to be treated as settled estate. The property may for convenience be held by trustees for such a person, but if the trustees have not the power to prevent him from disposing of his rights as he pleases it is not in any true sense of the word settled property, and therefore on his death a new duty becomes payable. So long as the person holding right under the settlement is not competent to dispose of the estate, he is not to be considered owner in the sense of the Estate-Duty Act; he has merely a limited right, and if the estate has already paid duty it is not to be again chargeable on the death of someone who has had only a limited interest. That being the case, if Mrs Harvey's money, instead of being her own property settled by her own desire under her marriage-contract, had come to her under the will of someone who had settled it, and estate-duty had been paid in respect of this settled estate, the present claim could probably not be maintained. The question is different in the case of a marriage-settlement where the settlement is the act of the person herself. The whole of the money in respect of which duty is now claimed was Mrs Harvey's money which she voluntarily settled. That applies to the money that came from her brother just as much as to what she had in her own right at the time of her marriage.

I do not mean to introduce matter of speculation or surmise into my opinion, and it does not signify in the least whether Mr Barnett Harvey when he made his will knew that his sister's estate was settled by marriage-contract. Very probably he knew, but whether he knew or not, the terms of his will show that he intended his sister to take as large an interest in his succession as the law would allow. So far as regards the gift from him to her, it was a gift in fee, and accordingly estate-duty was paid upon it without objection by Mr Barnett Harvey's trustees. Although estate-duty has been paid under Mr Barnett Harvey's will, it has never yet been paid under Mrs Harvey's marriage settlement, and in my opinion it is now for the first time payable upon Mrs Harvey's death.

LORD KINNEAR was absent.

The Court adhered to the interlocutor reclaimed against, and of new appointed the defenders to lodge an account.

Counsel for the Pursuer and Respondent—Dundas, K.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Lorimer. Agent—W. Kinniburgh Morton, S.S.C.

Thursday, October 31.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON *v.* NORTH OF SCOTLAND BANK, LIMITED.

Bank—Retention—Deposit-Receipt Payable to A or B—Retention by Bank for Debt Due by A.

A deposit-receipt was granted by a bank to A and B "payable to either or the survivor of them." On B presenting the receipt payment was refused, on the ground that A was largely indebted to the bank; that the money truly belonged to A; and that the bank was entitled to retain the sum due under the deposit-receipt in security of the debt due by A. In an action by B, with the concurrence of A, *held*, after a proof before answer (*affirming* the judgment of Lord Kincairney, Ordinary) that the obligation undertaken by the bank was to pay to either party in the absence of notice from either to the contrary, and that they were not entitled in a question with B to retain the sum due under the receipt in security of a claim against A, whether it had or had not been established that the money was the property of A.

The following narrative of the facts in this case, with the averments and pleas of parties, is taken from the opinion of the Lord Ordinary (Kincairney):—"This is an action against the North of Scotland Bank, Limited, for payment of £96, 8s. 5d. contained in a deposit-receipt dated 4th August 1887, granted by the bank, which is thus expressed—'Received from Miss Agnes Fyfe and Mr Charles Fyfe Anderson, Comerton, Leuchars (payable to either or the survivor of them), £96, 8s. 5d. sterling, which is placed to their credit on deposit-receipt with the North of Scotland, Bank, Limited.' The action is raised by Anderson with consent of Miss Fyfe. They are mother and son.

"The bank resists the action, and has averred that the money in the deposit-receipt belongs wholly to Miss Fyfe, and that she is co-obligant with her brother William Fyfe in a bond for a cash-credit opened by William Fyfe with the bank, and also in a promissory-note to the bank by William Fyfe and her, a debt, I understand, due by William Fyfe.

"The sums due to the bank under the bond and note greatly exceed the sum sued for.

"The pursuer, on the other hand, avers that the sum in the deposit-receipt consisted in part of savings out of sums which Miss Fyfe had received for the aliment of her son, the pursuer, from his father, and otherwise of joint-savings by Miss Fyfe and the pursuer, and that Miss Fyfe had made a donation of the deposit-receipt to the pursuer so far as the contents

of it had not belonged to him from the first. That is what I understand the pursuer's averment to amount to.

"The pursuer has pleaded—(1) That the bank is bound by the express terms of the deposit-receipt to pay its contents to the pursuer; (2) that the sum in the deposit-receipt is the pursuer's property; and (3) that the defences are irrelevant.

"The defenders have pleaded—'(1) In the circumstances . . . the defenders . . . are entitled to retain the amount in the deposit-receipt . . . against the indebtedness of . . . Miss Agnes Fyfe to them;' and (2) the sum . . . in the deposit-receipt . . . being the property of the said Miss Agnes Fyfe, and she being indebted to the defenders to a greater' amount, 'the defenders are entitled to retain the sum in compensation *pro tanto* of the indebtedness to them.'"

On 26th October the Lord Ordinary allowed a proof before answer.

Opinion.—"The pursuer, with consent of Agnes Fyfe, his mother, sues the North of Scotland Bank for payment of a deposit-receipt, bearing that the money acknowledged was received from them, and is payable to either of them or the survivor. I understood that deposit-receipts are frequently granted in such terms, and the case is therefore of considerable importance.

"The defence of the bank amounts to a plea of compensation in respect of a debt due by Agnes Fyfe, and it is averred by the bank that the money in the deposit-receipt belongs wholly to her.

"The pursuer avers that the money belongs to him. On this question of fact parties are wholly at variance. The defenders ask a proof. The pursuer is naturally desirous to avoid the expense of a proof, and demands a judgment on the terms of the deposit-receipt. He contends that these are unambiguous, and that the bank has no concern with the question of property.

"The case has an appearance of simplicity, and I felt anxious at first to comply with the demand of the pursuer. On carefully considering the case, however, I have found it to involve questions of much nicety and importance, and I have been somewhat reluctantly forced to the conclusion that it cannot be safely decided without the facts being ascertained, and I do not think that any question as to competency of proof arises. That being my conclusion, I abstain from any expression of opinion on the merits, and allow the parties a proof before answer."

A proof was taken, the import of which is fully stated in the opinion of the Lord Ordinary, *infra*.

On 30th January 1901 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the pursuer is entitled to decree in respect of the terms of the deposit-receipt libelled; (2) that it has not been proved that the money in the deposit-receipt does not belong to the pursuer: Therefore sustains the first plea-in-law for the pursuer: Repels the pleas-in-law for the defenders, and decerns in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.

Opinion—[*After stating the facts and pleas, ut supra*]—"These pleas, it will be observed, are pleas of retention, not pleas that the sum due by the bank is extinguished by compensation. If affirmed, the debt due by the bank would not be extinguished, but the bank would not be obliged to honour the deposit-receipt while the obligation of Miss Fyfe to the bank subsisted. It may be, however, that plea 2 may possibly be read as a plea of compensation.

"When the case was debated in the Procedure Roll, the pursuer craved a judgment on his first plea without a proof in respect of the terms of the deposit-receipt. I was very favourably impressed by that argument at the time; but it then appeared to me that the case was too difficult, and in its general application too important to be safely decided without ascertaining the facts, and I therefore allowed a proof before answer, leaving, of course, all pleas open. The proof has now been taken, and it has added something, although perhaps not a great deal, to the materials for judgment.

"It appears from the proof that the pursuer was born in 1870, and was not brought up and maintained by his mother but by his mother's parents. Miss Fyfe, however, received from the child's father during the earlier years of his life various sums, amounting in all to £37,10s., for the aliment of the child. Part of this sum may have been expended by her for that purpose, but I think that the greater part of it was not, but formed a part of his mother's savings. These savings, including the aliment which she did not require to spend, amounted in the year 1884 to about £63. Prior to that date her savings had been lodged in a savings bank in her own name, but on 28th February 1884 she drew them from the savings bank and lodged the amount (£63) in the North of Scotland Bank, Limited, on deposit-receipt expressed in the same terms as the deposit-receipt libelled, that is, in favour of herself and the pursuer, payable to either or the survivor.

"Agnes Fyfe says she took the receipt in these terms with the view of bestowing the money on her son, she herself being in receipt of wages beyond her daily requirements. To a question suggesting the unreasonableness of putting all her money in the power of a boy, her answer seems to be that she did not think of him drawing and spending it, or expect him to do so, and in that expectation she may probably have been right.

"Her brother William Fyfe has been called as a witness, and he speaks to this point. But his evidence upon it, although not unimportant, is not very satisfactory. He depones that she proposed that the receipt should be made out in name of him and her; but that when he declined that proposal it was made out on his suggestion in name of herself and her son, chiefly on account of some confused notion of his that it was better to have two names to a deposit-receipt than one.

"It does not appear that Miss Fyfe was advised as to this matter of the form of the receipt by any bank agent. Mr White was agent for the North of Scotland Bank, Limited, at Tayport since 1880, but he does not seem to have given her any information about the meaning or the effect of a deposit-receipt so expressed, or to have warned her that in certain circumstances it would not give the right which it purported to give, namely, a right to either party to it to draw the money. He did not tell her that anything was meant by the deposit-receipt but what it expressed. Mr White says he knew the money must belong to Miss Fyfe, because the present pursuer was then only a boy. but he admits afterwards that he did not know what age the pursuer then was. It is not very clear whether he then knew that the pursuer was Miss Fyfe's son. But in 1884 she was about forty-five years old, and her son might then have been of mature years. He knew nothing to the contrary.

"But whatever may have been Miss Fyfe's motive in making this deposit-receipt payable to herself and the pursuer or either or the survivor, it is very important to notice that her motive was not to overreach the bank, because it is not said that at that time she was under any obligation whatever to the bank, and the bank then and for three years and a-half afterwards would have had no right to refuse to cash the deposit-receipt on the demand of the pursuer, and indeed would have had no motive for doing so. It would rather appear that an endeavour to defraud the bank or to defeat its lien, which might readily enough be suspected, is not in this case, and indeed it is not averred or pleaded.

"After that, sums of £5, £4, and £8 were lodged in bank on three similarly expressed deposit-receipts on the several dates—20th August 1884, 20th May 1885, and 25th September 1885, on which last date Miss Fyfe signed the bond for her brother's cash-credit account, and became for the first time debtor to the bank. This bond has not been produced.

"On 17th July 1886 another sum of £8 was lodged on a similar deposit-receipt, and on 13th July 1887 all these deposit-receipts, with the addition of a small sum (perhaps of interest) were consolidated and acknowledged by one deposit-receipt for £96, 8s. 5d., at which amount the sums on deposit-receipt have since stood, interest having been drawn by the pursuer on 30th August 1895, 10th November 1896, and 4th August 1897, which is the date of the latest deposit-receipt, being the deposit-receipt libelled.

"All the deposit-receipts except this last were issued at the branch of the bank at Tayport. The latest was obtained at the branch at Dundee under circumstances which at the first blush seem somewhat suspicious. On 19th April 1897 the bank agent, Mr White, addressed a very significant letter to Miss Fyfe intimating the desire of the bank that the deposit-receipt standing in the joint-names of herself and her son should be transferred to her own name only, intimating that the bank would then exercise a lien over it for her obligation to the bank. The motive of the bank is quite plainly expressed, and the letter could not possibly have misled Miss Fyfe, and did not, but she did not comply with it. It was after this letter that the pursuer took the deposit-receipt, dated 10th November 1896, to Dundee instead of Tayport, and obtained at Dundee, where Miss Fyfe's relations with the bank were not known, payment of the interest and a new deposit-receipt in the same terms as the old one. But all the advantage which the pursuer got by this manœuvre was payment of the interest. His title to the capital was just as good on the old deposit-receipt as on the new one. He depones that at Dundee he was offered and declined payment of the capital, but I cannot say that I believe that. But I do not consider this incident material, seeing that it does not prove any attempt to obtain possession surreptitiously of the capital.

"Thereafter the last deposit-receipt was formally presented for payment, and payment having been declined this action was instituted. I suppose, indeed assume, that payment was demanded for the purpose of getting rid of the claim of retention.

"Both the pursuer and the concurring pursuer agree in deponing that the money in the deposit-receipts embraced money which belonged to the pursuer, and both depone that Miss Fyfe made a donation of the money in the deposit-receipts to the pursuer, and they said that she did so repeatedly—a statement which certainly does not add to the credibility of their story. I cannot say that the manner in which the pursuer gave his evidence was calculated to inspire much confidence. I do not mean that it was intentionally false, but it was hasty, inconsiderate, over-confident, and unreliable. The evidence of Agnes Fyfe, on the other hand, was given temperately and sensibly, and to all appearance truthfully.

"I cannot say that I am perfectly satisfied with the evidence of donation. In an ordinary case the presumption against donation would have overcome much stronger evidence, but this is a case in which the donor and donee are agreed—a unique circumstance, and in which a serious question has been raised as to the original ownership, and also as to the quality of Miss Fyfe's right if the money were held to belong solely to her.

"These are the circumstances in which the question here raised falls to be solved—the question being this, whether the pursuer is entitled with the consent of Miss Fyfe to draw this deposit-receipt, or whether, on the other hand, the defenders are entitled to refuse to cash it and to retain the money in it as the money of Miss Fyfe held or retained in security of the debt due by her to the bank, not indeed her own debt, but the debt incurred on behalf of her brother.

"I understood the pursuer to maintain that the defenders had here no true right of retention, because there were no documents on which such plea could operate.

That view, however, proceeds on a very stringent interpretation of the defenders' pleas; and I am not prepared to decide that a banker may not refuse to pay a cheque in respect of a debt due to the bank by the holder. I prefer to decide the case on other grounds.

"The form of this deposit-receipt seems very common. Banks issue such receipts habitually (on which account the case is important) and they have given rise to various questions—at least the terms of such receipts have formed an important element in such cases. It is well settled that such deposit-receipts are not to be held as determining or as affording much assistance in determining the rights of two (or more) creditors. As between them, such deposit-receipts are not written evidence of right or contractual (*Dinwoodie* v. *Christie*, 6th December 1895, 23 R. 234). Sometimes they have been regarded as favouring the plea of donation, as in *Macfarlane's Trustees* v. *Miller*, July 20, 1898, 25 R. 1201, and (perhaps) *Robertson* v. *Bank of Scotland*, January 12, 1870, 8 Macph. 391; but sometimes as rather adverse to it, according to circumstances (*Durie* v. *Ross*, July 6, 1871, 9 Macph. 969). But as between the depositors and the bank they are certainly contractual, and *prima facie* the contract they constitute is that which their terms according to ordinary interpretation express.

"That being so, and the terms of the deposit-receipt being unambiguous, the pursuer's demand is undoubtedly, in terms of the receipt and *prima facie*, well founded; and it must fall on the defenders to show why they should not implement their written obligation according to its undoubted meaning. The *onus* is clearly on the defenders, and they are substantially the pursuers of the action and of the issue which it raises.

"The defenders have accordingly stated in their defence that the whole of the money in the deposit-receipt belongs to their debtor Agnes Fyfe, and the first question to consider is whether that is a relevant defence, or rather, in the circumstances, a sufficient defence. No doubt a proof has been allowed, but it was allowed before answer, and all the pleas of parties are open.

"The pursuer renewed his argument that he was entitled to judgment in respect of the terms of the deposit-receipt, and on reconsideration, not without hesitation, I have formed the opinion that the pursuer is right, and that his first plea should be sustained, and that the defenders are bound by their express contract, and have no concern with any question which may exist between Miss Fyfe and the pursuer as to the right of property in the deposit-receipt. There might have been circumstances disclosed by the proof which would have affected this question but I think none have been proved. It has not been proved that the pursuer deceived the bank in any particular. Neither the pursuer nor Miss Fyfe made any statement to the bank as to the property of the sum deposited. The bank agent Mr Whyte ventured a conjecture on the subject, but he had no knowledge; and I do not see that the bank had any right to information on the subject. When two or more persons deposit money in a bank, the bank, if it receives the money, must or will give a receipt in the terms asked, and will not inquire, and has I take it no right to inquire, to which of the parties the money belongs. If a depositor asks a receipt in name of another it is no concern of the bank whether that nominee be the true creditor or not. The bank has just to give back the money received to the party to whom the bank undertook to pay it. No authority was quoted to show that it was competent for a bank to prove by parole that the creditor in a deposit-receipt was not the true owner of it. I think that would be incompetent for the double reason that the question of ownership was no concern of the bank, and also that the obligatory writ of the bank could not in a question with the apparent creditor be contradicted by parole evidence. I do not see that the question as to the rights of two *ex facie* creditors in a deposit-receipt is in a different position to that of a deposit-receipt in favour of one person in a question with their debtor. It is quite true that a deposit-receipt granted to two parties does not prove their respective rights. But the matter is wholly different when the question is as to the obligation of the bank.

"I am therefore of opinion that parole proof that Miss Fyfe was sole creditor in the deposit-receipt is incompetent, and that even although the bank should be held to have succeeded in proving that the money belonged or belongs wholly to Miss Fyfe as a matter of fact (supposing such proof to be competent), the bank would not the less be bound to fulfil the obligation undertaken."

[*His Lordship then, upon the assumption that his views expressed supra were unsound, proceeded to consider the question as to the property of the money in the deposit-receipt.*]

The North of Scotland Bank reclaimed, and argued — On the facts it had been proved that the money in the deposit-receipt belonged to Miss Fyffe. On that assumption, was there anything in the terms of the deposit-receipt to preclude the bank from exercising the ordinary right of a debtor to compensate with a debt due to him by the creditor? It was submitted that in the consideration of an equitable right like compensation, the real ownership, and not the formal title, must be looked at. Assuming that money is deposited by A, and a deposit-receipt is taken in the names of A and B, for the purpose of enabling A to deal with it through B as an agent or messenger, why should the bank not be entitled to plead compensation against the principal in a question with the agent? According to the Lord Ordinary's judgment, compensation on a debt due by A was excluded even when B was a mere servant. Arrestment was an analogous case, and it had been held that debts really due to A might be arrested by his creditor, even although the title stood in the name of a

nominee—*Rigby* v. *Fletcher*, January 18, 1833, 11 S. 256; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571. Taking the converse case, it had been held that the bank could not plead compensation when money was lodged in the name of a person to whom the bank knew it did not belong, as for instance when executry funds were lodged by their debtor—*Alison* v. *Fairholms & Malcolm*, 1765, M. 15,132. On the same principle they should be allowed to plead compensation when their debtor was the true owner, although the formal title was in the name of some other party.

Counsel for the respondent were not called upon.

LORD PRESIDENT—As the Lord Ordinary has in his opinion so fully stated the facts of the case and the questions of law arising upon them, it will be sufficient that I should mention shortly the grounds on which I consider that the conclusion at which his Lordship has arrived is correct.

The first finding of the Lord Ordinary is that the pursuer is entitled to decree in respect of the terms of the deposit-receipt libelled. This finding stands quite apart from the second ground on which his Lordship proceeds, viz., that it has not been proved that the money in the deposit-receipt does not belong to the pursuer. The terms of the deposit-receipt are distinct and unambiguous. At the top of it on the left hand the sum is stated to be "£96, 8s. 5d.," on the right hand are the words "North of Scotland Bank, Limited, Dundee, 4th August 1897," it bears, "Received from Miss Agnes Fyffe and Mr Charles Anderson, Comerton, Leuchars (payable to either or the survivor of them), ninety-six pounds, eight shillings and fivepence sterling, which is placed to their credit on deposit-receipt with the North of Scotland Bank, Limited;" and then follows the signature of the agent. The deposit-receipt thus implies an unequivocal obligation to pay the money contained in it to whichever of the two persons named in it presents it asking payment. This being the meaning of the deposit-receipt as an instrument, it does not appear to me to be ambiguous, and the question comes to be, when an unambiguous document of this kind has been delivered to the person or persons who deposited the money, is the bank entitled to decline to pay the money to one of them upon an allegation of matters entirely extrinsic to the receipt. I am of opinion that this question must be answered in the negative, and I consider that the reasoning of the Lord Ordinary in which he deals with this part of the case is sound. It appears to me that where an unequivocal document of this kind is given by the bank binding it to pay to two people or either of them, either of them is, when not interpelled by the other, entitled to present the document to the bank and demand payment. The bank's contention involves the view that notwithstanding the terms of the receipt the bank may, by a course of dealing with one of the parties altogether destroy the rights of the other. The Lord Ordinary's first ground of judgment is a very short one, and I think that it is entirely right.

The view now expressed is not at all at variance with the decision to which Mr Cullen referred—*Alison* v. *Fairholms & Malcolm*, M. 15,132. In that case a factor for an executor having lodged his constituent's money with a banker in his own name, it was found that after the factor's death the money was not *in bonis* of him but belonged to his constituent. There was no question as to a receipt taken in two names, nor was there even any question as to whether the factor had right to present the receipt and claim the money. When the depositor was dead, so that he could not uplift it, and it was proved that he was merely the agent for another person to whom it belonged, it was held that it was *in bonis* of the true owner, and not *in bonis* of the depositor. It does not follow from anything which was decided in that case that if the question had arisen in the depositor's lifetime, and he had gone with the receipt and asked for payment according to its terms, the principal not intervening, the bank would have been entitled to refuse payment on the ground that the money did not truly belong to him. The question would have then arisen as it does here, whether the bank was not bound to pay according to the written contract. Here both parties consent, for the mother does not object.

But the Lord Ordinary has also proceeded upon a separate ground, viz., that it has not been proved that the money contained in the deposit-receipt does not belong to the pursuer. As the first ground of judgment is sufficient for the disposal of the case I do not find it necessary to form any definite opinion as to this second ground—it is sufficient to say that the argument submitted for the bank has not satisfied me that the finding of the Lord Ordinary upon this point is erroneous.

LORD ADAM concurred.

LORD M'LAREN—In an action founded on a deposit-receipt two questions may be raised which I think in a case like the present it is necessary to keep distinct. The one is, what is the obligation which the bank has undertaken when it received the deposit and granted the receipt in the terms which are founded on? The other is, who is the true owner of the fund which is the subject of the deposit? Now we are perhaps more familiar with questions relating to the second of the two heads I have distinguished than to the first, because nothing is more common than disputes arising as to the ownership of deposited money, especially after the death of the person who brought the money into the bank. And in such cases it is most clearly recognised that the terms of the receipt are not evidence—at all events are not conclusive evidence—as to the ownership of the money. It may be nothing more than this, that the true owner has deposited money under an arrangement with someone by which that party, it may be the

wife, or child, or agent of the depositor, is empowered to uplift the money. In regard to these cases the position of a bank or depository is perfectly clear, because until the depository is interpelled by action or diligence he is safe in paying to the person to whom he had undertaken to pay with the assent of the party making the deposit; and no court would compel second payment in such circumstances. But of course if there is a dispute the bank may be interpelled by arrestment or by notice, which probably would in most cases be accepted as equivalent to diligence. But now for the purposes of this action it does not seem to me to be necessary to determine who is the owner of this fund. Miss Fyfe and her son, Mr Anderson, by mutual agreement lodged this money in bank, not on a current account but as a deposit payable to either of them or the survivor. Although I do not need to draw an exact parallel between this case and that of the drawer of a bill, I think that when a bank, upon a deposit by A, agree, in writing, to pay to B, they are much in the same position as if they had accepted a draft by A in favour of B. Whoever is the true owner has at all events for the purposes of delivery made over his right of delivery in favour of another person, or, as in this case, in favour of either, or the survivor. Just suppose that the bank had no interest in this matter, and an action had been brought, they could not be heard to maintain that they were not going to honour Mr Anderson's demand because as a result of private inquiries they had heard that the money belonged to his mother. The bare statement of such a plea carries absurdity on the face of it. But then they say the bank is not doing this as a matter of interest in family history, but with a view to a more substantial interest, because Miss Fyfe has incurred liabilities. I do not think they put it as compensation, but they say they are entitled to retain until they see whether this obligation will be fulfilled. Now I do not know any legal ground that would justify such a claim of retention, because it is a very peculiar contract, and the obligation resulting from it is a precise and definite obligation to pay to a particular person. Unless there were identity of persons and "reciprocal claims," I should think compensation or retention was impossible. I cannot see how the claims of two persons who are jointly interested in a fund can ever be set against a debt which is due by only one of them, because there is not that identity of person between debtor and creditor that would raise either compensation or a right to retention.

I should wish to reserve my opinion as to the case where a person deposits money in his own name and he has at the same time an overdraft, because I think it would raise a very difficult question, and I can see grounds on which the bank might say, "We decline to pay your deposit unless you will agree to it being applied to the overdraft." Passing from this, I think it follows that it is unnecessary for the purposes of the present case to consider to whom in fact this money belongs. If the bank are bound to pay it, then I think that question of ownership could only arise in an action between the bank and Mr Anderson, or between them and some person who had claims on his estate. But I agree that if it had been necessary to consider the matter of fact, one would wish to hear argument on both sides, and to have the evidence more fully examined. I agree that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Respondent —Watt, K.C.—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—Cullen. Agents—Alex. Morison & Company, W.S.

Thursday, November 7.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LAMB *v.* THOMPSON.

Process—Sheriff—Suspension of Charge on Sheriff Court Decree ad factum præstandum — Imprisonment Threatened —Competency—Diligence.

A manufacturer who had consigned certain goods for sale to an auctioneer, on the bankruptcy of the latter raised an action against him in the Sheriff Court for delivery of the goods, and obtained decree. Meanwhile part of the goods had been sold by auction. Thereafter the consignor charged the auctioneer upon the decree to deliver the goods sold under pain of imprisonment. The auctioneer brought a suspension of the charge and whole grounds and warrants thereof, and averred that he was unable to implement the decree in respect that the goods had been sold to purchasers for cash, whose names and addresses he did not know.

Held that the suspension was competent (*per* the Lord Justice-Clerk and Lord Young) in respect of the circumstances of the case; and (*per* Lord Trayner and Lord Moncreiff) upon the general ground that decrees of inferior courts may still be competently brought under review by way of suspension.

This was a note of suspension at the instance of D. B. Lamb, auctioneer, Edinburgh, against M. Thompson, wholesale boot and shoe manufacturer, Kettering, Northamptonshire, in which the complainer craved the Court to suspend a charge under a Sheriff Court decree executed against him at the instance of the respondent, and whole grounds and warrants thereof, whereby the complainer was charged to