and military officers. Two of the directors who had opportunities of observing what was going on, and Mr Ryan the manager, speak to the pursuer constantly associating with the officers. This troubled the directors, who came to think that the pursuer was using the hotel for the purpose of promoting his money-lending business. Mr Younger, in answer to the question "Have you any evidence whatever that he ever did transact business?" says—"In my own mind I am absolutely confident that he did, but I have no evidence. I think myself that he threw the fly; I don't say that he landed the fish there. He would get them elsewhere." Mr Gray says—"We cannot say that business was done in the hotel in the sense of bonds made, but we felt that the net was spread." An incident involving the pursuer and another money-lender called Hurwitz, which occurred in the autumn of 1917, created a grave suspicion in the mind of Mr Gray that the two money-lenders had in connection with a money-lending transaction obtained a certain hold over one of the military guests.

In November 1917, by which time the pursuer had become the subject of comments and complaints by the guests, and the directors had become anxious with regard to the purpose for which he was using their hotel, the pursuer was pilloried by *Truth*, a paper which was current in the hotel, and held up to public ridicule and contempt. It described the rapacious way in which, along with his principal or partner Hyman Cohen, he had bled the victim of one of his money-lending transactions, and referred generally to the unconscionable way in which members of the fraternity to which he belonged fleeced those who had not strength of will to resist their exactions. The article commenced with a reference to the trial which had just before taken place of Hyman Cohen and others for fraud and conspiracy in connection with recruiting. It called attention to the business relations existing between Cohen and the pursuer, although the pursuer was not said to be in any way connected with the crime committed by his partner. The latter had pleaded guilty and been sentenced to eight months' imprisonment. Notwithstanding the scathing, and if not well founded the very gross, attack made on him, the pursuer after taking legal advice made no attempt to vindicate his character.

This attack in the public press brought matters to a climax, and the defenders resolved to get rid of the pursuer's presence in the hotel and to refuse again to admit him. He had become notorious and an object of suspicion and offence to the other guests, and according to the best judgment the directors could form he was endeavouring to use their premises for operating his business. It would not be reasonable, it seems to me, to exact from them absolute proof that their suspicions were well founded. It is enough that it clearly appears that they had reasonable grounds for thinking as they did and that they did not act rashly or capriciously, but on the contrary came to an honest conclusion only after patient and anxious consideration of the whole circumstances. On this evidence I think that their contention that they were justified in refusing to receive the pursuer into their hotel is well founded.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Solicitor-General (Murray, K.C.)—M. P. Fraser, K.C. — Paton. Agents — Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Macmillan, K.C.—MacRobert, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, May 25.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

BERTRAM, GARDNER & COMPANY'S TRUSTEE *v.* KING'S AND LORD TREASURER'S REMEMBRANCER.

Statute — Construction — "Persons having Possession of" Money before Consignation — Court of Session Consignations (Scotland) Act 1895 (58 *and* 59 *Vict. cap.* 19), *secs.* 2 *and* 16.

Prescription — Trust — Long Negative Prescription — Debt Due by Trustee for Creditors — Deposit-Receipt in Name of Trustee qua Trustee.

A trustee under a voluntary trust for creditors was due a debt to a trustee upon a sequestrated estate. The former made one payment of dividend to the latter, but when he came to make a second and final payment the latter had died and no successor had been appointed. He therefore in 1824 deposited the money in bank upon deposit-receipt which narrated the circumstances of the deposit. The money lay on deposit-receipt till 1896, the interest from time to time being marked upon it up to 1863 and thereafter in the books of the bank, and added to the principal. In 1896 the original sum deposited and the accumulated interest thereon were included in the sums paid over to the King's and Lord Treasurer's Remembrancer under the Court of Session Consignations (Scotland) Act 1895. In 1917 a new trustee was appointed upon the sequestrated estate and he brought an action against the Remembrancer for an account, claiming the sum transferred in 1896 and interest thereon. *Held* (1) that "the person or persons having possession of [the consigned money] before payment to" the defender was the trustee under the voluntary trust deed, or his representatives, and that the pursuer in terms of section 16 of the Act of 1895 had the same right to recover payment from the defender as he would have had against that trustee, and (2) that the pursuer's claim to the money upon deposit-receipt being a claim by a beneficiary upon a fund

impressed with a trust and still extant and available, was not subject to the operation of the negative prescription; and the defender *ordained to lodge accounts.*

The Court of Session Consignations (Scotland) Act 1895 (58 and 59 Vict. cap. 19) enacts —Section 2—"In this Act the expression 'consignation' shall extend and apply to any sum of money consigned or deposited in any bank under orders of the Court, or in virtue of the provisions of any Act of Parliament, and shall include any sum of money, or any bank deposit-receipt, security, or other voucher for a sum of money received by the Accountant of Court . . . or by any of the clerks of court, as the case may be, for deposit or consignation, in any cause or proceeding whether by order of court or otherwise, and any sum of money lodged by way of caution or security in corroboration of any bond, and also any unclaimed dividends, or special deposits, or unapplied balances in any sequestration or cessio, deposited in any bank in terms of the Bankruptcy (Scotland) Act 1856 or otherwise." Section 16—"Every person having any legal claim to the moneys to be paid over in terms of this Act or any part of them shall have such and the like claim thereto and such and the like right to demand and recover the same from the Queen's and Lord Treasurer's Remembrancer, after payment hereof to the Remembrancer, as from the person or persons having possession of such moneys before payment to the said Remembrancer."

William Paterson Scott, C.A., as trustee on the sequestrated estates of Bertram, Gardner, & Company, *pursuer*, brought an action against Sir Kenneth Mackenzie, Bart., King's and Lord Treasurer's Remembrancer, as such and as an individual, *defender*, concluding as follows—"It ought and should be found and declared by decree of the Lords of our Council and Session—(1) That the pursuer, as trustee in the sequestrated estates foresaid, is in right of and entitled to payment of the proceeds of a deposit-receipt for £585, 10s. 4d. granted by the Royal Bank of Scotland to the late David Thomson, W.S., on or about 31st March 1834 and quoted in the condescendence annexed hereto; (2) that the proceeds of said deposit-receipt amounting to £2589, 18s. 1d. were on or about 8th May 1896 paid over by said Royal Bank of Scotland to the defender then (who discharged the said bank of said deposit-receipt), and are at present held by and retained by him; (3) that the defender is liable to account for and to make over to the pursuer the said sum of £2589, 18s. 1d., together with all profit and interest accrued or that may accrue thereon from the date of the receipt thereof by the defender until payment to the pursuer, but always under deduction of such sums of expenses of process or of administration as the defender may qualify against the said sum of £2589, 18s. 1d. and profits or interest accrued or that may accrue thereon in his hands," and with conclusions in ordinary terms for an accounting and failing an accounting for £4000.

The *facts* of the case were—Bertram, Gardner, & Company were sequestrated on 10th December 1793, Richard Hotchkiss, W.S., being appointed trustee in the sequestration. James Ramsay, Accountant-General of Excise, one of the debtors of the sequestrated firm, had executed a trust deed for creditors, upon which David Thomson, W.S., had been appointed trustee in 1792. In 1820 a first dividend of 3s. in the £1 was paid from Ramsay's estate by Thomson to Hotchkiss. Hotchkiss died in 1824 without having been discharged, and the sequestration remained in abeyance until the appointment of the pursuer on 24th November 1917. In 1832 a further and final dividend of 3s. 1d. in the £1 was payable out of Ramsay's estate. Bertram, Gardner, & Company's share of that dividend was £585, 10s. 4d. As there was no trustee in the sequestration then in office, Thomson deposited the money in the Royal Bank of Scotland, and took from the bank a deposit-receipt in the following terms:—"*Edinburgh, 31st March* 1834. —Received from David Thomson, Esq., Writer to the Signet, trustee for James Ramsay, Esq., Accountant-General of Excise, deceased, and his creditors, five hundred and seventy pounds, fourteen shillings and sevenpence sterling as a dividend, payable conform to scheme of division as at first December Eighteen hundred and thirty-two years, on a debt due by the said James Ramsay to the late company of Bertram, Gardner, & Company, bankers in Edinburgh, together with fifteen pounds, three shillings and threepence as the interest thereon from that date to the date hereof, amounting the said two sums, after deducting seven shillings and sixpence for stamp for this receipt, to five hundred and eighty-five pounds, ten shillings and fourpence, which sum is deposited by the said David Thomson for behoof of all concerned in respect there has been no trustee named on the sequestrated estate of Bertram, Gardner, & Company since the death of Richard Hotchkiss, Writer to the Signet, the original trustee on the said estate, which sum is placed to the said David Thomson's credit with the Royal Bank of Scotland for behoof foresaid.

"£585, 10s. 4d. (Intd.) A. B.

"*For* the Royal Bank of Scotland,
"JOHN THOMSON, *Cashier.*"

On the payment of the final dividend Thomson was duly discharged *qua* Ramsay's trustee. In 1895, on the passing of the Court of Session Consignations (Scotland) Act 1895, the defender's predecessor in office claimed the sum so deposited with accumulated interest, in all £2589, 18s. 1d., and on 17th March 1896 Lord Moncreiff, then Lord Ordinary in Exchequer Causes, pronounced an interlocutor in terms of section 7 of the 1895 Act, under which the defender's predecessor obtained possession of the money in question. It so happened that David Thomson (Ramsay's trustee) was the son of an Alexander Thomson of the Excise, who was a creditor of Bertram, Gardner, & Company as an individual for £317, 2s. 4d., along with Hugh Scott of Harden, afterwards Lord Polwarth, upon a promissory-note payable to them or either of them for £2151, 9s. 7d.,

jointly with Alexander Alison upon current account for £1706, 12s. 5d. Dividends in respect of those debts were paid in 1796, 1799, and 1807, the last being paid to David Thomson, who was a partner in the firm of Thomson & Fleming, W.S., which firm acted for Alexander Thomson's heirs, Alexander Thomson apparently being dead at that date. The inventory of Alexander Thomson's estate included as assets claims against Hugh Scott and A. Alison, and a claim in the sequestration of Bertram, Gardner, & Company, and David Thomson and his two sisters were Alexander Thomson's residuary legatees. Thomson & Fleming also acted for other two creditors of Bertram, Gardner, & Company, viz., John Fowler, brewer, Prestonpans, and Cullen's representatives. In 1819 David Thomson's son, Alexander Thomson junior, was assumed a partner. On David Thomson's death the inventory of his estate was sworn to by Alexander Thomson junior, but it contained no reference to any debts due to him from the estates of Bertram, Gardner, & Company or James Ramsay, or any claim by him on those estates. The firm of Thomson & Fleming underwent various changes of name. From 1860 it was known as Thomson, Elder, & Bruce to 30th April 1863, when Alexander Thomson junior, being indebted in substantial sums to the firm, retired from it, and the name was altered to Elder & Bruce. At that date Hugh Scott and Cullen's representatives were still clients of the firm. David Thomson's deposit-receipt remained in the custody of the firm till the death of Bruce in 1892, which it passed to his successor in the business. Between 1841 and 1856 the deposit-receipt was taken to the bank on eight separate occasions when the interest accrued was noted on the deposit-receipt and added to the principal, and the additions were initialled by the servants of the bank. In 1862 Bruce again sent the deposit-receipt to the bank to have the interest calculated, but the bank did not on that occasion initial it. On 3rd January 1863 Bruce wrote to the bank asking repayment of the deposit-receipt to Alexander Thomson junior as forming part of the estate of David Thomson. On 6th January the bank wrote refusing to recognise any right in Alexander Thomson junior to represent his father as trustee in Ramsay's sequestration. On 21st March 1863 Bruce again wrote demanding payment on the ground that Alexander Thomson junior was a creditor of Bertram, Gardner, & Company through his grandfather Alexander Thomson senior, and that the firm represented other creditors of the company. The bank refused payment on the ground that Alexander Thomson junior could not grant a valid discharge. In the bank's books interest continued to be accumulated regularly at the end of each year.

The pursuer *pleaded, inter alia*—"1. The sum sued for being an asset of the estate in charge of the pursuer, decree of declarator and accounting should be granted as concluded for. 2. The defender being in possession of the fund sued for, and the same being vested in the pursuer, decree should be granted as concluded for. 4. The bank having in 1863, and also in 1896, acknowledged indebtedness in respect of the deposit-receipt founded on, the plea of negative prescription is unfounded and falls to be repelled."

The defender pleaded—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. All claims founded on the deposit-receipt having prescribed, the defender should be assoilzied."

On 19th November 1918 the Lord Ordinary (BLACKBURN) sustained the second plea-in-law for the defender and assoilzied him.

Opinion. — [*After narrating the facts averred*]—"Under these circumstances the pursuer sues the defender for payment of the sum of £2589, 18s. 1d., with all profit and interest that may have accrued thereon in the defender's hands from the date of his receipt of the money until payment. The defender pleads the negative prescription as having extinguished all claims based by the pursuer on the deposit-recipt, and, though I do not think the plea deserves any favour in the circumstances under which it is put forward, I do not see my way to repel it.

"Had the claim been made against the bank subsequent to 1874, and while the money was still in their hands, I do not think it doubtful that they would have been entitled to plead that the claim had been extinguished by prescription. The deposit of money with a bank merely creates the relation of debtor and creditor between the bank and the depositor or the person in whose name the deposit-receipt is taken. The law is so stated by Professor Bell in his Commentaries, vol. i, p. 277, where he distinguishes between the deposit of a specific article, *e.g.*, a plate chest, as a case of proper deposit where the right of property remains with the depositor, and the deposit of money as a case of improper deposit where the only obligation on the depositary is to repay a corresponding sum on demand.

"Accordingly, had this plea been put forward by the bank, the pursuer in order to meet it would have required to prove that there had been interruption of the running of prescription by the 'taking of document' upon the debt within the forty years. There is no averment upon record of interruption of prescription either by the endorsations on the back of the deposit-receipt or by any other writing. It was argued for the pursuer that the bank only had right to the money *qua* trustee for the creditors in the sequestration, but a claim against a trustee not pursued for forty years is extinguished as effectually by negative prescription as a claim against any other debtor. It was further maintained that the fact that the money had been paid over to the defender's predecessor in 1896 was an admission by the bank that it still held the money at that date, not in its own right but for behoof of the creditors. This, it was said, barred the defender from pleading that prescription began to run before 1896. I think this argument proceeded on the assumption that the loss by the creditors in Bertram's sequestra-

tion of their right to sue for payment of the debt would establish in the bank a valid title to the money. This does not necessarily follow, even though it may be difficult to find anyone else who could establish a title to it. The decision in the case of *Air* v. *Royal Bank*, 13 R. 734, 23 S.L.R. 508, which dealt with a sum of money consigned as in the present case prior to the Bankruptcy Act of 1839, apparently excludes any claim to the money by the creditors or representatives of James Ramsay, which would appear to exhaust all possible claimants. The same situation resulted in the case of *Air*, and is referred to in the opinion of the Lord President, but he does not suggest that the apparent extinction of all possible claims to the fund other than that of the bank gave the bank a good and valid title. I think that the fact that the bank paid over the money after the Consignations Act was passed amounts to no more than an admission that the bank had not itself a good title to the money, and I do not see how it can possibly be construed as an admission that they were still the debtors of persons whose legal claims to the money had long been extinguished. In any event the admission was not made to Bertram's creditors, in whose right the pursuer now stands, which in my opinion would have been essential as an interruption to prescription

"I was informed by counsel for the defender that in practice it is unnecessary for a creditor in a deposit-receipt with a bank to take steps to interrupt the running of prescription, since as a matter of business banks never plead that such a debt has prescribed provided the person claiming payment can show an otherwise good title to the debt. If this statement is correct, which I have no reason to doubt, it may be unfortunate for the pursuer that he has to deal with the defender instead of with the bank, but it cannot in my opinion affect the pursuer's plea. He is in possession of the money in virtue of an Act of Parliament, and his rights are regulated by the Act. By section 16 of the Consignations Act it is provided that 'every person having any legal claim to the moneys to be paid over in terms of this Act . . . shall have such and the like claims thereto and such and the like right to demand and recover the same from the King's and Lord Treasurer's Remembrancer, after payment thereof to the said Remembrancer, as from the person or persons having possession of such moneys before payment to the said Remembrancer.'

"Now if the bank before they parted with the money could have pleaded successfully that the claim of Bertram's creditors had been extinguished by the negative prescription, it follows that the creditors had at the date of payment to the defender's predecessor no legal claim or right to demand and recover payment which they could have enforced against the bank, and on this ground I think that the defender is legally entitled to repudiate liability to the pursuer. The fact that the bank might *ex gratia* have waived the plea of prescription and paid the debt does not in law compel him to follow the same course. I accordingly propose to sustain the second plea-in-law for the defender and to assoilzie him from the conclusions of the summons."

The pursuer reclaimed, and, after amendment of the record had been allowed, the First Division recalled the interlocutor of the Lord Ordinary, and remitted the cause to him to allow the parties a proof before answer.

On 21st February 1920 the Lord Ordinary, after the proof, of new sustained the second plea-in-law for the defender and assoilzied him.

Opinion.—[*After narrating the facts as disclosed at the proof*]—"I do not think it is clearly proved that Alexander Thomson junior was entitled to any part of the debt due to his grandfather by Bertram, Gardner, & Company, or that the clients of the firm in 1863 who represented Hugh Scott of Harden and others were in right of the debts of those creditors of Bertram, Gardner, & Company, but they may have been. It is settled apparently that an acknowledgment by a debtor to one who is merely a putative creditor justifies the real creditor in pleading interruption of prescription — Napier on Prescription, p. 676; Miller, pp. 111-112. Accordingly I think the pursuer is entitled to found on the acknowledgments by the bank to the firm of law agents acting on behalf of persons who were at least putative creditors, as interrupting the running of prescription down to 27th March 1863.

"Accordingly when the money was paid by the bank to the King's and Lord Treasurer's Remembrancer in 1896, the debt had not prescribed in their hands and would not have done so until 27th March 1903. No claim was made against the King's and Lord Treasurer's Remembrancer until 1918, and the question arises whether on the construction of section 16 of the Consignations Act he is entitled to plead that the negative prescription has been running since 1863. The pursuer maintains that he has the same right to demand payment to-day from the defender as he would have had against the bank when the money was handed over to the defender, and that as the debt had not prescribed then the defender cannot plead prescription against him now. The logical result of this argument is that the terms of the section exclude the extinction of any debt paid over to the King's and Lord Treasurer's Remembrancer no matter how many years may elapse before payment is claimed, provided only that the debt had not prescribed before payment was made to the King's and Lord Treasurer's Remembrancer. I cannot think that a construction leading to such a result is the true construction, and in my judgment the meaning of the section is that the person having a legal claim to moneys in the hands of the King's and Lord Treasurer's Remembrancer shall have the like right to demand and recover the moneys from him as he would have had against the persons who previously possessed the money had they not paid it over to the King's and Lord Treasurer's Remembrancer. This construction receives support from the terms of section 9, which deals with money

consigned in Court. The result is that, in my opinion, I must again sustain the defender's second plea-in-law."

The pursuer reclaimed, and argued—The Lord Ordinary's interlocutor should be recalled and accounts ordered. The Lord Ordinary had held that the claim against the bank had not prescribed in 1863, as the running of prescription had been elided. When the money passed to the defender in 1896, forty years had not elapsed since 1863, and the claim against the bank was still good in 1896 and the defender had so treated it, for he had taken interest to that date. The person who was in possession previous to the transfer to the defender was David Thomson or his representatives; in 1896 the pursuer would have had a valid claim against them and that was not affected by the transfer of 1896. That transfer was carried out by mistake, and the interlocutor of Lord Moncreiff could not prejudice the pursuer for he was not a party to the process. But assuming that the Court of Session Consignations (Scotland) Act 1895 (58 and 59 Vict. cap. 19) applied, section 16 stereotyped matters in 1896 and gave to the pursuer the same rights against the defender as he would have had against David Thomson or his representatives. David Thomson was a mere trustee and could not plead prescription, neither could the defender for the same reason. The bank did not found on prescription, and if David Thomson was entitled to get the money from the bank, then the pursuer was entitled to get it from him or from the defender. *Briggs* v. *Swan's Executors*, 1854, 16 D. 385, and *Jamieson* v. *Clark*, 1872, 10 Macph. 399, 9 S.L.R. 233, were referred to.

Argued for the defender—There had been no valid interruption of prescription in the period prior to 1896. At that date the right to the money in the deposit-receipt had been wiped out by the negative prescription. If not, then the action was wrongly laid against the present defender. If the money in the deposit-receipt was wrongly paid to the defender's predecessor, the pursuer should have sued the bank, who would have obtained redress from the defender under guarantees given to the bank. The defender's title on which he obtained the money was purely statutory, and there was nothing in the Act of 1895 to give the pursuer a title to sue him. If, however, the pursuer could sue the defender, then he did so on the footing that the defender came in place of the bank, and if so, forty years from 1863 had run without any interruption of prescription and accordingly the debt was now extinguished. The following were referred to—Act 1469, cap. 28; Ersk. iii, 7, 8, 15, and 41; Bell's Comm. i, 352; Millar on Prescription, pp. 79 and 89; *Jamieson's* case (*cit.*) at p. 405; *Barns* v. *Barns' Trustees*, 1857, 19 D. 626; *Kermack* v. *Kermack*, 1874, 2 R. 156, 12 S.L.R. 105; *Napier* v. *Campbell*, 1703 M. 10,656.

At advising—

LORD SKERRINGTON — Shortly after the passing of the Court of Session Consignations (Scotland) Act 1895 (58 and 59 Vict. cap. 19) the Queen's and Lord Treasurer's Remembrancer, in the discharge of the duty imposed upon him by section 7 of the said Act with reference to consignations made prior to 1st January 1889, presented a representation to the Lord Ordinary in Exchequer Causes which resulted in an interlocutor bearing that the Lord Ordinary "having made due inquiry," determined and certified that the amount not paid out or otherwise accounted for of consignations and of deposit-receipts for unclaimed dividends consigned with the Clerk of the Bills prior to said date with interest thereon was £6968, 2s. 11d., conform to the lists appended to the said interlocutor. Included in this sum total and in the relative lists was a sum of money deposited on 31st March 1834 with the Royal Bank of Scotland by David Thomson, W.S., trustee for James Ramsay deceased and his creditors. The deposit-receipt which is quoted bore that £570, 14s. 7d. was received from the said David Thomson "as a dividend, payable conform to scheme of division at First December Eighteen hundred and thirty-two years, on a debt due by the said James Ramsay to the late company of Bertram, Gardner, & Company, bankers in Edinburgh . . . which sum is deposited by the said David Thomson for behoof of all concerned, in respect there has been no trustee named on the sequestrated estate of Bertram, Gardner, & Company since the death of Richard Hotchkiss, Writer to the Signet, the original trustee on the said estate, which sum is placed to the said David Thomson's credit with the Royal Bank of Scotland, for behoof foresaid." The sum deposited, including about £15 of interest, amounted to £585, 10s. 4d. David Thomson died in 1837. So far as appears no one was ever assumed by him or appointed by the Court to act as trustee under Ramsay's trust-disposition in succession to David Thomson. There are on the back of the deposit-receipt notes initialled by servants of the bank which show that the bank from time to time accumulated the interest with the principal. The last of these is dated 18th December 1856, but the bank's books show that from that time onwards it regularly accumulated the interest at the end of each year. On 8th May 1896 the accumulated sum, amounting to £2589, 18s. 1d., was paid by the bank to the Queen's and Lord Treasurer's Remembrancer.

While I do not regard the circumstance as having a material bearing upon the questions which we have to decide at this stage (though it may or may not prove important at a later stage), I think it proper for the sake of clearness to state that as at present advised I am of opinion that the consignation with which we are concerned in the present action did not fall within the purview of the Act of 1895, and that it ought not to have been included in the statutory list. The Act (as appears from section 2) applies to money consigned or deposited in any bank "under orders of the Court or in virtue of the provisions of any Act of Parliament," including, *inter alia*, unclaimed dividends in any sequestration or *cessio*

deposited in any bank, but it does not apply to dividends voluntarily consigned by a trustee acting under a voluntary trust for creditors. David Thomson was a trustee under a voluntary trust for creditors, and so far as appears he made the consignation voluntarily and not by the orders of the Court of Session, or in virtue of the provisions of any Act of Parliament. The deposit-receipt was never in the possession either of the Clerk of the Bills or of the Remembrancer, but remained with David Thomson's firm and its successors until 1917, when it came into the possession of the pursuer. Bertram, Gardner, & Company's sequestration was in abeyance from the death of the original trustee in bankruptcy in the year 1824 until the pursuer's appointment as his successor in the year 1917.

In the present action the pursuer, as trustee on Bertram's sequestrated estates, calls upon the defender, the King's and Lord Treasurer's Remembrancer, to account to him for the sum of £2589, 18s. 1d., being the proceeds of the deposit-receipt in question, together with all profit and interest accrued thereon from the date of the receipt thereof by the defender, but under deduction of such expenses of process or of administration as are chargeable against the said sum. The defender pleads (1) that the pursuer's averments are irrelevant, and (2) that all claims founded on the deposit-receipt are prescribed. On 19th November 1918 the Lord Ordinary sustained the defender's second plea-in-law and assoilzied the defender. From the opinion annexed to the interlocutor it appears that his view was that the bank's debt was extinguished by the operation of the long negative prescription on the expiry of forty years from the date of the deposit, viz., on 31st March 1874, and that consequently there was in existence in 1896 no claim which could transmit against the Remembrancer. On a reclaiming note to this Division the Court allowed the record to be amended at the instance of the pursuer, and after recalling the Lord Ordinary's interlocutor it remitted the cause to him, with instructions to allow the parties a proof of their averments before answer. On 21st February 1920 the Lord Ordinary, having considered the proof, of new sustained the defender's second plea-in-law and assoilzied the defender. From the opinion annexed to this interlocutor it appears that the Lord Ordinary held that the currency of the negative prescription had been interrupted down to 27th March 1863, but that the claim sought to be established in the present action was extinguished by the operation of the negative prescription on the expiry of forty years from that date. In the view which I take of the case it is unnecessary to consider whether the evidence warranted the Lord Ordinary's decision on the question of interruption.

It is, I think, unfortunate that the Lord Ordinary does not in either of his two opinions clearly explain his view in regard to the meaning and legal effect of the deposit-receipt. Probably the responsibility for this rests with the pursuer, who does not make what I regard as the true position of matters at all clear in his pleadings. I think that the Lord Ordinary assumed that the effect of the deposit-receipt was to make the creditors in Bertram, Gardner, & Company's sequestration creditors of the bank for payment of the sum in the deposit-receipt. Upon the principle of *jus quæsitum tertio* there was nothing to prevent David Thomson, if he had so wished, from directing the bank to frame a receipt in such terms as would have created privity of contract between the bank and any person who might thereafter be appointed to act as trustee in Bertram's sequestration. Had that course been followed there would have been no danger of the bank's debt being extinguished by the negative prescription, as it would not have become exigible until a new trustee had been appointed. On the other hand, such an arrangement would have deprived David Thomson and his successors in office of the possession and control of the money, and would have placed them in a position of disadvantage if a dispute had subsequently arisen with Bertram, Gardner, & Company's trustee as to the amount of the dividend, or if the money had been claimed by the representative of a partner of Bertram's firm as a fund which had been abandoned by Bertram's creditors to the bankrupts. There is nothing in the terms of the deposit-receipt to indicate that the bank agreed to recognise as its creditor anyone except David Thomson or his successors in office as trustees of James Ramsay's trust. It follows that the right which the pursuer seeks to enforce in the present action is that of a beneficiary who has an interest in a fund impressed with a trust in his favour. The language of section 16 of the Act of 1895 is sufficiently wide to justify a claim of this character against the King's and Lord Treasurer's Remembrancer. The relevant part of the section is as follows—"Every person having any legal claim to the moneys to be paid over in terms of this Act, or any part of them, shall have such and the like claim thereto, and such and the like right to demand and recover the same from the Queen's and Lord Treasurer's Remembrancer, after payment thereof to the said Remembrancer, as from the person or persons having possession of such moneys before payment to the said Remembrancer." Moreover, at common law a trust beneficiary is entitled to follow the trust fund into the hands of any person who has obtained possession of it gratuitously, and to enforce the trust in a question with such gratuitous possessor. Though the defender avers that he handed over the money to the Treasury he does not plead that he is not in possession of the fund, and that the action ought to have been directed against the Treasury.

The Lord Advocate argued that upon a just construction of section 16 the person "having possession of" the money "before payment to the said Remembrancer" was the Royal Bank, and that as the pursuer was not the bank's creditor he could have no claim against the Remembrancer.

Obviously this argument would have been equally good, or equally bad, if the deposits had been made in the year 1884, in which case no question as to the operation of the negative prescription could possibly have arisen. In my judgment David Thomson was the person having possession of the money which stood at his credit with the Royal Bank, and the pursuer has the same rights in a question with the defender as he would have had in a question with David Thomson. Further, I see no justification for the suggestion that a beneficial interest in trust money is not a "legal claim" thereto within the meaning of section 16.

As regards the negative prescription, I shall assume that the Royal Bank might have successfully pleaded this defence in the year 1896 instead of allowing the deposit in question to be included in a list of deposit-receipts "not paid out or otherwise accounted for." The bank chose to waive this plea, following in this respect what is said to be the usual practice of Scottish banks in the case of deposit-receipts. I have difficulty in understanding the contention that this waiver did not enure to the advantage of the persons beneficially interested in the fund, as it certainly would have so enured if the claim against the bank had been made by a judicial factor upon James Ramsay's trust. A trustee cannot appropriate to his own uses a windfall connected with the trust merely because he could not have recovered it by action at law, and the statute does not appear to confer a right of this exceptional character upon the Remembrancer. Though the claim which the pursuer now seeks to vindicate might have been made at any time after the year 1834 if Bertram's creditors had shown due attention to their own interests, the trust fund is still extant and available for the purposes of the trust, and accordingly the negative prescription does not apply to the pursuer's claim.

For the foregoing reasons I am of opinion that the interlocutor reclaimed against should be recalled, that the defender's pleas-in-law should be repelled, and that the defender should be appointed to lodge an account. Any questions as to the extent of the defender's liability, in view of the terms of the statute and of the special circumstances under which he received the money, will fall to be disposed of in the accounting, and will not be prejudiced by our present decision.

LORD CULLEN—The sum of £585, 16s. 4d. deposited with the bank in 1834 formed part of the trust estate under the trust-disposition granted by James Ramsay and his wife for behoof of creditors in 1792, and it was voluntarily deposited by David Thomson, who had it in his possession *qua* trustee under the said trust. David Thomson was unable to pay it over to Bertram, Gardner, & Company's estate because there was no one *in titulo* to receive and discharge it. He accordingly deposited it in bank for safe keeping, and to provide for the matter of interest on it until such time as it might come to be paid over. The deposit was placed to his credit with the bank, but at the same time it was by the terms of the deposit-receipt earmarked so as to differentiate it from his own funds and to stamp its origin and identity. The deposit-receipt was received by David Thomson as trustee, and it was retained by him during his life. At his death it was among his papers, and it remained in the custody of the agents of the Thomson family until the proceedings which resulted in the present action began. The legal situation created by the making of the deposit I take to have been that the deposited money was in the possession of David Thomson in his trust capacity, the bank being his debtor therefor under the document of title to the debt placed in his hands. He could have uplifted it at any time and deposited it elsewhere had he so chosen. If a trustee on Bertram, Gardner, & Company's sequestrated estates had then come forward, his claim would have lain not against the bank but against David Thomson, and it would have been that the deposit with accrued interest should be made furthcoming to him, and the claim would have been met by David Thomson either endorsing and handing over the deposit-receipt to him or uplifting and handing over to him the amount, capital and interest, due by the bank under the receipt. This situation was not essentially altered by the death of David Thomson, the depositor and creditor of the bank in his trust capacity. The bank remained merely debtor under the deposit-receipt. The bank did not become the possessor of the deposit as David Thomson in his trust capacity had been. The deposit belonged to the trust estate of the Ramsays, from which it had never been paid away. The trust was a lapsed trust—that is to say, there was no acting trustee under it in succession to David Thomson.

Under these circumstances the present defender in 1896 obtained payment from the bank of the amount due under the deposit-receipt upon an order of Court bearing to proceed under the Act of 1895. It does not appear to me, however, that the deposit belonged to any of the classes of consigned or deposited moneys to which the Act applies. The parties are, I understand, agreed as to this. They are, however, also agreed that the pursuer's claim should be dealt with as if the deposit had fallen under the Act and had been properly included in the said order of Court. There is a difficulty about this, arising from the fact that the consigned or deposited moneys falling under the Act are of different kinds with different qualities, and the words of section 16—"the person or persons having possession of such moneys before payment to the said Remembrancer"—may vary in their application. But I agree with your Lordships in the view that on an application of these words to the circumstances of the deposit here in question the words are not apt to describe the position of the bank, which was all along that of a mere debtor for the amount due under the deposit-receipt granted by it and delivered to David Thomson as its creditor in his trust capacity, and that on the other hand the pos-

session of the deposit falls to be ascribed to the Ramsay trust, to which the money belonged as part of the Ramsays' estates, from which it had never been paid away to the creditor to whom it had been allocated as dividend. On this footing the liability of the defender is the same as would have been the liability of David Thomson had he been still alive, or as would have been the liability of any person representing the Ramsay trust after David Thomson's death, and so having right to the deposit as creditor of the bank; and such liability being a liability to make forthcoming trust estate, set apart as such and extant in the hands of the trust holder, to the true beneficiary, would not have been extinguished by the negative prescription.

I accordingly concur in the order which your Lordships propose.

LORD MACKENZIE—The Lord Ordinary has sustained the defender's plea of prescription upon an argument in which the pursuer maintained that "he has the same right to demand payment to-day from the defender as he would have had against the bank when the money was handed over to the defender." As the argument was developed in the Inner House it became apparent that the pursuer's true position is that his claim as now representing the beneficiary in the deposit-receipt in the sequestrated estate of Bertram, Gardner, & Company is not against the bank but against the successor of David Thomson. Now David Thomson held the fund in a fiduciary capacity and prescription could not be pleaded by him, the money being extant and available. The King's and Lord Treasurer's Remembrancer succeeded to David Thomson under the order of the Court. One trustee has been succeeded by another. There is in this view no room for the plea of prescription. The order of Court was made under the Consignation Act of 1895. None of the categories of that Act fits the fund here in question. The defender's argument was that the person having possession of the money within the meaning of section 16 of the Act was the bank. It is sufficient to say that the bank were the debtors, and that the only person *in titulo* to grant them a discharge was David Thomson's successor. The claim in this action is against David Thomson's statutory successor, the King's and Lord Treasurer's Remembrancer. The opening words of section 16 of the Act are directly applicable. The nature of the claim is the same as it would have been against a judicial factor appointed to administer the contents of the deposit-receipt. The King's and Lord Treasurer's Remembrancer is bound to account just as his predecessor would have been. The fallacy in the argument the pursuer presented to the Lord Ordinary is in supposing that the King's and Lord Treasurer's Remembrancer is identified with the bank. For these reasons I am of opinion that the plea of prescription should be repelled, and that the case should be remitted to the Lord Ordinary in order that the defender may lodge an account.

The LORD PRESIDENT (CLYDE) did not hear the case and delivered no opinion.

The Court recalled the interlocutor of the Lord Ordinary, repelled the pleas-in-law for the defender, and appointed the defender to lodge an account.

Counsel for the Pursuer—Macphail, K.C. —Ingram. Agents—P. Adair & Company, S.S.C.

Counsel for the Defender—Lord Advocate (Morison, K.C.)—A. R. Brown. Agent—Thomas Carmichael, S.S.C.

Thursday, June 10.

FIRST DIVISION.

NORTH OF SCOTLAND AND ORKNEY AND SHETLAND STEAM NAVIGATION COMPANY, LIMITED—PETITIONERS.

(*Vide supra*, p. 117.)

Company — Alteration of Constitution — Memorandum of Association—Objects—Form of Objects Clause—Extension of Objects—Companies (Consolidation) Act 1908 (*8 Edw. VII, cap.* 69) *sec.* 9.

In the case of a shipping company substituting for copartnery writs a memorandum and articles, the Court *confirmed* a memorandum of association in which the objects-clause (1), as to form, went beyond a strict statement and definition of the objects and included a variety of powers designed to secure the objects, and (2) contained provisions enabling the company, which was formerly for carriage by land and sea, (*a*) to carry by air, and to perform functions and exercise powers subsidiary thereto; (*b*) to acquire and take over the business, property, goodwill, and liabilities of any other company carrying on a business of a similar nature, or possessed of property suitable for the purposes of the company, and to arrange to share profits or co-operate with such a company; (*c*) to lend money to customers; (*d*) to obtain Provisional Orders, or Acts of Parliament, or Orders of the Board of Trade to enable the company to carry its objects into effect, or for effecting any modification of its constitution; (*e*) to dispose of generally, including to sell, any part of the property and rights of the company; and (*f*) to promote freedom of contract, and to resist, insure against, counteract, and discourage interference therewith, and to subscribe to any association or fund for any such purposes—and *refused* to confirm an interpretation clause to the effect that each paragraph in the objects clause should not be limited or restricted by inference drawn from the terms of any other paragraph or from the name of the company. The petitioners in the course of the proceedings *departed* from the following in the proposed objects - clause — Provisions enabling the company (*a*) to operate as marine insurers apart from insurance