Friday, March 3.

SECOND DIVISION

[Lord Anderson, Ordinary.

DICKSON *v.* NATIONAL BANK OF SCOTLAND.

Bank—Partnership—Deposit-Receipt—Dissolution of Partnership—Payment of Consignation-Receipt on Signature of a Firm Eight Years after its Dissolution—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 38.

A sum of money was consigned in bank. The consignation-receipt bore that the money was received by the bank from the executors of a deceased person and was payable on the signature of a firm of solicitors, and contained a declaration that "the bank are not cognisant of the facts above set forth." The firm of solicitors was dissolved and eight years thereafter one of the partners of the dissolved firm, who had subsequently entered into a new partnership with a new firm name, having endorsed on the consignation-receipt the signature of his original firm and also that of his new firm, presented the consignation-receipt to the bank and received payment of the money. He never accounted to the executors for the money, and his new firm was sequestrated. In an action by assignees of the executors against the bank for payment of the consigned money the Court (*rev.* the Lord Ordinary, Anderson) *dismissed* the action, *holding* that the uplifting of the money was an act necessary to wind up the affairs of the partnership and to complete a transaction begun but unfinished at the dissolution, and that the bank was bound to pay the money on presentation of the consignation-receipt with the signature of the original firm endorsed on it.

The Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 38, enacts:—"*Continuing authority of partners for purposes of winding-up.*—After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. . . ."

Mrs Dickson and others, the residuary legatees of the deceased Adam Robertson, paper manufacturer, New Calder Mills, Mid-Calder, as such residuary legatees and as assignees of his sole surviving trustee and executor, *pursuers*, brought an action against the National Bank of Scotland, Limited, Edinburgh, *defenders*, for payment of £155 with interest, being the sum contained in a deposit-receipt granted by the Bank to the executors of Mr Robertson.

The pursuers averred, *inter alia*—"(Cond. (3) The property of the said paper-mills . . . is situated on the estate of Lord Torphichen, whose agents, Messrs Tods, Murray, & Jamieson, Writers to the Signet, allege that there is in existence a bond and disposition in security for £145 over said property granted by Adam and Joseph Robertson on 8th December in the year 1766 in favour of the Baron Torphichen of that day. In or about the month of February 1890 the said trustees and executors gave notice that they would pay the sum contained in the said bond if the lender produced it and granted them a valid discharge thereof. The alleged creditor in the said bond and his agents were unable, or at least failed, to produce the said bond when the aforesaid offer was made, and in order that the affairs of the trust might be wound up the said executors directed that the sum of £155 should be consigned with the defenders upon the terms hereinafter set forth, and these instructions were duly carried out by their agents, namely, Messrs A, B, and C. (Cond. 4) On 7th August 1890 the said sum of £155 was deposited with the defenders, who granted a receipt therefor in the following terms:—'The National Bank of Scotland, Limited, Edinburgh, 7th August 1890. Received for the National Bank of Scotland, Limited, from the executors of the late Adam Robertson, papermaker, New Calder, the sum of £155 (One hundred and fifty-five pounds sterling), payable up till the 21st day of November 1890 on the joint signatures of Messrs Tods, Murray, & Jamieson, W.S., and Messrs A, B, and C, W.S., and thereafter on the signature of A, B, and C only, declaring the bank are not cognisant of the facts above set forth. David M'Kie, *p.* Manager. W. J. C. Samuel, *p.* Accountant.'"

The pursuers pleaded—"(2) The defenders having wrongfully and illegally paid the sum contained in the said deposit-receipt to persons not entitled thereto, the pursuers, as assignees or otherwise as residuary legatees foresaid, are entitled to decree as craved. (3) The averments of the defenders are irrelevant and should not be remitted to probation."

The defenders pleaded—"(1) No title to sue. (2) The pursuers' statements being irrelevant and insufficient in law to support the conclusions of the summons the action should be dismissed. (3) The defenders not being due any sums to the pursuers should be assoilzied. (4) In respect that the defenders have made payment of the sum contained in the said consignation-receipt in terms of the contract therein contained, they are entitled to absolvitor."

On 17th November 1914 the Lord Ordinary (ANDERSON) sustained the second plea-in-law for the pursuers, and decerned in terms of the conclusions of the summons.

Opinion.—"The pursuers are the residuary legatees of the late Adam Robertson, paper manufacturer, Mid-Calder, and they sue in this capacity and also as assignees of the said Adam Robertson's sole surviving trustee and executor. The pursuers crave decree against the defenders for a sum of

£155, which was deposited with the defenders by the executors of the said Adam Robertson on 7th August 1890.

"This sum was deposited in bank in the circumstances narrated in cond. 3 in order to allow the executry estate of the said Adam Robertson to be wound up and his executors discharged.

"A deposit-receipt in the ordinary case is in these terms — 'Received from A B the sum of £x which is this day placed to the credit of his deposit account with the Y Bank.' A document in these terms is the written evidence that a contract of deposit has been entered into between the depositor and the Bank. Under this contract the duties of the Bank as depository are to keep the money in safe custody on behalf of the depositor, and when called upon to do so to repay to him or in accordance with his instructions.

"The deposit-receipt which was granted in the present case was in a somewhat different form from that above mentioned. Its terms will be found in the condescendence. It bears that the depositors were the executors of the said Adam Robertson, and it provides that the sum deposited was to be payable after 21st November 1890 on the signature of A, B, & C only.

"In 1890 the said firm acted as the law agents of said executors, and the partners of the said firm were A, B, and C. The said sum remained on deposit with the defenders from 1890 till 22nd February 1904, when it was uplifted as after mentioned. In the interval these events had occurred—(1) On 22nd August 1890 the trustees and executors of the said Adam Robertson were discharged, and the discharge was registered in the Books of Council and Session on 4th September 1890. (2) On 30th September 1896 the firm of A, B, and C was dissolved by the retiral of the said C, and public notification of the dissolution was made in the *Edinburgh Gazette* on 2nd October 1896. (3) After this last-mentioned date the remaining partners of A, B, and C, to wit, A and B, constituted a new firm and carried on business under the firm name of A and B. (4) On 4th January 1898 the firm of A and B was dissolved by the death of the said A. (5) In the same year the surviving partner of the last-mentioned firm, B, assumed D as a partner, and they carried on business thereafter under the firm name of A and B.

"On 22nd February 1904, while the last-mentioned copartnery was subsisting, the said B — whose said firm of A and B had no authority to have possession of or to cash said deposit-receipt—induced the defenders to pay to him the foresaid sum of £155, with £38, 9s. 8d. of interest due thereon. The deposit-receipt is No. 22 of process, and it bears the signatures 'A, B, and C,' and 'A and B.' The parties are agreed that these signatures are in the handwriting of the said B, who is now deceased. Having obtained these sums the said B or his said firm misappropriated them. The said sums are irrecoverable from said firm, which was sequestrated some years ago.

"The pursuers' case against the defenders is that money which now belongs to them was deposited with the defenders, and the defenders have repaid the money neither to the depositors thereof nor to those who are now in right of the money, nor to the persons who were authorised by the depositors to receive payment of the money. The pursuers maintain that in these circumstances the Bank is bound to pay the amount deposited with interest due thereon to the pursuers.

"The defenders answer that their only contract was to pay to A, B, and C, that the pursuers cannot connect themselves with that firm, and therefore have no title to sue. The defenders' argument implies—and this was in point of fact maintained by them—that the terms of the deposit-receipt precluded the Bank from making payment to the executors themselves—the owners of the money and the persons who deposited it with the Bank. I cannot accede to this contention. I do not think it can be disputed that if the executors, subsequent to the date of deposit, had become indebted to the Bank the sum deposited could and would have been impounded by the Bank in extinction of that indebtedness. The depositors were entitled to recal at any time their authorisation to the Bank to pay to their agents, and if this had been done—or, indeed, whether it had been done or not—the Bank would have been bound to pay to the executors.

"The defenders further maintain that they made payment in terms of their contract to A, B, and C. They contend that B was entitled to sign the firm name of A, B, and C, and to receive payment of the deposited fund as the sole surviving partner of that firm, and that it was as such surviving partner that he did receive payment. The validity of this contention depends on the terms of section 38 of the Partnership Act 1890, which authorises a dissolved partnership to subsist, 'so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.' I am of opinion that this enactment is not applicable. Mr B when he cashed the deposit-receipt was not collecting an asset of the old firm for the purpose of winding it up, nor was he completing any unfinished transaction of that firm. The firm had been dissolved eight years previously, and presumably it had long prior to 1904 been wound up and had all its transactions completed. Moreover, the second signature on the deposit-receipt, that of A and B, shows that the defenders knew they were making payment not to A, B, and C, but to a different firm.

"This is one of those unfortunate cases where it has to be determined which of two innocent third parties must bear the loss occasioned by the fraud of another. The law which has to be applied in such circumstances is stated thus by Smith, L.J., in the case of *Nash* v. *De Freville* (1900), 2 Q.B. 72 —'It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion

the loss must sustain it.' The defenders aver that the executors and the pursuers were negligent 'in respect that they took no steps from 1890 until recently to have said sum accounted for.' I am unable to hold that there was any such negligence. The executors and the pursuers, knowing that the authorised payees became non-existent in 1896, merely allowed their funds to remain with the defenders. It was all to the defenders' advantage that they did so, and I cannot attribute negligence to a depositor of money merely because he continues to allow his money to remain for a long period in bank.

"On the other hand, I think the pursuers have clearly brought home negligence to the Bank. The depositors were executors, and I am of opinion that after a lapse of fourteen years the Bank was put upon its inquiry (1) as to whether the executry still continued, (2) as to who were then the owners of the fund, and (3) as to whether the authorisation to pay still subsisted after that long interval. Further, and specially, the Bank chose to pay to a firm, A and B, which had no authorisation to receive payment.

"I therefore propose to sustain the pursuers' second plea-in-law and grant decree as concluded for.

"The following authorities were referred to:—For pursuers—*Wood* v. *Clydesdale Bank, Limited*, 1914 S.C. 397, 51 S.L.R. 364; *Moore*, 11 I.R., C.L. 512; *Evans*, 13 T.L.R. 429. For defenders—Lindley on Partnership (8th ed.) 264; *Gordon*, 3 Pat. 428; *Snodgrass*, 8 D. 390; *Goodwin*, 18 R. 193; *Struthers Rock Company*, 13 R. 434, 23 S.L.R. 291; *Barstow*, 20 D. 230."

The defenders reclaimed, and argued—The Bank was bound to pay the money on the demand of the executors, and the signature of the firm name A, B, and C was evidence sufficient for the Bank of the consent of the executors to the payment. The moment it was established that the signature was the genuine signature of the firm the Bank was bound to pay—*Anderson* v. *North of Scotland Bank, Limited*, (1901) 4 F. 49, *per* Lord President (Balfour) at 53, 39 S.L.R. 75, at 79; *Cairns* v. *Davidson*, 1913 S.C. 1054, *per* Lord Salvesen at 1057, 50 S.L.R. 850 at 852. The respondents admitted that the Bank knew that A was a member of the firm of A, B, and C, and having that knowledge it was not necessary for the Bank to take any further steps to satisfy themselves of the right of A to receive payment. The additional endorsation of the signature of the new firm-name A and B was of no significance. It was merely the usual endorsation which the Bank was in the habit of requiring from messengers in order to catch forgers. The Bank could not insist on it as a condition of making payment. At common law, as well as under the Partnership Act 1890 (53 and 54 Vict. cap. 39), after the dissolution of a partnership a surviving partner could use the firm-name for the purpose of winding up its affairs—*Gordon* v. *Douglas, Heron, & Company*, (1795) 3 Pat. 428; *Milliken* v. *Love & Crawford*, (1803) Hume 754; *Ramsay's Executors* v. *Grahame*, F.C., January 18, 1814; *Snodgrass* v. *Hair*, (1846) 8 D. 390; *Goodwin* v. *Industrial and General Trust, Limited*, (1890) 18 R. 193, *per* Lord President Inglis at 195; Bell's Commentaries (7th ed.), vol. ii, pp. 527, 528, 533–535. The Partnership Act 1890 (*cit.*), sec. 38, made no change in the law. That section empowered A to sign the firm-name A, B, and C. The deposited money was an asset of the dissolved partnership. It fell within the scope of the winding up and therefore was covered by the provisions of section 38—*Bourne* v. *Bourne*, [1906] 1 Ch. 113, *affd.* [1906] 2 Ch. 427.

Argued for the respondents—The Bank was not entitled to pay the money to A—*Wood* v. *Clydesdale Bank, Limited*, 1914 S.C. 397, 51 S.L.R. 364. The executors who had deposited the money had constituted the firm of A, B, and C, their mandatories for the purpose of uplifting the money, and the Bank admitted that it knew that the firm were merely mandatories and not the owners of the money. But with the dissolution of the firm the mandate fell—*Snodgrass* v. *Hair* (*cit.*), *per* Lord Medwyn at 398; Bell's Commentaries (7th ed.), vol. ii, 534. A consignation-receipt was merely a receipt for and obligation to repay money. It was not a negotiable instrument—*Moore* v. *Ulster Bank*, (1877) 11 I.R., C.L. 512; *Forbes' Executors* v. *Western Bank of Scotland*, (1854) 16 D. 807; *Barstow* v. *Inglis*, (1857) 20 D. 230. When a mandatory died his mandate fell, and his executor had no authority to execute it, because a mandatory was a person specially selected by the mandant. Similarly when a firm was dissolved a mandate in its favour fell, for the surviving partners of a firm could have no greater authority than had the executors of a deceased. The Bank tacitly admitted that the signature of the firm A, B, and C was invalid, for they had taken on the consignation-receipt in addition to that signature the signature of the new firm name A and B. Nor did the Partnership Act 1890 (*cit.*), sec. 38, give A power to uplift the money. The section did not give a surviving partner any right of succession. It only gave him power to do what was necessary in order to wind up the partnership or to complete an unfinished transaction. But the endorsation of the consignation-receipt and the uplifting of the money by A was not necessary for the winding up of the partnership. A would have discharged his whole duty by merely handing over the consignation-receipt to the true owner of the money. Nor was it necessary for the completion of the transaction. The firm of A, B, and C had entered into a contract of deposit with the Bank. Whenever the money was deposited the transaction was completed. The endorsation of the consignation-receipt and the uplifting of the money was not necessary to its completion. The endorsation of the consignation-receipt and the uplifting of the money was a new transaction which flowed from the original completed contract.

At advising—

LORD JUSTICE-CLERK—[*After referring to the Lord Ordinary's interlocutor*]—I have come to be of opinion that the pursuers have not stated a relevant case against the Bank. The 38th section of the Partnership Act of 1890 provides—[*His Lordship quoted the section*]. The effect of that section is, I think, quite correctly expressed in Lindley on Partnership (8th ed.), where it is said at page 263—"Although dicta may be found in many cases which state the authority of a partner to bind the firm after a dissolution in wider terms than those contained in this section (*b*), the statement in the section appears to be in conformity with the actual decisions on this subject." I think that is perfectly sound, if I may respectfully say so. Section 38, like a great many other sections of the Partnership Act, simply expresses and declares what was then the state of the law, and the previous authorities, both English and Scottish, are in harmony with that provision of the statute. It is noticeable that the statute does not say that the partnership is to continue. What it does say is that the authority of the partner to bind the firm and the other rights and obligations of the partners are to continue—notwithstanding the dissolution—limited only by this, that what is done must be necessary, first, to wind up the affairs of the partnership, or, second, to complete transactions begun but unfinished at the time of the dissolution.

In this case what Mr B did in adhibiting the signature of the firm of A, B, and C to this receipt could be justified either on the ground that it was necessary to wind up the affairs of the partnership or on the ground that it was necessary to complete a transaction begun but unfinished at the time of the dissolution. On the face of the document the defenders knew nothing more than this, that they received a sum of £155, which they were told was derived from Robertson's executors, but with regard to which they took care to say that they were not cognisant of the circumstances under which the sum was lodged with them on consignation receipt. The obligation they undertook was that up till November 1890, that is to say, nearly four months after the date of the consignation receipt, they would pay it only on the joint signatures of Tods, Murray, & Jamieson, and A, B, and C, but after that they would pay on the signature of A, B, and C alone.

What happened was that the money was not asked for before November 1890, nor was it asked for until some time in 1904, before which date the firm of A, B, and C had been dissolved. I think the effect of the statute was that the partners of A, B, and C still remained after dissolution invested with authority entitling them to use the firm's signature, and that the partnership continued for anything that was required to wind up its affairs or to complete any transaction begun and not then finished. But the affairs of the partnership could not be properly wound up without getting the money in this deposit-receipt paid over to the parties entitled to it; nor do I think the transaction which was begun by the depositing of the money in bank on 7th August 1890 could be held as completed until the deposit was uplifted and paid to the parties entitled to it.

I think Mr B was quite within his legal rights in using the signature of the firm so as to enable him to go to the Bank with the endorsed receipt and demand the money. On the other hand, I think the defenders were entitled to say that if the document bore the signature of the firm on whose signature they agreed to pay the money—and it was not said to be a forged signature—then they were bound to pay the money to the person who presented the receipt. I think the Bank were not only within their right but discharged their duty when on presentation of the consignation receipt endorsed as it was they paid the money.

It is said that Mr B failed to hand over the money to those entitled to it. That may be; but that failure occurred after the Bank had discharged their duty, and accordingly there is no liability on the Bank. This was not a deposit-receipt in any sense of the term. It was a consignation receipt, as to which there is certainly this distinction in form—which I do not think is immaterial—that in the consignation receipt there is nothing to the effect that the sum is placed to the account of so-and-so. It is a receipt acknowledging the consignation of money which is to be paid on the terms and conditions set out on the face of it. These terms and conditions were duly satisfied here, and in my opinion the Lord Ordinary's judgment was wrong, and the proper judgment we should pronounce is one finding that the pursuer's averments are irrelevant, and dismissing the action.

LORD SALVESEN—I am of the same opinion. We must now in view of the admission of the pursuers construe condescendence 8 as if it said that B applied to the defenders for payment of the principal sum and that he wrote the two endorsements which are found on the face of the deposit-receipt. That fact being so ascertained, the contention which the pursuers submitted to us, and which they asked us to decide in their favour, was that after the dissolution of the firm no partner of that firm could sign the firm name with reference to a transaction such as this; that the firm had ceased to exist with reference to such transactions exactly in the same way as if it had been an individual who had died; and that therefore payment by the Bank on such a signature was a payment without authority for which they must take the consequences, if, in point of fact, the money did not reach the hands of the true owners.

I am unable to accept this contention. Mr Watson as representing the pursuers told us that the question in his view would have been the same whatever the interval of time that had elapsed—and indeed in order to be logical he required to take up that position—and his contention was that if, a week after the dissolution of the firm

had been notified to the Bank, Mr B had gone with the instructions of his clients to uplift the deposit-receipt for the purpose of paying it over to those clients, the Bank would still have been responsible if in fact he did not carry out these instructions. I think that is an untenable proposition. I think this was a matter connected with the liquidation of the affairs of the dissolved firm, in regard to which one of the partners was entitled to adhibit the signature of the firm, and that being so the Bank had no concern with the application of the proceeds provided they made payment to the person who *ex facie* of the document was entitled to receive it.

A question might have arisen from the two circumstances that are stated upon the record, namely, that Mr B did not adhibit his individual signature but the signature of a firm which had succeeded to some of the business of the dissolved firm, and that the transaction took place eight years after the dissolution of the firm; and if there had been pointed averments on the lines stated by the Lord Ordinary in his note, to the effect that these circumstances put the Bank on their inquiry, and that they were negligent in making the payment on the endorsation of the dissolved firm without ascertaining whether the dissolved firm had the authority of the true owners to uplift the contents of the deposit-receipt, I would not have been indisposed to allow inquiry. We asked council for the respondents whether they desired to make an amendment on the lines suggested by the Lord Ordinary, which in his view stated a separate ground for liability against the Bank, and we were told that they had definitely decided that they would make no change upon the record. There being thus no averment of negligence and no plea of negligence I do not think we are entitled to consider such a case as the Lord Ordinary figures and upon which in the absence of averment as to the facts he has in effect decided this case.

The point at issue therefore, as I take it, is limited by the pursuers' attitude to the one question whether a partner of a dissolved firm is entitled to adhibit the signature of the old firm for the purpose of uplifting a deposit-receipt which has been made out in their name or has been made payable to them in accordance with the instructions of a client of the firm; and on that point I have no hesitation in holding that so far as the Bank is concerned they were entirely warranted in making the payment on that endorsation.

LORD DUNDAS and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuers (Respondents)—W. T. Watson—Graham Robertson. Agents—Wylie, Robertson, & Scott, S.S.C.

Counsel for the Defenders (Reclaimers)—Hon. William Watson, K.C.—Wilton. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, March 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACKENZIE *v.* MACLENNAN.

Process—Suspension—Lawburrows—Competency of Suspension of Decree of Lawburrows—Civil Imprisonment (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 42), *sec.* 6.

Since the passing of the Civil Imprisonment (Scotland) Act 1882 a suspension of a decree of lawburrows is *incompetent.*

The Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42), sec. 6, enacts—"In order to amend the law in regard to imprisonment in the process of lawburrows, the following provisions shall have effect, that is say—(1) It shall not be competent to issue letters of lawburrows under the Signet in the Court of Session or Court of Justiciary. (2) Upon an application for lawburrows being presented, the sheriff or sheriff-substitute or justice of the peace shall immediately, and without taking the oath of the applicant, order the petition to be served upon the person complained against, and shall at the same time grant warrant to both parties to cite witnesses. (3) At the diet of proof appointed, or at any adjourned diet, the application shall be disposed of summarily under the provisions of the Summary Jurisdiction Acts and without any written pleadings or record of the evidence being kept. . . . Provided always that, except in so far as expressly altered by this section, nothing in this Act shall affect the existing law and practice in regard to the process of lawburrows."

Kenneth Mackenzie, *complainer*, brought a note of suspension against Kenneth Maclennan, *respondent*, craving the Court to suspend *simpliciter* a decree of lawburrows granted on 27th October 1915 by the Sheriff-Substitute (SQUAIR) at Stornoway against the complainer in an application for lawburrows at the instance of the respondent against the complainer.

The respondent pleaded—"(2) The present application being incompetent ought to be refused."

On 1st February 1916 the Lord Ordinary (ORMIDALE) allowed the parties a proof of their averments and to the complainer a conjunct probation.

Opinion.—"The procedure in a petition for lawburrows is now regulated by the Civil Imprisonment Act 1882 (45 and 46 Vict. cap. 42).

"Under the older law and practice the party taking out letters of lawburrows was not bound to give, and in practice did not give, any notice at all to the alleged wrongdoer. The letters passed on a bill without the production of any warrant, and all that was required was that before execution the messenger should take the complainer's oath that he dreaded bodily harm, injury, and oppression. There was absolutely no inquiry of any sort. Further, if the charge under the letters to find caution