £1300 out of the contents of a bill for £6000, which was the property of Mrs M'Neill at the time of her death, callled upon the respondent to give up an additional inventory of his mother's estate, and agreed upon his doing so, and paying the additional duty, to repay him £70 of the duty pa d upon the succession of Lachlan M'Neill Campbell. The agent of the respondent thereupon stated that the bill for £6000 was specially endorsed in favour of his client by the creditors of Mrs M'Neill, and delivered to him some time before her death, and that the interest has ever since been paid to him. The Inland Revenue officials thereupon proposed to withdraw their claim for additional duty on the part of the Crown upon the one estate, on condition that the respondent withdrew his claim for return of duty on account of the other. To this the respondent would not accede, and on the 13th of December 1861 raised an action against the appellant as representing Her Majesty, concluding for repayment of the sum of £70, being the duty paid in excess by him on the succession of Lachlan M'Neill Campbell. A counter-action was thereupon brought by the appellant for payment of the sum of £88 due upon Mrs M'Neill's succession. A proof was allowed to each of the parties, and after debate Lord Ormidale, Ordinary in Exchequer causes, pronounced an interlocutor conjoining the actions, finding that the respondent failed to establish that the bill for £6000 had been made over to him as a donation, that its contents were therefore *in bonis* of Mrs M'Neill at the time of her death, and that he was therefore liable to pay the sum of £88, being the duty applicable to that amount, less the £1300 paid to Miss Isabella M'Neill. His Lordship also found that the respondent was entitled to repayment of £70 on account of duty paid on Lachlan M'Neill Campbell's succession. Against this decision the respondent presented a reclaiming note to the Judges of the First Division, who upon the 6th February 1864 altered the Lord Ordinary's interlocutor, decerned against the appellant in the action brought against him by the respondent, and assoilzied the respondent from the conclusions of the action brought against him by the appellant. Lord Deas dissented (2 Macph. 626).

Against this interlocutor the present appeal is brought.

The LORD ADVOCATE, for the Crown, said the first presumption as to the endorsement of a bill of exchange was, that it had been endorsed for value. That presumption could not arise in the present instance, because the holder himself admitted that he gave no value for it. Then, upon a question whether a particular act or deed constituted a donation or a trust, the *onus probandi* lay upon the person alleging donation. Donation was never presumed, according to the law of Scotland; but the learned Judges in the Court below had apparently overcome that presumption by two objections—namely, that a bill is supposed to be endorsed for value, and that under the statute of 1696 a trust in such a case as this could only be proved by the truster's writ or oath. His Lordship quoted Lord Stair (B. 4, tit. 45, sec. 17) to the effect that a man who gave gratuitously was presumed to intend a trust only "donatio non presumitur." Mr Erskine also (Inst. 3, 3, 92) laid down the same rule. Henderson *v.*