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 due 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.*

M'Culloch (1 D. 927), Heron *v.* M'Geoch (14 D. 25), and other authorities showed that attempts to make a gift of deposit-receipts simply by endorsement had always been held invalid. It would be contended, however, that there was a difference between bills and deposit-receipts. But the moment the character of the transaction appeared to be what it was in the present case, the rules laid down in the authorities he had mentioned would apply. There was, however, a case in Morrison, 3600—M'Farquhar *v.* Colville—in which it was decided by the Court of Session that a valid gift of a bill of exchange could not be made simply by endorsement. The presumption against donation was just as applicable to bills of exchange as to deposit-receipts. The burden therefore lay upon the respondent to prove donation, which he had utterly and entirely failed to do, as a reference to the proof fully showed. That view of the evidence was also strengthened by the opinion of the Lord Ordinary. The learned Lord then referred to the opinions of those Judges of the First Division which were adverse to the appellant, and argued that they disregarded the result of all the cases, which was this, that however the transfer was made, donation was never presumed. Lord Elibank *v.* Hamilton (July 1827) showed it was competent to prove a trust, as between third parties, otherwise than by the writ or oath of the trustee. The presumption, then, both by law and by fact was against donation, and the interlocutor appealed against was therefore wrong, and ought to be reversed.

The SOLICITOR-GENERAL (Sir R. P. Collier) then followed on the same side, and in commenting upon the evidence, said it was remarkable the respondent had not called Mr Peter Campbell, who was a witness of the greatest importance.

Mr ANDERSON explained that he could not call witnesses from the other world.

The SOLICITOR-GENERAL said he was willing to accept his learned friend's statement that the witness was dead, but it did not appear from the case.

Lord CHELMSFORD—How does Mr Anderson know that it is so?

Mr ANDERSON said his client informed him that the witness had been dead for many years; he begged to disclaim any personal knowledge of the fact.

The SOLICITOR-GENERAL then proceeded to remark upon the presumption of Scotch law that an endorsement was made for value received.

Lord CHELMSFORD—There is no presumption here that an endorsement was made at the time it states. There is no such presumption in English law, to which, I understand, the law of Scotland as regards bills of exchange has been assimilated.

Mr ANDERSON said there were still points of variance arising in the city of London.

Lord CHELMSFORD—The Scotch do not readily assimilate their laws.

The SOLICITOR-GENERAL than continued his argument, and submitted that a donation had not been proved by the respondent, and that consequently the contents of the bill for £6000 were *in bonis* of Mrs Campbell at the time of her decease, and were therefore liable to duty.

Mr ANDERSON, on the part of the respondent, admitted that it was a rule of Scotch law that donation was not to be presumed; there were, however, exceptions to that rule, one being that a transfer to a child was presumed to be a donation. Erskine, B. 3, tit 3, sec. 92. Another institutional writer, Lord Bankton (B. 1, tit. 9, sec. 11, 17, 19), also supported that doctrine. Further, as regarded authorities it would be found that there was no presumption against donation in the case of a child when the transfer was completed (Hume's Decisions, 295; Braidwood *v.* Braidwood (14 S. 64); and Fyfe *v.* Kedslie, 9 D. 853)—a case decided by the whole Court).

Lord KINGSDOWN—There is no analogy between the circumstances of that case and the present.

Mr ANDERSON said there were many others. In Morison's Dictionary, p. 1498, and subsequent pages—under the title presumption—a whole string of cases would be found. Then the *onus probandi* lay upon the Crown, which sought to invalidate a complete legal title.

Lord CHELMSFORD—There is no evidence as to the person in whose possession the bill was at the time of Mrs Campbell's death.

Mr ANDERSON said there was not; but there was a presumption upon that subject which he would refer to presently. The markings on the back of the bill, too, of interest being paid, were admissible in evidence, as being against the writer's interest, to show that he was the real owner

Lord CHELMSFORD—I see the bill is payable one day after date. Would three days' grace be given?

Mr ANDERSON said undoubtedly; as was also the case when a bill was made payable at sight. Then as to endorsation, that was presumed by the law of Scotland to have been made at the date it bore, so that thus the bill in the present case had become the property of the respondent six years before his mother's death. Then as to delivery, Maitland *v.* Forbes (5 Brown's Suppl. 491) decided that a bond of provision is regarded as delivered on the day it bore date. With reference to the testamentary writings he thought them both invalid, but assuming that the latter was good it was quite consistent with a gift of this bill. Then from the evidence, and particularly that of Miss Maclean, whose interest must be regarded as opposed to that of her brother, it was plain that she perfectly understood from her mother that the latter had made an absolute gift of the bill to Dugald, and had never interfered with the contents of the bill nor received the interest which was paid upon it. He therefore submitted that this appeal should be dismissed with costs.

The Lord CHANCELLOR—There is no direct evidence in whose possession the bill was.

Mr ANDERSON said there was not.

Lord CHELMSFORD—Nor, I think, of the time of delivering the box in which the last testamentary writing was found.

Sir HUGH CAIRNS then followed on the same side. He contended that the maxim *donatio non presumitur* merely meant that the mere custody of property was not to raise a presumption of donation, but had no application when the legal title was complete. Here the legal title was completed, and that in the only mode in which it was possible to confer a title — namely, by endorsement. He begged to refer to Wilson's Thomson's Bills of Exchange, pp. 20 and 125, where the difference between deposit receipts and bills of exchange was very conveniently stated. He protested against the *onus probandi* being cast upon him, but a reference to the evidence showed that Mrs Campbell did not part with all her means of maintenance by making a gift of this £6000 to her son. The memoranda on the back of the bill—markings of interest and of capital paid—were admissible in evidence as entries against the writer's interest, and show that he was the real owner. The endorsement must be presumed to have been made at the date it bore. The respondent was executor of Mrs Campbell; but that could make no difference. It would be very hard if a person who was subsequently appointed should be bound to prove that he had received a bill in a legal manner. He ventured to say there was no such absurd doctrine in the law of Scotland as that which the Lord Ordinary had laid down—namely, that a donation *inter vivos* could not be proved by parole evidence.

Lord CHELMSFORD—Lord Deas illustrated the opposite doctrine by supposing the case of his presenting a gold watch to a fair lady.

Sir HUGH CAIRNS said he would content himself with less exciting illustrations; besides, in such a case, the presumption of donation might possibly be stronger than in any other. He would therefore refer to the evidence in the present case.

Lord CHELMSFORD—The Lord Advocate read the whole of the evidence and Mr Anderson part of it.

Sir HUGH CAIRNS said he would not follow their example. but must refer to it for the purpose of showing that the valid will was not made subsequently to the time at which he submitted the gift of the £6000 bill was made. He submitted, in conclusion, that the endorsement conferred a legal title which there had been no evidence produced to invalidate.

The LORD ADVOCATE then briefly replied upon the part of the appellant.

Judgment was given to-day (March 23).

The question decided is that not only endorsement, but also delivery, is requisite to the valid transfer of a bill of exchange, and that in the particular case no delivery was made.

The LORD CHANCELLOR said—The respondent in this appeal, upon his mother's death, paid succession duty upon the sum of £198, 16s. 1d., which he alleged to be the value of her estate. In addition to that sum, however, the officers of Inland Revenue allege that Mrs M'Neill was at the time of her death possessed of £6000, the contents of a bill of exchange dated 22d November 1838, drawn by her upon Lachlan M'Neill Campbell, and accepted by him. The respondent denies that that was so; but he paid duty on the sum of £1300, which was part of the £6000. Two actions were brought—one on the part of the Crown to recover the amount of stamp duty due upon this sum of £6000, and the other by the respondent against the Crown to obtain repayment of what he alleged he had paid in excess as duty upon the succession of Lachlan M'Neill Campbell. It was admitted, however, that the question at issue in both actions was simply whether this £6000 formed part of Mrs M'Neill's estate at her death. If it did, then succession duty was exigible upon it. That Mrs M'Neill was at one time entitled to the bill is not denied; but Dugald alleges that she had subsequently endorsed it to him. Now, endorsement is not sufficient to transfer the property in a bill of exchange, if by that is meant the mere writing upon its back; it is further necessary that it should be delivered to the endorsee. Now Dugald has utterly failed to show that he ever had possession of this bill in his mother's lifetime, and its being in his hands now is as much attributable to the fact that he is his mother's executor as that he is an endorsee. The bill was produced, and it was argued for Dugald that the markings of payment of interest upon its back, as being against his interest, went to show that he was its real owner. But then there is nothing to show that those markings were made at the time they profess to be. They are all in Dugald's handwriting, and all apparently written at the same time, and with the same ink. It is improbable, too, that the interest would be paid for so many years with such perfect regularity as the dates would denote, and I observe that one payment bears to be made upon a Sunday, which is hardly credible. I beg, therefore, to advise your Lordships that there never was any delivery of this bill of exchange; and if that is so, then the question as to what presumption arises from its endorsement it is unnecessary to decide. I move your Lordships to reverse the interlocutors appealed against, and to affirm that of the Lord Ordinary.

Lord CHELMSFORD concurred; observing, however, that in a question so purely one of fact, he would not have differed from the learned Judges in the Court below, had he seen a majority of them upon one side or other.

Lord KINGSDOWN also concurred, remarking that all the facts and probabilities in the case were against the respondent. He was the person who could have given the most evidence upon the subject, but had excused himself by pleading a total loss of memory. The matter had, however, been under discussion for years; the respondent had consulted law agents upon it, and had also sworn several affidavits. His impression was it was an arrangement between Mrs M'Neill and the respondent to defeat the Revenue.

Interlocutors reversed.

COURT OF SESSION.

Monday, March 26.

FIRST DIVISION.

HAMILTON *v.* TURNER AND OTHERS (*ante*, p. 52).

Reparation—Minerals—Wrongful Working. In an action by a feuar directed against his superior, who was proprietor of the minerals in the ground feued, and also against the mineral tenants, for damages caused by alleged wrongful working of the minerals, proof allowed before answer as to the liability of both or either of the defenders.

Counsel for Pursuer—Mr Pattison and Mr J. G. Smith. Agent—Mr James Paris, S.S.C.

Counsel for Defender Turner—Mr Gordon and Mr Gifford, Agents—Messrs Maconochie & Hare, W.S.

Counsel for Monkland Company—Mr Clark and Mr Watson. Agents—Messrs Davidson & Syme, W.S.

This is an action of damages for injuries caused to property by mineral workings. The pursuer holds a feu-right of his property from Mr Dennistoun, the predecessor of the defender, Mr Turner of Barbauchlaw, which was granted on 12th August 1865. The superior reserved to himself the property of the minerals—"I and my foresaids paying to my said disponees and their foresaids all damages the subjects belonging to them may sustain in and through my working or taking away the same." This qualification was added—"But declaring always that should said minerals be let by me or my foresaids, my said disponees and their foresaids shall have recourse against the lessee thereof for all damages which may be occasioned by the working thereof, and not against me or my foresaids, farther than that I and my foresaids shall be bound to oblige our tenants to settle said damages with our said disponees and their foresaids in manner above mentioned."

The other defenders, the Monkland Iron and Steel Company and their trustees, are tenants of the minerals lying beneath the pursuer's subjects, by virtue of a lease granted by Mr Dennistoun in 1854—two years prior to the date of the pursuer's feu. By the lease, it is stipulated that the tenants "shall annually satisfy and pay all damages done by their operations, whether above or below ground;" and it also contains this clause—"Farther, the said second parties (the tenants) bind and oblige themselves and their foresaids to free and relieve the said first party (the superior) of all claims and demands whatsoever which may be made against him and his foresaids by the tenants of said lands, arising in any way out of the operations of the said second parties in working, raising, storing, carrying away, or disposing of the minerals hereby let."

The pursuer avers that the minerals "have been improperly and wrongfully dug out and removed, without proper and sufficient support being left for the surface ground and land, and the said house and buildings thereon, whereby the pursuer's said subjects have sunk and given way, and his said houses and buildings have been weakened, the walls cracked and rent, the door-posts and window lintels broken, and the whole structure has been totally and permanently injured, and there is fear of the same falling."

The Lord Ordinary (Kinloch) held the action relevant as against the mineral tenants, but dismissed it as against Mr Turner, on the grounds (1) that he was not responsible for his tenants; and (2) that the claim was excluded by the terms of the pursuer's feu-charter. The mineral tenants re-