the subjects in 1846, and that in 1849 and 1851 Mr Dixon granted a conveyance, and a supplementary conveyance, by which he disponed them to Mr William Johnston as his trustee, who in April 1854 conveyed them to Mr James Bunten, from whom they were acquired by the Western Bank. Before conveying to Mr Johnston, however, Mr Dixon in 1847, by an *ex facie* absolute disposition, had conveyed the subjects to the Commercial Bank, who were infeft. In March 1854 the Commercial Bank granted a reconveyance to Mr Dixon, on which he was infeft. In these circumstances the suspenders maintained that the trust-deeds in favour of Johnston, having been granted by Dixon when he had no title or right of any kind to the lands, the trust-deeds and Johnston's infeftment thereon were therefore invalid, and incapable of being validated by the accretion of the right subsequently acquired by Dixon under the Commercial Bank's conveyance to him. The Lord Ordinary (Barcaple) repelled this plea, founding on Stair (3, 2, 1–2), Erskine (2. 7, 3-4), and Bankton (3, 2, 16).

The suspenders reclaimed; and cited Bell's Principles (sec. 882); Keith *v.* Grant, 14th Nov. 1792 (M. 2933); Munro *v.* Brodie (6 D. 1249); Glassford *v.* Scott (12 D. 893); Clark (12 D. 1047); and Dunlop *v.* Crawford (11 D. 1062, and 12. D. 518). The other side referred to Erskine and Stair *ut supra*, Menzies on Conveyancing (3d edition), p. 660, and Ross' Bell's Law Dictionary, *voce* "Accretion." The Court adhered.

The LORD PRESIDENT said—I cannot say I have so much doubt on this point as Professor Bell had. In 1847 Mr Dixon conveyed the subjects to the Commercial Bank, and in 1854 that bank reconveyed them to him. In the interval Mr Dixon had granted, in 1849 a trust-deed to Mr Johnston, and thereafter in 1851, a supplementary trust-deed. The question is whether, when Mr Dixon got the reconveyance in 1854, the right he then acquired accresced to Mr Johnston. There is no mid-impediment. It has been argued that the conveyance to the Commercial Bank was granted in security merely, and there is strong ground for so holding; but I take the argument on the assumption that it was an absolute conveyance, and am of opinion that the right created by the reconveyance did accresce to Mr Johnston. I think that is the fair meaning of all the institutional writers before Professor Bell. But we have his doubts, and also the opinions expressed by Lord Ivory in the case of Munro. I don't mention Lord Mackenzie, because I think any doubt expressed by him in Munro's case had disappeared before the subsequent case of Glassford occurred. He did not adhere to his doubt in that case. Professor Bell no doubt seems to have died possessed of his doubt. But it is only a doubt; and I cannot throw out of view the statement made by Mr Bell himself that the late Mr Robert Jamieson did not agree with him. Mr Jamieson was a man of high position and authority in questions of this kind, and although he was not professor of law in the University, I am inclined to place as much reliance on his opinion as if he had been.

Lord CURRIEHILL—The question is whether Mr Johnstone had power in 1854 to convey to Mr Bunten. His title consisted of two trust conveyances by Mr Dixon in which he had a power of sale. The objection taken is that Mr Dixon had divested himself in favour of the Commercial Bank before he conveyed to his trustee. I have no doubt that the conveyance to the bank was in security merely, but as there is no evidence of that *ex facie* of the deed, I assume that it was absolute. Now, was the power of sale effectual, Mr Dixon having previously divested himself? The reply is that in March 1854, a month before the power of sale was exercised the subjects had been reconveyed to Mr Dixon. There was no mid-impediment. The party who had granted the power of sale was reinvested before it was executed. I have no doubt that that right accresced to Mr Johnston. I concur entirely as to the retrospective effect of a conveyance granted to a person who had previously been vested and as to its accrescing to his disponee if there be no mid-impediment. I look upon this as an elementary principle of our law. And it is not inconsistent in any way with the rules of feudal law. On the contrary, the effect of a charter of confirmation is, by the common feudal law, irrespective of statute, retrospective to the date of the last entry, and it extinguishes all mid-superiorities created in the interval. The feudal law is therefore not repugnant to the doctrine of accretion.

Lord DEAS—I take the case on the same footing, and assume that the conveyance by Mr Dixon was an absolute one, and that the Commercial Bank was infeft as absolute proprietor. When so denuded Mr Dixon granted this deed to Mr Johnston, and having been thereafter reinvested, the question is, whether that reconveyance accresces to his disponee. It is Mr Bell's doubt alone that gives importance to this case; but the doubt is expressed by no one else. The doubt expressed by Lord Ivory and Lord Mackenzie is of a different nature altogether. Their opinion was that if the granter had a mere missive of sale there could be no accretion. It humbly appears to me that that view is unsound. Their objection would equally apply to a disposition with neither procuratory nor precept of sasine, or to a disposition in all respects formal, but having a flaw in the precept, and therefore incapable of being followed by valid infeftment. If Lord Ivory was right there never could be accretion in such cases; but our law recognises bargains as to heritable subjects, although the seller has no right at the time; and it is the doctrine of accretion that meets such a case. The case of Keith *v.* Grant, which was referred to, differs from the present, because the question there arose with the granter's heir.

Lord ARDMILLAN arrived at the same result. He thought that the doctrine of accretion had its root in equity. It was a remedy for a wrong, not repugnant to feudal rules and taking feudal effect, whereby, wherever there was a conveyance by a person having no title or an imperfect one, his disponee acquired right to any title or muniment of title subsequently acquired by him, and of which good faith forbade that he should be deprived. The maxim *jus superveniens auctori accrescit successori* was not a feudal maxim. It is not put by Lord Stair as one, and it applies more strongly in a case where there is no title, than in one where the title is only inchoate just because the wrong is all the greater.

Friday, March 23.

RENNIE *v.* SMITH'S TRUSTEES.

Cautionary Obligation—Construction. A principal debtor having bound himself to pay six specified instalments of the cost of erecting three houses, and to pay the balance when the work was completed, and a cautioner having bound himself to see the creditor paid "the above instalments," held (alt. Lord Jerviswoode) that (the instalments having been paid) the cautioner was not responsible for the balance.

Counsel for Pursuer—Mr Gifford and Mr Alexander Moncrieff. Agents—Messrs J. & R. Macandrew, W.S.

Counsel for Defenders—Mr Clark and Mr Gloag, Agents—Messrs A. G. R. & W. Ellis, W.S.

The pursuer, a builder in Glasgow, contracted in 1862 with John Steven Harkness, a joiner there, to execute the mason, brick, and digger work of three houses which Harkness intended to erect in Anderston of Glasgow. By letter dated 18th July 1862, Harkness bound himself to pay to Rennie certain specified instalments of the contract price (amounting together to £600 for each house), "and the balance when the work is completed." The late Mr James Smith, architect in Glasgow, appended to the said letter the following obligation:—"Mr John

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 hand, 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.

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 jurisdiction 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