

HOUSE OF LORDS.

Thursday, May 17.

(Before the Lord Chancellor (Finlay), Lord Dunedin, Lord Shaw, Lord Parker, and Lord Wrenbury.)

DICKSON v. NATIONAL BANK OF SCOTLAND.

(In the Court of Session, March 3, 1916, 53 S.L.R. 448, and 1916 S.C. 589.)

Bank — Partnership — Deposit — Receipt — Dissolution of Firm — Payment by Bank to Partner of Dissolved Firm on Signature by him of Firm-Name — Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 38.

A sum of money forming part of a trust estate was placed on deposit-receipt with a bank. The receipt bore that the money was received from the trust's executors, and was to be payable on the signature of a legal firm. That firm having been dissolved, one of the partners some years later signed the firm's name to the deposit-receipt, received the money, and embezzled it.

In an action against the bank, held that the uplifting of the money was necessary "to wind up the affairs of the partnership," and "to complete transactions begun but unfinished at the time of the dissolution" within the meaning of the Partnership Act 1890, sec. 38, and consequently it was within the power of the partner of the dissolved firm to adhibit the signature and the bank was entitled to pay the money thereon.

This case is reported *ante ut supra*.

The pursuers appealed.

At the conclusion of the argument for the appellants—

LORD CHANCELLOR—This action is brought against the Bank for the purpose of recovering from them money which it is alleged they improperly paid to Mr Robertson on his signature of the name of the firm of Wyllie, Robertson, & Rankin. The facts on which the claim arises are concisely stated in the third condescendence. Certain paper mills belonged to the estate of Mr Adam Robertson, papermaker, the settlor, and an action was brought by his residuary legatees, and in the third condescendence it is stated that "the property of the said paper mills is situated on the estate of Lord Torphichen, whose agents . . . 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" of Adam Robertson "gave notice that they would pay the sum contained in the said bond if the lender produced it and gave them a valid discharge thereof. The alleged creditor . . . 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 set forth" in the next condescendence. These instructions were carried out by the agents, Messrs Wyllie, Robertson, & Rankin. The sum of £155 was deposited with the defenders' Bank, which granted a receipt in the terms which are set out—"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 Wyllie, Robertson, & Rankin, W.S., and thereafter on the signature of Wyllie, Robertson, & Rankin only, declaring the Bank are not cognisant of the facts above set forth.—David M'Kie, p. manager, W. J. C. Samuel, p. accountant." It is not easy to see what the meaning of these last words in the receipt "declaring the Bank are not cognisant of the facts above set forth" may be. Probably it is taken from some form, though it is not applicable to the particular case in hand.

Now in my view that shows that the executors deposited this money with the Bank on the terms as between the executors and the Bank that up to a certain date—the 21st of November 1890—it should be paid out on the joint signature of the two firms, and after that date on the signature of the firm of Wyllie, Robertson, & Rankin only. I do not think it is in the least necessary for the purposes of this case to consider whether there has been anything amounting to what in English law would be called an interment by the Bank to Messrs Wyllie, Robertson, & Rankin which would have enabled Messrs Wyllie, Robertson, & Rankin to bring an action. The point is that the executors handed that money to the Bank on the terms that the Bank should pay it out on that signature after the date I mentioned. Of course, if anything happened which made that signature impossible the beneficiaries—those who are entitled to the money—could bring an action against the Bank alleging that it was impossible to get the signature owing to circumstances which had occurred, and that they claimed that they should have the money as being the beneficiaries.

Now what occurred was this—The deposit having been made in the year 1890, in the year 1896 the firm of Messrs Wyllie, Robertson, & Rankin was dissolved. Mr Rankin set up in business on his own account, and the other two partners, Mr Wyllie and Mr Robertson, continued in business from 1896 to 1898 under the style of Wyllie & Robertson. In 1898 Mr Wyllie died, and in September of that year Mr Robertson took in Mr Scott as his partner, and continued to carry on the business from 1898 onwards. Then in 1904—that is, eight years after the firm of Wyllie, Robertson, & Rankin had been broken up—the money was got by Mr Robertson from the Bank. He signed the name of his old firm Wyllie, Robertson, &

Rankin, and the name of the firm of Wyllie & Robertson, and the Bank paid upon that signature. The question is whether the Bank are discharged by that payment.

The case came in the first instance before Lord Anderson as Lord Ordinary, and in his judgment there are certain propositions which the appellants' counsel did not endeavour to defend. Lord Anderson laid it down that on this instrument "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 the executors." I cannot agree with that at all. In my opinion the contract between the executors and the Bank was that after the date named payment should be made to the order of the firm which was named there, and that in order to get the money the executors would have had to show that that signature had become impossible, and that they as the beneficiaries were entitled to the money.

There is another proposition laid down in the judgment of the Lord Ordinary which the appellants' counsel also did not seek to defend. He laid down towards the end of his judgment that he thought the pursuers had clearly brought home negligence to the Bank. Well no proof had been made and the judgment of the Lord Ordinary cannot possibly be supported on the ground that negligence had been established when the question had not been investigated. The material part of the Lord Ordinary's judgment is that in which he deals with the effect of section 38 of the Partnership Act 1890. He said that in his opinion that section did not apply. The case was taken to the Inner House, and the Inner House decided the case altogether upon the applicability of that section 38. Section 38 of the Partnership Act 1890 really embodied the old law relating to partnership derived originally from the Roman law, and it is this—that for certain purposes a partnership continues notwithstanding dissolution. There is an interesting passage quoted from Paulus in the digest by Sir Frederick Pollock in his edition of the Partnership Act where it is pointed out that although when one of a firm dies the survivors cannot undertake new transactions on behalf of the firm, they can complete what is left unfinished, and that distinction is really what animates this section 38 and the law of which section 38 is the embodiment.

Now section 38 is this—"After the dissolution of the 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." In my opinion that section applies. This really in my judgment was a transaction begun but not finished. The firm had undertaken the duties referred to in that receipt and the transaction was not completed until the money was somehow or other disposed

of. That being so any member of the firm of Wyllie, Robertson, & Rankin, which was dissolved in 1896, had after the dissolution power to append the signature of that firm for the purpose of uplifting that money, and the Bank were in my opinion justified in paying upon that signature. It is to no purpose to aver that Mr Robertson when he applied for the money to the Bank applied for it not in order that he might hand it over to the true owners but in order that it might be converted to his own purposes, as we are informed it afterwards was; with all that the Bank had nothing to do. They had contracted with the executors to pay on the order of the firm. Of course a forged signature would not have been an order of the firm, but no one contends that this was a forgery. The only question is, was it authorised. In my opinion the Inner House was right in holding that section 38 applied, and therefore that the Bank were discharged by that payment.

On these grounds, in my judgment, this appeal fails and ought to be dismissed, with costs.

LORD DUNEDIN—I concur. I am entirely satisfied with the reasons given in the judgment by the learned Lord-Justice Clerk, and I will only say one or two words more because I certainly heard from the Bar some arguments to-day which startled me very much. One thing I heard from the Bar I quite concurred in—that was that the Lord Ordinary's grounds of judgment were abandoned. I do not need to say any more about them because my noble and learned friend on the woolsack has already dealt with them.

I thought the law of deposit-receipts was very well settled in Scotland; there has been a great deal of litigation about deposit-receipts, mostly no doubt connected with another question, namely, with the question of donation; but in the course of those judgments, which are far too numerous to cite, the character of a deposit-receipt has often been adverted to. A deposit-receipt is a contract in which the Bank promises to pay upon a certain order, but it does not give any indication as to the person to whom the money really belongs after it has been paid; that may be proved in other ways. Accordingly the payer-in of a deposit-receipt may stand in the position that after he has got the money it is not his money at all, but that he may hold it as agent or trustee for some other person.

There was an endeavour made by the learned counsel to say that the payer-in of the deposit-receipt was not as regards the Bank in the position of a creditor to a debtor. I think that would be a most fatal view to take, and if my noble and learned friend on the woolsack gave any sort of help to that view by saying that it was not necessary to show that there was in the sense of English law an interment, I cannot help thinking that that depends upon what is the difference between our Scottish law and English law in this regard. In England no one can sue upon a contract who is not a party to that contract. In

Scotland that is not so. A person who has what is called a *jus quæsitum tertio* has a perfect right in Scotland to sue although he was no party to the contract, and undoubtedly the payer-in of a deposit-receipt has a *jus quæsitum tertio*. The result of this—and this is a very practical matter—will, I think, be very easily apparent. If the learned counsel's argument was right, then the result would be that in every case of a deposit-receipt where the deposit-receipt bore that the money was received from somebody who was different from the payer-in of the deposit-receipt, the Bank would be in this position that when it was asked for payment it would be enabled to say—"Well, unless you can bring that other person and give me his writing to say that he does not object to this money being paid I will not pay the money, but I will throw the whole money into Court, and charge against you the expense of a multiplepoinding."

In the matter of judgment I concur in the opinion that this appeal should be dismissed, with costs.

LORD SHAW—I agree. The learned Lord-Justice-Clerk in the course of his judgment, in which I concur, says—"I think the affairs of Wyllie, Robertson, & Rankin 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 completed until the deposit was uplifted and paid to the parties entitled to it." I put to the learned counsel for the appellants what was his position in law if either of these propositions were true in fact, and he admitted to me in a perfectly candid and helpful argument that if either the one or the other were true then the appellant would not be entitled to succeed. Without dealing with the second proposition, on which I do not commit myself, I am in entire agreement with the learned Lord-Justice Clerk upon the first.

The point of the case accordingly is whether the transaction of endorsement of this receipt and uplifting of the money was part of the affairs of this partnership, and accordingly whether the signature of the firm was a necessary incident to the winding up of those affairs. The learned counsel for the appellants submitted that the endorsement of this consignment-receipt was no part of the company's affairs, and in no way fell within the scope of winding these up.

I totally differ from that view. If that were the case I submit to your Lordships that in all commercial and even legal circles an immediate arrest of business would then of course result from a change of the personnel of a firm. Whether you consider it from the point of view of a solicitor's firm, or say a stockbroker's firm, instant and in some cases almost inextricable confusion would ensue. The law itself remedied that state of matters, and the settled law was crystallised by section 38 of the Partnership Act, which entitled a surviving partner, or a partner of a dissolved firm, to continue the mandate resting on each member of the

firm and to sign the firm's name in any matter relating to the affairs of the concern.

When a client's money is deposited with a bank, or other third person, in the name of a solicitor's firm, it is, and it remains, the affair and the very important affair of that solicitor's firm to adhibit such a signature as will enable the money to be recovered in order to be paid over to the person whose money it is.

These are two different transactions. The first is the recovery of the money, the second is the payment to the beneficial owner. With the second of these the bank has no concern; with the first, and the first alone, it has a concern, namely, payment by it upon a demand by a member of the firm. In making that payment and enabling that confusion to be avoided the Act of Parliament has given this facility, and the law before the Act of Parliament gave the same facility, namely, that a partner's mandate for his firm will include the power to sign the firm name.

When the Act of Parliament uses the language as to the authority of each partner to bind the firm I hold that it is clearly within the ambit of that power to do what is here done in pursuance of the former words in the section, namely, "in so far as may be necessary to wind up the affairs of the partnership." This transaction was necessary to wind up the affairs of the partnership. Having made that payment in that way, the Bank had no further concern whether the partner so receiving the money misapplied it or properly applied it. Otherwise, as I say, business could not be smoothly or properly conducted.

There is one part of the argument which has been referred to by my Lord Dunedin, and I express my concurrence with him about it. It is a confusion of thought to apply the law of Scotland in this way, that a person entitled to uplift a deposit-receipt is necessarily the beneficial owner of the contents of the receipt. The question of the beneficial ownership of the contents of a deposit or consignment receipt is sometimes, not infrequently, the subject of keen and sometimes of protracted litigation. It would be out of the question to involve the depository with such litigation. Beneficial ownership is one thing—the question of the obligation of the Bank to pay as stipulated by the Bank's contract is another thing. Here I think the Bank has paid to the persons to whom it contracted to pay. The signature of the persons with whom it contracted to pay has been duly adhibited by virtue of the law, and specifically by virtue of section 38.

LORD PARKER—I agree. I concur so thoroughly with what has just been said in the Court below by the Lord Justice-Clerk, and what has been said by your Lordships already, that I need not add anything.

LORD WRENBURY—I have found the judgment delivered by the Lord Justice-Clerk so satisfactory and so convincing that I should be content to say only that in my

opinion this appeal fails for the reasons stated in that judgment.

I hope I do no injustice to the learned argument which has been used at your Lordships' Bar if I endeavour to summarise that argument in a few words. It seems to me that that argument amounted to this—that a partnership may have an affair which is not an affair of the partnership. To my mind that is a contradiction in terms. I can give no assent to such a proposition. It seems to me that obligations and responsibilities arise in respect of the signature of the deposit-receipt that was in the hands of the firm, and the *terminatio*, the working out, of that obligation was the working out of an affair of the partnership—an affair of the partnership to be dealt with in the winding up of the partnership affairs—and that the section of the Act of Parliament is exactly applicable to enable Robertson, if he was, as he was, a member of the dissolved firm, to sign as he did in 1904. That is the only question your Lordships have to determine.

I add one other word, and that is this. Apart altogether from these considerations, I have from first to last been unable to see how these pursuers, that is to say the beneficiaries with the concurrence of the executors, could sue in this action at all against the National Bank of Scotland in the absence of Wyllie, Robertson, & Rankin. The executors upon the receipt have no right of action at all, they have parted with the money, upon the terms that the Bank should not be responsible for it, to somebody else. I quite agree that it would have been competent to them, in a proceeding for which they joined Wyllie, Robertson, & Rankin as defenders, to have recovered upon proving a certain state of facts as against the Bank, but how they can do it in the absence of Wyllie, Robertson, & Rankin I do not understand.

I am of opinion that the appeal should be dismissed, with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—W. T. Watson—Douglas Jamieson. Agents—Wyllie, Robertson, & Scott, S.S.C., Edinburgh—Warren & Warren, London, Solicitors.

Counsel for the Respondents—The Hon. W. Watson, K.C.—G. W. Wilton. Agents—Mackenzie, Innes, & Logan, W.S., Edinburgh—Murray, Hutchins, Stirling, & Company, London, Solicitors.

COURT OF SESSION.

Wednesday, May 23.

FIRST DIVISION.

BELCH'S TRUSTEES v. DALZIEL AND OTHERS.

Revenue—Fee and Liferent—Undeveloped Land Duty—Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), secs. 16, 19, and 42—Incidence of Undeveloped Land Duty as between Fiar and Liferenter.

By the Finance Act 1910, sec. 19, undeveloped land duty is recoverable from the owner of land. By section 42 "owner" is defined as meaning the fiar of the land. Held in a special case that undeveloped land duty fell to be debited against the capital of a heritable estate held by trustees for a liferentrix and fiars, the liferentrix suffering the loss of income on the amount of capital so applied.

The Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8) enacts—Section 16—"Duty on Site Value of Undeveloped Land.—(1) Subject to the provisions of this part of this Act, there shall be charged, levied, and paid for the financial year ending the thirty-first day of March Nineteen hundred and ten, and every subsequent financial year, in respect of the site value of undeveloped land, a duty called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value. . . ."

Section 19.—"Recovery of Undeveloped Land Duty.—Undeveloped land duty shall be assessed by the Commissioners . . ., and any such duty for the time being unpaid shall be recoverable from the owner of the land for the time being as a debt due to His Majesty, and shall be borne by that owner notwithstanding any contract to the contrary. . . ."

Section 42—"Application of Part I to Scotland.—In the application of this part of this Act to Scotland, unless the context otherwise requires—(1) . . . The expression 'owner' means the fiar of the land, except that where land is let on lease for a term of which more than fifty years are unexpired, the tenant under the lease shall be deemed to be the owner, and includes an institute or heir of entail in possession. . . ."

Mrs Janet Belch or Smyth or Dalziel, daughter of the late John Belch of Drumoyne, and others, his testamentary trustees, *first parties*, the said Mrs Dalziel as an individual, *second party*, and John James Belch Smyth and others, the children of the second party, and the marriage-contract trustees of the said John James Belch Smyth, *third parties*, brought a Special Case for the opinion and judgment of the Court as to whether undeveloped land duty payable in respect of heritable property belonging to the first parties was a charge against the capital or the income of the trust estate.

John Belch of Drumoyne died 28th December 1831, leaving a *trust-disposition and*