Thursday, January 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PATERSON BROTHERS *v.* GLADSTONE.

Copartnery — Unauthorised Use of Company Name by Partners — Fraud — Reparation.

The partnership deed of a builders' firm provided that W, one of the partners, should take the whole charge of the financial transactions of the copartnership, and should alone sign the company's name to bonds and bills. R, another partner, entered into a series of transactions with a money-lender, and granted various bills at 40 per cent., to which he signed the company's name without the knowledge or consent of his copartners. He applied the money to his own purposes, and the money-lender did not make inquiries as to his customer's right to use the company's name, or as to the use to which the money was put. *Held* that the money-lender could not recover the amount from the firm.

The firm of Paterson Brothers carried on the business of builders and joiners in Edinburgh from June 1884 to November 1889, the individual partners being Robert Paterson, William Hume Paterson, and John Paterson.

By the contract of copartnery it was provided that William Hume Paterson should take the whole charge of the financial transactions of the copartnership, and should alone sign the company's name to bonds and bills.

In October 1887 Robert Paterson wrote to Andrew Alexander Gladstone, Liberal Loan Office, High Street, Edinburgh, as follows—"Enclosed please find bill for £15, which I wil feel obliged if you will discount for me. I may state that Mr Ramage is a cousin of my wife's. He is a purchaser from our firm of one of our houses in Cameron Crescent, Dalkeith, which he has furnished, and where he now stays. He is principal assistant in the Regent Road School (Board School). I had occasion to help him when he bought the house from us, and having no private banking account of my own, apart from that of the firm of Paterson Brothers, builders, 234 Causewayside, of which I am a partner, I did not care about taking the bill to our own bank at Lutton Place. I would not have troubled you, but I find I cannot want the money myself till he is prepared to repay me. You may rest assured, however, it will be met when it falls due. When sending me your cheque you can just retain the discounting from it. Of course this is strictly confidential between you and I." Gladstone replied on the same day—"I have yours to-day, with bill on Mr Robert Ramage for £15. Please find enclosed herewith cheque for same, less discount, £13, 10s. All such communications confidential." The bill was renewed and paid by Ramage.

On 6th September 1888 Gladstone wrote to Robert Paterson—"I have yours addressed to me at High Street; it would have been better (quicker) sent here direct. All bills sent me for discount must have at least two names to them. I will be pleased to discount Paterson Brothers' bill on Mr R. Ramage for the amount, £24, @ 2/m/d, but the discount will be 35/, and for 3/m/d, 48/. Your firm to draw on Mr R. and endorse over to me; forward on here direct, and I will send cheque less discount. *P.S.* —Bill returned herewith." The bill referred to was discounted for "Paterson Brothers."

Thereafter, and on to November 1889, numerous transactions took place between Gladstone and Robert Paterson, and bills passed between the parties which bore either to be drawn or to be accepted by "Paterson Brothers."

On 29th November 1889 Robert Paterson ceased to be a partner of the firm of Paterson Brothers.

On 3rd December 1889 Paterson Brothers received the following intimation from Gladstone—"Dear Sirs,—As your pro. note to me for £12, 10s. has not been paid to-day, I must request that it be retired to-morrow before twelve o'clock, otherwise I shall note and protest same. Please also note the two for £14 each fall due on 5th inst., and are payable here as usual, that for £23 on the 7th inst. also payable here. Your immediate attention, so as to prevent unpleasantness to-morrow, will oblige," &c.

Paterson Brothers thus discovered that Gladstone held four promissory-notes bearing to be granted to him by R Paterson, Paterson Brothers, Margaret Hope, 282 Morningside Road, and R M Ramage, 2 Cameron Crescent, payable each one month after date, and of the following dates and contents—(1) October 31st 1889, £12, 10s., due December 3rd 1889; (2) November 2nd 1889, £14, due December 5th 1889; (3) November 2nd 1889, £14, due December 5th 1889; (4) November 4th 1889, £23, due December 7th 1889.

Paterson Brothers repudiated all liability on the said promissory-notes, but as Gladstone threatened to protest each of them for non-payment, and to charge the firm thereon, Paterson Brothers presented the present note of suspension and interdict.

In the proof allowed by the Lord Ordinary it was established that Robert Paterson was not authorised to adhibit the firm's signature to any bonds or bills in connection with the firm's business; that when Robert Paterson signed the firm's name to the various bills and notes that passed between him and Gladstone, he did this without the knowledge or authority of his fellow-partners, and that the money which he thus obtained was devoted by him entirely to his own private uses.

It was further shown that Gladstone never made any inquiries as to whether Robert Paterson was authorised to use the firm's name in financial transactions, or as to the purposes for which the money was borrowed or the uses to which it was put.

He accepted Robert Paterson's explanation that the money was required for business purposes.

There was a conflict of evidence as to whether Robert Paterson had informed Gladstone that he was not entitled to sign the name of the firm, Paterson maintaining that he did and Gladstone that he did not.

On 5th December 1889 the Lord Ordinary (KINCAIRNEY) granted interim interdict, and on 13th June 1890 his Lordship sustained the reasons of suspension and declared the interdict perpetual.

"*Opinion.*—This is a suspension of a threatened charge on four promissory-notes which bear to be granted by Paterson Brothers, builders in Edinburgh, in favour of Mr A. A. Gladstone, the respondent, who is a money-lender in Edinburgh. The ground of suspension is that the signature of Paterson Brothers on the notes is unauthorised. There are some points about which I think there is no doubt at all. All the notes were signed by Robert Paterson, who was a partner of the firm, and they were signed without the knowledge or authority of the other two partners. Under the provisions of the contract of copartnery Robert Paterson had no right or power to adhibit the signature of the firm to such documents. Further, it is proved that Robert Paterson retained the money which the respondent gave for these notes, and that the firm got no benefit by them. In point of fact, the notes were not signed in the course of the business of the company or for its behoof.

"But although that be so, there is no doubt that unless the settled law on this point has been altered by the 24th section of the Bills of Exchange Act of 1882, to which counsel for the complainers has referred, no member of the public dealing with the partner of a firm can be bound or affected by any private stipulation in the contract of copartnery, and I think that *prima facie* a partner in a firm in trade will bind the firm by bills granted in the ordinary course of business whatever the provisions of the contract of copartnery may be.

"I think that this rule of law applies to builders in the position of Paterson Brothers, and I therefore think that they would be liable on bills granted in their name in the ordinary course of business by Robert Paterson, although his signing of such bills was without any true authority, and in breach of the contract of copartnery. On the other hand, I think that they would not be liable for bills granted out of the ordinary course of business, nor if the person in whose favour these bills were granted knew, or ought to have known or suspected, that the bills were granted without the authority of the firm.

"Further, there is no doubt that the money advanced on all these notes was advanced at a discount of 40 per cent., which is the highest rate of discount which the respondent is in use to charge unless in very exceptional cases.

"There are certain other matters of fact about which there may be more room for dispute. The most prominent of these questions is, Whether Robert Paterson told the respondent that he had no authority to sign the name of the firm? If he did, there could, of course, be no doubt that the firm would not be liable. He depones very distinctly that he did, and the respondent depones with equal clearness that he did not. On this point I do not hesitate to say that I believe the evidence of the respondent, and that I do not believe the evidence of Robert Paterson. Indeed, I place no reliance at all on the evidence of Robert Paterson, and I deal with the case as though that evidence had not been given.

"Whether the respondent knew or ought to have known that Robert Paterson was borrowing money on his own account, and not on that of the firm, is a totally different question. It has been pointed out that the respondent was aware that there were other partners of the firm, and that from the first letter he had from Robert Paterson he must have known that the firm kept a bank account, and that that letter suggested that the firm had no difficulties with their bankers. Various suspicious circumstances have also been brought out in evidence, such as the fact that many of the respondent's letters were addressed, and many, if not the whole of them, were sent, not to the place of business of the firm, but to Robert Paterson's private residence. It is further said to be suspicious that the respondent got the names of parties to the notes who were connected with Robert Paterson, and in no way related to the firm, and that he bolstered up his security by policies of insurance. It is said to be highly suspicious, that while any outside inquiries which he made disclosed nothing against the financial condition of the firm, he made no communication to the other members about these notes and renewals at 40 per cent. discount.

"While there is a good deal calculated to arouse suspicion in these circumstances, I am not prepared to reject the evidence of the respondent on this point. He depones positively that he did not know that Robert Paterson was using the firm's name without authority, and for his own benefit, and I believe that. He depones, also equally positively, that he entertained no suspicion on the subject. I confess I wonder at that considering the circumstances. But I take the case on the footing that the respondent did not know or suspect the true state of the facts.

"Thus taking the case, it comes to this—that Robert Paterson cheated both the complainers and the respondent, and the question is, on which of the two is the loss to fall? In several cases in which that question has arisen, it has been solved by throwing the loss on the party who put the instrument of fraud in the hands of the party defrauding, and so enabled them to defraud. But there is nothing of that kind, I think, in this case. There was in fact no instrument of fraud at all in the hands of Robert Paterson. He could not have used the contract of copartnery for that purpose, for it would have at once disclosed his want of power. I think that in this case the loss should fall on the party whose negligence or rashness or supineness made the fraud possible, and I see no negligence or rashness on the part of Paterson Brothers, but a great deal on the part of the respondent in failing to make due inquiries.

"Further, the loss has fallen on the respondent, and I see no good reason for shifting it to the complainers.

"Perhaps it may be a simpler ground of judgment to say, that while the complainers might have been liable for bills or notes signed by their partner in the ordinary course of trade, they are not liable for bills which are not in the ordinary course of trade. And I am of opinion, that having in view what has been proved as to the character of the business of Paterson Brothers, and their financial position, bills at 40 per cent. discount were not bills in the ordinary course of business. They may have been ordinary enough in the respondent's business, but there is no proof that such bills were in the ordinary course of the complainers' business, or of such a business as they carried on. When the partner of a firm of some years' standing, and in sound public repute, comes to a money-lender to borrow money at 40 per cent., I think that the money-lender is put on his inquiry, and if he advances money at that rate he does it at his own risk and peril.

"With regard to the Bills of Exchange Act, it is not necessary that I should say much. The respondent appealed to section 23, which is to the effect that the signature of the name of a firm is equivalent to the signature by the person so signing of the names of the persons liable as partners in that firm. As to that provision, I shall only say that whatever it means it cannot possibly mean that a totally unauthorised subscription of the name of a firm can bind the partners of the firm. It must assume the authority of the person signing.

"Section 24 was pleaded by the complainers, and it was maintained that in respect of its provisions the unauthorised signature of their firm could not bind them unless they were barred from proving the want of authority. I was informed that there has been as yet no decision on the import and effect of this clause. But as apart altogether from the import of the clause my decision is in favour of the complainers, it is not necessary that I should express any opinion on the question whether this clause operates any change on previously existing law as to the right of the public to rely on the signature of the name of a firm by one of its partners."

The respondent reclaimed, and argued—That the transactions between him and Robert Paterson were carried on in the usual course of his business as a money-lender; that it was not his duty to inquire either whether Paterson was entitled to use the firm's name, or the purposes to which the money borrowed was devoted. He was entitled to rely on the fact that Robert Paterson was the senior partner of the firm, and if in using the firm's name in signing the notes Robert Paterson was committing a fraud upon his fellow partners, and infringing the conditions of the copartnery, that was not a matter for which the respondent was in any way to blame or ought to suffer.

Counsel for the complainers and respondents were not called upon.

At advising—

LORD PRESIDENT—This is a suspension of a threatened charge on four promissory-notes against the firm of Paterson Brothers, builders in Edinburgh; and the ground of the suspension is that the bills upon which the respondent (who is a money-lender in Edinburgh) proposes to do diligence were not signed by or with the authority of the complainers. No doubt the bills bear the firm's signature, but it has been shown that this was appended not only without their authority but by one who was expressly forbidden so to make use of the firm's name.

What the complainers here aver is, as a general rule, a perfect and complete answer to the threatened charge, and the question whether it is applicable in the present case depends upon the circumstances of the case as these have been established by the proof.

There are numerous rules in copartnery law, one of which is that the various members of a firm may sign cheques on behalf of the firm, and for which the other members will be liable, provided that these cheques are granted in the ordinary course of the firm's business.

In the present case it is somewhat surprising to me that the respondents' counsel has found so much to say in support of the charge.

The complainers do a substantial business in the erection of dwelling-houses and tenements, which they themselves build with a view to disposing of them at a profit.

Now, this is a perfectly legitimate mode of carrying on business, and there has been nothing urged against the complainers except that occasionally the credit side of their bank account falls rather low. But the nature of their business, and the periodical payments they have to make to their workmen and others necessitate this.

It appears that Robert Paterson was by the terms of the deed of copartnery expressly precluded from signing cheques or bills in connection with the firm's business transactions, and accordingly when he signed the first promissory-note in question, he committed a fraud upon his fellow partners, which fraud he renewed each time he appended the firm's name to the various promissory-notes.

The position of the respondent Gladstone is that he advanced the money in question to Robert Paterson in the ordinary course of business, and without making much inquiry as to what Paterson was going to do with the money, and the conditions of the loan were discount at the rate of 40 per cent.

In the letter of 28th October 1887, the first letter which appears in the correspondence between the parties, Robert Paterson wrote to Gladstone and enclosed a bill for £15 which he requested him to discount, and after referring to some other matters he added—"I would not have troubled you, but I find I cannot want the money myself. . , . You may rest assured, however, it will be met when it falls due. When sending me your cheque you can just retain the discount from it. Of course this is strictly confidential between you and I."

It is to be observed that while in this first transaction Robert Paterson is seeking an advance on his own behalf, when he next returns to borrow from Gladstone it is ostensibly on behalf of his firm that he does so; and it is at this stage of the proceedings that I think the money-lender begins to be in fault, for he must have had his suspicions aroused that things were not all right when a firm of builders in good repute required to borrow at 40 per cent., and he must have known that it was impossible for them to continue carrying on business upon these conditions.

Gladstone might by a little inquiry have found out whether Robert Paterson was dealing fairly with him and with his fellow-partners; but he seems to have abstained from all such inquiry, and accordingly the question which arises in the present case is, with whom does the fault lie which enabled this fraud to be committed? Unquestionably a fraud, and a bad fraud, has been committed, and if it could have been shown that the firm of Paterson Brothers had in any way derived benefit from the fraud, then assuredly they would have been liable; or if it could have been shown that the firm had enabled Robert Paterson to commit the fraud, their liability would in these circumstances have also been established.

But the firm not only derive no benefit from what has been done, but they knew nothing about these transactions until a charge upon the four bills in question was threatened. If we contrast this with the state of knowledge of the respondent Gladstone, it will not be difficult to determine upon whom the loss must fall.

He knew or must have suspected the real state of matters, and if he had only made reasonable inquiry, no loss would have resulted to anyone.

I am therefore of opinion that Gladstone was in fault, and that upon him the loss must fall.

I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord M'Laren and Lord Kinnear concurred.

Lord Adam was absent.

Counsel for the Complainers—M'Kechnie—Watt. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondent—Jameson—Law. Agent—Alex. Campbell, S.S.C.

Friday, February 21, 1890.

OUTER HOUSE.

[Lord Kincairney.

COUNTESS OF ELGIN AND OTHERS, PETITIONERS.

Curator bonis—Appointment of Peer.

On the petition of the Dowager-Countess of Elgin and a son and daughter, the Earl of Elgin was appointed *curator bonis* to another son of the Dowager-Countess who was of unsound mind and incapable of managing his own affairs.

Counsel for the Petitioners—Gillespie. Agents—Thomson, Dickson, & Shaw, S.S.C.

Tuesday, January 20, 1891.

SECOND DIVISION.

[Sheriff of Aberdeen.

LITTLEJOHN *v.* STIVEN.

Bankruptcy—Consignation—Preference—Act 1696, *c.* 5—*Bankruptcy Act* 1856, *sec.* 12.

A firm of merchants brought an action for £79, 16s. 2d. as the balance of an account due to them, and used arrestments on the dependence. Upon the alleged debtors consigning £100 in the hands of the Sheriff-Clerk the arrestments were loosed. Within sixty days of the use of arrestments the estates of the debtors were sequestrated. The depending action was intimated to the trustee in bankruptcy, but he failed to sist himself, and decree was pronounced by default in favour of the pursuers, who claimed a right to receive the sum found due to them out of the said £100. The trustee claimed the said sum as part of the sequestrated estates, and maintained that it was only a deposit, not a consignation, and that in any case as a security granted within sixty days of bankruptcy it fell to be reduced.

Held that consignation had been made in due form, and as being equivalent to payment, was not reducible. *Diss.* Lord Rutherfurd Clark, who held that the consignation being merely a *surrogatum* for the arrestment conferred no preference.

Upon 18th March 1889 Charles Reynolds & Company, warehousemen, London, brought an action in the Sheriff Court at Aberdeen against John Grieve & Company, auctioneers there, for the sum of £79, 16s. 2d., being the balance of a mercantile account, and upon 20th April 1889 used an arrestment on the dependence of the action in the hands of the Town and County Bank, Limited, Aberdeen, to the extent of £100.

Upon 27th April 1889 Messrs Grieve & Company entered into an arrangement with