LORDS JOHNSTON and MACKENZIE were absent.

The Court answered the first branch of the first question of law in the affirmative and the second in the negative.

Counsel for the First, Third, and Fifth Parties—Burnet. Agent—Henry Smith, W.S.

Counsel for the Second Party—M'Phail, K.C.—R. C. Henderson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Fourth and Sixth Parties—Chree, K.C.—Dykes. Agents—J. L. Hill, Dougal, & Co., W.S.

Thursday, March 15.

FIRST DIVISION.

[Lord Cullen, Ordinary.

KEITH *v.* CAIRNEY.

Right in Security—Bond and Disposition in Security—Diligence—Competency of Summary Diligence on a Bond which did not Truly Express the Transaction between the Parties.

The creditor in a bond and disposition used summary diligence upon it against the debtor. The bond bore that a sum of money had been instantly borrowed and received by the debtors. One of the debtors brought a suspension of the charge. He alleged and proved *scripto* that the bond was not granted in respect of money instantly advanced but in security of balances due by a third party to the creditor. The parties were at issue as to whether those balances had been paid off in whole or in part, but no proof of payment in whole or part was adduced. *Held* (*sus.* Lord Cullen) that it being proved that the bond was not in consideration of money instantly advanced, the *onus* was upon the creditor to prove the amount of the balance for which the bond was truly granted, and the charge fell to be *suspended.*

Alexander Aberdein Keith, *complainer*, brought a note of suspension against Douglas Cairney, *respondent*, craving suspension of a charge at the instance of the respondent upon a bond and disposition in security.

The complainer pleaded—"3. In respect that (1) the terms of the said bond and disposition in security do not represent the true nature of the obligations between the parties thereto; and (2) the debt, if any, due by the complainer to the respondent has not been properly constituted against the complainer, personal diligence upon the said bond and disposition in security is incompetent, and decree of suspension of the said charge should be pronounced as craved."

The respondent pleaded—"5. The complainer's averments can be proved only by the writ or oath of the respondent."

The *facts* of the case and the procedure appear from the opinion of the Lord Ordinary (CULLEN), who on 5th February 1916 suspended the charge.

Opinion.—"In this case the complainer seeks to suspend a charge on a bond and disposition in security for £500, dated 4th July 1903, granted by him, his now deceased brother William Leslie Keith, and his sister, in favour of the respondent, with whom the said William Leslie Keith had stock-broking transactions.

"The bond bears that the granters 'have instantly borrowed and received' from the respondent the sum of £500 sterling, which sum they bind and oblige themselves to repay at Whitsunday 1904, with the usual provisions for interest and penalties. It contains a clause of consent to registration for execution.

"The complainer avers that the bond sets forth a fictitious transaction; that neither the sum of £500 nor any other sum was borrowed and received by the granters in exchange therefor; and that the true cause of its being granted was to secure payment to the respondent of any balance (to the extent of £500) which was due to him at the date thereof by the said William L. Keith. He further avers that he signed the bond subject to a condition not expressed in it that he 'should incur no personal obligation and should be involved in no personal obligation to pay the sums due thereunder.' He further avers that, if any balance was in fact due to the respondent at the date of the bond—which he does not admit—it was wiped out by subsequent transactions between him and the said William L. Keith. The respondent admits that the bond was granted not for money borrowed and received by the granters in exchange therefor but to secure payment to him (up to £500) of the balance then due him by the said William L. Keith, which balance he avers amounted to more than £700. He denies that any part of this indebtedness has been paid off. He further denies the alleged condition as to the complainer coming under no personal liability.

"At the discussion in the procedure roll the complainer asked to be allowed a proof of his said averments *prout de jure.* The respondent did not move for any proof on his side, but confined himself to maintaining his fifth plea-in-law. I allowed the pursuer a proof *scripto*, being of opinion (1) that while the bond falsely stated the consideration therefor the parties were on record agreed as to this, and were further agreed that the true cause for which it was granted was to secure payment to the respondent of whatever balance might be due to him by the said William L. Keith at its date, and (2) that as regards the complainer's averments of no personal liability under the bond and discharge of any indebtedness at its date, the respondent's fifth plea-in-law was sound.

"The complainer's proof *scripto* consists of documents which do not go further than to show that no money was given in exchange for the bond, and that it was granted, as stated on record, as security for the indebt-

edness of William L. Keith to the respondent at its date. There is confessedly no proof whatever of the alleged condition absolving the complainer from personal liability nor of any discharge of indebtedness.

"In these circumstances the complainer contends that the respondent was not entitled to do summary diligence against him as if the bond had been true according to its terms, and as if he, the complainer, had failed to repay a sum of £500 borrowed and received by him in exchange for the bond; that as the bond was truly granted for a different consideration, to wit, to secure whatever balance was due to the respondent at its date, it lay on the respondent to proceed according to the truth of the transaction and to establish, which the false narrative in the bond does not, the amount of that balance; that he should have proceeded so to make out his claim by an ordinary action, and that in any event he has not established the amount of the said balance in the present process.

"The complainer founds on the case of *Hotson* v. *Paul*, 1831, 9 Shaw, 685, which appears to me substantially to support his contention. There the holder of a bond for £900, said in it to have been borrowed and actually received of its date, who admitted that that sum had not been paid but alleged that £300 had been paid, was subjected, in respect of the false terms of the bond, to the *onus* of proving that anything at all had been paid, which he failed to do save as to the sum of £5. It is true that there was not in that case, as here, the element of parties being agreed as to the bond having been granted for an actual consideration different from that stated in it. But the *ratio* of the decision would seem to apply, for while parties here agree that the bond in question was intended to secure up to £500 whatever balance was due at its date by William L. Keith to the respondent, they are not agreed as to the amount, if any, of that balance. And the respondent, while he avers that the balance exceeded £500, has not proved its amount, if any.

"It would have been quite easy in framing the bond to state the true cause of granting, and that the balance then due amounted to or exceeded £500, as leading up to the personal obligation of the granters to repay £500 and the disposition in security thereof. Why the bond should have misstated the consideration I do not know. As the matter stands it seems to me that I must follow the *ratio* of *Hotson* v. *Paul* in holding that the *onus* lies on the respondent, in proceeding against the complainer, to establish the amount of the balance for which the bond was truly granted and for which the complainer is liable according to the truth of the transaction.

"I shall accordingly suspend the charge as craved."

The respondent reclaimed, and argued—It was admitted that the bond was not in fact granted in respect of money instantly advanced but in security of the balance due by William Keith to the respondent. That, however, did not preclude the use of summary diligence, which was competent on a bond under which the balance due was uncertain—*Fisher* v. *Syme*, 1828, 7 S. 97, at p. 102. In that case the amount of the balance was matter of proof. Proof thereof was quite competent—*Hotson* v. *Paul*, 1831, 9 S. 685. The respondent was entitled to a proof of the amount of the balance due.

Counsel for the complainer was not called upon.

LORD PRESIDENT—This is a reclaiming note from a judgment of Lord Cullen suspending a charge upon a bond the narrative of which is admittedly false. Both parties are agreed that the bond was really granted in security of certain balances on stock-broking transactions which were due by one of the debtors in the bond. In my opinion summary diligence is not competent upon a bond granted in such terms where the sum for which the bond is truly granted has not been liquidated in a definite way and is not admitted. The decision in the case of *Hotson* v. *Paul*, 1831, 9 S. 685, is not required as a foundation for the Lord Ordinary's judgment. Summary diligence necessitates that the sum for which a charge is given shall be definitely ascertainable on the face of the bond without further proof, or that the bond shall state the mode in which the sum due thereunder is to be ascertained, as, for instance, by a separate certified account. I am accordingly for affirming the interlocutor of the Lord Ordinary.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I think that the judgment of the Lord Ordinary is right, but that the procedure is to be regretted. On 22nd October his Lordship allowed the complainer to amend the record by pleading that the summary diligence was incompetent. Instead of that plea being disposed of the case was sent to proof.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for the Complainer—Maconochie. Agents—Norman Macpherson & Dunlop, S.S.C.

Counsel for the Respondent—D. Anderson, K.C.—Ingram. Agent—W. Carter Rutherford, S.S.C.