Thursday, January 14.

SECOND DIVISION.

[Sheriff Substitute of Lanarkshire.

THE STRUTHERS PATENT DIAMOND ROCK PULVERISER COMPANY, LIMITED, AND LIQUIDATOR *v.* THE CLYDESDALE BANK, LIMITED.

Bank—Contract between Banker and Depositor—Authority to Pay.

A. J. S. opened a current account with a bank in name of the "S. Co.," of which he was a promoter, but which was not yet formed or registered, handing them an extract from a minute of meeting of the promoters stating that cheques were to be drawn by him (S.) and by W. L. G. as secretary. The company was thereafter registered, and both before and after registration the account was so operated upon. The company having gone into liquidation, the liquidator refused to give credit to the bank for the payments out of the account on these signatures, on the ground that A. J. S. and W. L. G. had no authority from the company so to draw money. *Held* that the money had been paid into the bank on a contract that it was to be drawn out in a certain way, and that the payments having been made in that way, the bank was not liable to pay the money again to the liquidator.

This was an action by The Struthers Patent Diamond Rock Pulveriser Company, Limited, and James Charles Park, liquidator thereof, against the Clydesdale Bank, for decree against the bank for £1165, 5s. 9d. (with interest at five per cent. from the 27th December 1884), as being money of the company paid away by the bank without sufficient authority, and for which therefore they had no sufficient discharge.

The pursuers' allegation was that the company kept an account with the bank into which £1153, 13s. 9d. was paid from time to time, and that the payments out of the account founded on in defence were not authorised by or binding on pursuers.

The defenders denied liability on the grounds fully stated *infra*.

It appeared that on 9th October 1883 A. J. Struthers opened an account with the defenders in name of the "Struthers Patent Diamond Rock Pulverising Company, Limited." The purpose of this company, which was then only projected, and not incorporated, was to send out machines to South Africa for the purpose of crushing the diamondiferous rock there, as in the course of breaking it by the ordinary method there was a great deal of theft by the workers. The profit to the company was to be got from the money paid for the hire of machines made under Struthers' patent. Struthers had previously attempted to start a company in London for the same purpose, but had failed to do so. He raised some funds there, however, for the purpose, and some in Glasgow.

The first money paid into the Clydesdale Bank on this account was a cheque for £76, 8s., dated 3d September 1883, on the "Capital and Counties Bank, Limited," London drawn by A. J. Struthers and D. Cowan, on account of the "Struthers Patent Diamond Rock Pulverising Company, Limited." Cowan was one of the proposed directors of the company which Struthers tried to float in London. This cheque was sent for collection, but was returned to the Clydesdale Bank with the words "authority incomplete" across it. Struthers' attention was drawn to this, and he procured another signature to the cheque, "Peter Stewart." Mr Stewart was a merchant in Glasgow, and was another of the proposed directors of the proposed London company. He had nothing to do with the Glasgow company. The cheque was then paid.

A few days after opening the account, viz., on 13th October, Struthers handed to the bank this letter bearing to be stamped with a stamp of the Struthers Diamond Rock Pulverising Company—"We have pleasure in handing you extract from the minutes of meeting of Tuesday, 9th October.

"'It was resolved that the following gentlemen constitute the board of directors *in Glasgow*, viz.:—'A. J. Struthers, 28 Norfolk Street, London, and 5 Oswald Street, Glasgow.

[*Here followed certain other names.*]

"'2*d*, To send out allotment letters to the various shareholders in Scotland.

"'3*d*, To entitle A. J. Struthers and W. L. Gardner to sign all cheques and receipts for and on behoof of the Coy.'

"All cheques signed by the undernoted.

"A. J. Struthers.

"W. L. Gardner, *Secretary*.

"A true extract. *A.J.S.*

"A. J. Struthers, *Chairman*."

After the bank received the letter above quoted money was paid in from time to time by W. L. Gardner as secretary, and drawn out from time to time on cheques signed by Struthers as managing director, and W. L. Gardner as secretary. Cheques paid in were indorsed by W. L. Gardner, secretary, and A. J. Struthers."

A minute book of the company was kept, and under date 9th October 1883 was a minute which bore that Struthers and certain other gentlemen were appointed directors of the company, that it had been agreed that allotment letters should be sent out to the various shareholders, and that A. J. Struthers and W. L. Gardner were authorised to sign all cheques and receipts for and on behoof of the company.

On 4th December 1883 the company was registered under the Companies Act 1862 to 1880 as the Struthers Patent Diamond Rock Pulveriser Company, Limited. No notice of the registration was given to the bank. At that time about £437 had been paid in and about £316 drawn out. The articles of association provided that cheques should be signed by two directors, and countersigned by the secretary, or other officer appointed for that purpose.

After registration operations on the account continued to be dealt with in the same way as before it. In October 1884 a communication bearing to be a note of what passed at a meeting of directors was sent to the bank. It bore that the managing director (Struthers) was given power on behalf of the company to sign all cheques on English and Scotch banks. After

that at least one cheque was honoured which was signed by Struthers alone. There were no minutes after registration.

In November 1884 it was determined that the company should be wound up voluntarily, and that James Charles Park, accountant, should be appointed liquidator. This was agreed to at an extraordinary general meeting of the company on 4th December 1884. At this time all the £1153, 13s. 9d., which had from time to time been paid in on the company's account in the Clydesdale Bank had been drawn out on cheques signed by Struthers and Gardner except £1, 19s. 3d.

The liquidator applied to the bank for payment of the £1153, 13s. 9d., as money of the company paid into their account, and for which there was no proper discharge. This was refused, and this action was then brought.

The case stated by the defenders is contained in the following statement from their defences—"In October 1883 A. J. Struthers opened an account with the defenders' head office in Glasgow in name of 'Struthers' Patent Diamond Rock Pulverising Company, Limited,' into which he and W. L. Gardner paid from time to time sums amounting *in cumulo* to £1153, 13s. 9d., and upon which he, in conjunction with W. L. Gardner, operated from time to time till 29th October 1884, when there remained a balance at the credit of said account of £1, 19s. 3d. The pursuers' company never opened an account with the defenders. The promoters of the company knew, or ought to have known, of the circumstances above stated, and by their actings led the defenders to believe that the said A. J. Struthers and W. L. Gardner had power to open an account and to operate upon it as they did. The money drawn out of the account was applied for the purposes of the pursuers' company."

Struthers and W. L. Gardner had both died before the action was raised.

A proof was led. It appeared that, in point of fact, no directors were appointed after registration, that the persons proposed as directors before incorporation continued to be so styled, but that the affairs of the company had been left almost altogether to Struthers.

The Sheriff-Substitute (ERSKINE MURRAY) found that the payments in question were made through negligence on the defenders' part, but that there was contributory negligence on the company's part, and assoilzied the bank.

"*Note.*— . . . The liquidator now sues the bank for repayment of all the money paid away by them, on the ground that they did so without proper authority, and are liable to refund.

"Now there can be no doubt that technically, and even more than technically, the defenders were in fault subsequently to the registration of the company in paying away money on cheques which were not signed in the mode provided in the articles of association. See *Mahoney*, 7 L.R. (H. of L.) 869, and *Heiton*, 4 R. 830. The defenders were bound to examine these articles of association and see for themselves what the articles required. If everything was *ex facie* conform to the articles, they were safe, even though in reality meetings were never held, directors never properly appointed, or notices never given. But where a thing was clearly in the teeth of the articles they were not justified in paying. As to the time previous to registration, as the rules of joint stock-companies could not apply, it was more like the case of parties using a fancy firm, and payment by the bank to the parties who lodged the money and used the name was justifiable. If, therefore, there was no more in the case, decree would have fallen to be pronounced for the sums paid out since the registration.

"But the Sheriff-Substitute is of opinion that the shareholders who are represented by the pursuer were guilty of contributory negligence. Their negligence was quite as great if not far greater than that of the bank, and it contributed to their ultimate loss in a far greater degree than the negligence of the bank. For if the bank had demurred and required the signature of another director, in terms of the articles, it is manifest that nothing could have been easier for Struthers than to get a co-director to sign with him. They were as wax in his hands. The money would have been lost to the shareholders all the same. Whereas, on the other hand, if the shareholders had taken the most ordinary concern in their own affairs, they would have found at once that there were no directors; that there was a minute-book with no minutes of the registered company, and a cash-book with entries therein which was not exclusively their cash-book at all, and that everything was in confusion. The principal shareholders especially, who would profit most if this case succeeds, were the seven who subscribed the articles. They had plenty facilities for knowing the state of matters had they chosen to inquire. Three of them were even acting as directors without any appointment, and actually are now claiming and expecting to get through the liquidator funds which were paid out by the bank in consequence of the letter No. 39, which they themselves had authorised. Surely for this contention to succeed would be monstrous." . .

The pursuers appealed to the Court of Session, and argued—The Sheriff-Substitute had made a mistake as to the class of cases that this fell under; the question was, whether there was sufficient authority given to the bank to pay away the money lodged, as they did or not. Money paid into a bank for a company before registration, was held for the company if it came into existence, and was all held to be paid in at the date of registration, and could be only drawn out in the manner provided by the articles of association of the company. If, on the other hand, the company prove abortive, the money must be paid only to the individual persons who paid it in, and perhaps only under judicial sanction—Lindley on Partnership, i. 252; *Mahoney* v. *The Liquidator of the East Holyford Mining Co.* (*Limited*), July 12, 1875, 7 L.R., E. and I. App. 869. This company was represented as a going concern; the money was lodged on account of a limited company, and the pass-book bore that heading. The entry in the pass-book was evidence against the bank, and the liquidator need not go beyond that—*Rhind* v. *The Commercial Bank of Scotland*, February 24, 1857, 19 D. 519. The statements sent to the bank on 13th October 1883 and 1st September 1884, *i.e.*, both before and after registration, bore that the company was a going concern, and the bank ought to have satisfied itself by inspection of the articles of association that the money was being drawn out

in the proper manner; if it did not do so, then it ran the risk of having to repay any money improperly paid out. There was no obligation on the company to send notice of registration to the bank—*The Royal British Bank* v. *Turquand*, May 1, 1856, 25 L.J., Q.B. 317, 6 Ellis and Blackburn 327. The article of association which dealt with the powers of the directors in signing cheques on behalf of the company was not merely directory but imperative. None of the cheques on which the bank paid were signed as there required, and as the bank ought to have known of the fact that cheques for the company could only be properly signed in this way, they were liable in repetition of all sums improperly paid out. The liquidator was not barred by the actings of the shareholders from bringing this action. Negligence of individual shareholders could not be set up against the pursuers.

Argued for the bank — In October 1883 Mr Struthers was the whole company, so far as anyone had notice. If the cheques were agreed to be paid when they were signed in a certain way, that was equivalent to a contract between Struthers and the bank, and it was enough to give authority to the bank to pay money to Struthers on his cheques up till 4th December 1883, the date of registration. No notice of the registration or of any change of circumstances was brought under the notice of the bank, and they continued to pay the money on cheques signed by the only persons whom they knew anything about in regard to this account, viz., Struthers and Gardner. This case differed from that of *Mahoney*, as in that case the bank was the registered bank of the company, and was bound to know the facts connected with the company. The directors had very wide powers of delegation, and could leave the signing of cheques to Struthers and Gardner, even although the articles of association prescribed a different method of signing cheques on behalf of the company. That clause in the articles was merely directory and not imperative—*Smiths and Others* v. *The Hull Glass Co.*, January 22, 1852, 11 Scot. Rep., C.B. 897; *Mahoney*, *supra*. The liquidator was barred by the personal actings of the shareholders from insisting in this claim of repetition. They knew that money was being paid out both before and after registration, and still they left everything in the hands of Struthers, as was shown by the proof. The bank had paid out the money they did on quite proper authority, and were not liable in repetition.

At advising—

Lord Justice-Clerk—In this case, which is an important and in some respects difficult one, I am of opinion that judgment must be given for the bank, and that on several grounds. I do not agree with all that the Sheriff-Substitute states in his note. He seems to have supposed that the law of negligence in regard to accidents applied in some degree to this case. The question is, whether the bank here acted with reasonable grounds for supposing that they had sufficient authority to pay away the sums of money to the persons they did. I am of opinion that they had. The facts of the case are these:—Mr Struthers first tried to start a company in London for the profitable working of a machine which he had apparently invented, or which he had got the right to. This machine was intended to be worked in crushing the rocks at the diamond diggings in South Africa in such a way as to prevent peculation. He failed to get up a company in London, but he got some money from some persons who were willing to have become shareholders in his projected company. He afterwards came to Scotland and began operations in Glasgow with the view of starting a company to work this invention. The result was that he got money from various parties before any steps had been taken to form these parties into a company. In this state of affairs he went to the Clydesdale Bank and opened an account with them in the name of the Struthers Patent Diamond Rock Pulverising Company, or words to that effect. Nothing had been done in the way of constituting the company by registration, and nothing was done till the 4th of December 1883, when the company was registered, although the account had been opened in the name of the company in October. Now, I think it was quite understood between Struthers and the bank that although the account was opened in the name of the company, he, as there was no company then in existence, was to be allowed to operate upon it by cheques, drawn in his own name, until some change took place. During the currency of the account no change took place in the relations between Struthers and the bank, so far as communication to the bank was concerned, and operations went on in the name of Struthers and Gardner, both of whom signed cheques for the company. Apparently they were appointed directors by a provisional committee, so called, that is to say, by some of the projectors, who intended to take shares, and had paid for prospective shares, although the company was not then registered. But then in the course of time the company was constituted by registration, and I entirely agree that if any contract had been made between the company and the bank the latter would have been bound by the mere fact of registration to know that it had taken place, and would be liable for the consequence which resulted from registration.

It is said that the bank were not entitled to pay away any of the money in the way they did, or at least that after the registration of the company they were not entitled to pay away any money except in the manner provided by the articles of the registered company. There never were any directors appointed, nor any meeting of the company held as directed by the articles of association. The company did nothing in the way of constituting a regular administration of its affairs. The original contract was that Struthers and Gardner should operate on the account. That is proved, and if I am right in thinking that, there is no ground on which the payments made to Struthers and Gardner can be objected to by the liquidator as representing the parties who took shares, but failed to take part in the administration. In the end nearly the whole was paid out of the bank before the liquidation. The liquidator now contends that the bank has no sufficient discharge for the money it paid out, and says that the bank must account for this money, and that the money it paid away in good faith it must pay again. Of course this is a kind of claim that does not meet with much favour or

sympathy. But the case does not depend on sympathy or favour, but upon the law applicable to it, and that, I think, supports the view of the bank. If I am right in the proposition that the original contract was proved to be between Struthers and the bank, I think that that contract continued till the liquidation, and I am of opinion that there are no grounds for holding that the payments made to Struthers and Gardner can be claimed by the liquidator to be repeated for the benefit of the shareholders. I entirely assent to the doctrines laid down in the case of *Mahoney*, but I think that the circumstances of this case are quite different. There the bank was held free, having paid over money on the authority of *de facto* directors, although the shareholders had not taken any steps under the articles of association to give sufficient authority to anyone to act as directors under these articles. I am of opinion that the bank should have our judgment.

Lord Young—I am of the same opinion, and upon the same grounds. As I pointed out during the discussion, the foundation of the pursuers' claim is the pass-book which we have before us, and which is entirely conform to the bank's own books. But what is the foundation of the entry in the pass-book? A contract between the bank and somebody. *Prima facie* it may be assumed that the contract was between the bank on the one hand and the company on the other, but it was open to show on what footing it was—if it was a different footing—that the pass-book was opened and the account operated upon, and we have evidence on the subject. The pursuers' case on that point is stated in article 3 of the condescendence—"The company kept an account with the defenders, and there was from time to time paid into the credit of this account sums amounting *in cumulo* to £1153, 13s. 9d., as in the pass-book produced. Explained that the payments by the defenders out of the account were not authorised by the pursuers." That is the pursuers' case, and the answer to that is in these terms—"Denied. In October 1883 A. J. Struthers opened an account with the defenders' head office in Glasgow in name of 'Struthers Patent Diamond Rock Pulverising Company, Limited,' into which he and W. L. Gardner paid from time to time sums amounting *in cumulo* to £1153,13s. 9d., and upon which he, in conjunction with W. L. Gardner"—and here I read in words which are omitted, but which had better have been expressed, as was mentioned in the course of the argument, viz., "in pursuance of the contract upon which the account was opened;" and the statement on record then goes on—"operated from time to time till 29th October 1884, when there remained a balance at the credit of said account of £1, 19s. 3d. The pursuers' company never opened an account with the defenders." That is the defence.

The question here raised is, whether that answer is a relevant defence? It is an averment that the company which came into existence in December 1883 never opened an account with the bank at all, and that that contract was opened at the bank with Struthers, and was to be operated upon by cheques drawn by Struthers and Gardner. Is that statement a relevant answer to the pursuers' first plea-in-law, which is—"The statements in answer third are irrelevant, and should not be admitted to probation?" I think it is relevant, and further I think that it is proved in point of fact. But the pursuers' case is, that the heading to the pass-book being "Struthers Patent Diamond Rock Pulveriser Company," the bank, although the account was opened in October, is indebted to a company which came into existence in December in any sum put in by the customer who opened that account, but is not entitled to pay any sums that may be due except to the company. I think that it would be an act of injustice to sanction such a view. The facts of the case are made plain by the evidence. Mr Struthers, now dead, invented a machine for crushing the diamond rocks at the diamond diggings in South Africa. He first tried to start a company to bring his machine into useful and profitable employment in London, but was not successful; he then came to Glasgow and made a similar attempt there. He got some persons to take shares in the prospective company, and to contribute money as the price of these shares, when they would be afterwards allotted to them. He got some money from friends in South Africa, where he had been, but the greater part of the money he received was from his friends in Glasgow. But it was quite plain that the company could not be constituted so as to work this machine for use profitably without some preliminary expenditure of money. There must have been some outlays: his own salary—for he was paid for his time—payments to his secretary, and to his mining engineers for constructing machinery, and so on; it was obvious that a good deal of money was needed, and we see from Mr Struthers' cash account that such payments were made. I am speaking of these facts generally, because if a particular account of the expenditure was wanted some further inquiry would be necessary. It is quite plain Mr Struthers could not have proceeded the length he did without spending money. Well, I asked the Dean of Faculty in the course of the argument what he was to have done with the money as it came in? and he answered, "Put it in a drawer or till, or in the bank." There was nothing else to be done with the money except put it in the bank account, which was the most reasonable course, and he put it in an account under the heading of the "Struthers Patent Diamond Rock Pulveriser Company, Limited." The heading of the bank account is rather an insignificant matter, but it has raised all this controversy. Well, Mr Struthers before any company was in existence had gone to the bank and desired them to open an account with him. He gave the name of this company as a heading, as he might have given "the Emperor of China," or any other name he thought of, but on the condition that the money he put in should be drawn out by him as it was wanted. The notion of a *jus quæsitum*, which had the effect of locking up the money until the company came into existence, is extravagant nonsense. The heading just identified the money. How was it to be operated upon? Struthers said, "You will pay it on cheques signed by me and Gardner." The bank said, "Very well, that shall be done." The money is paid in and drawn out accordingly, and at the end there is only £1, 19s. standing at the credit of the account. There is no reason to suppose fraud on anybody's part, and yet the bank, who acted in

pursuance of a contract made with their customer, are asked to pay the money over again. In my opinion the demand is extravagant. I think it is quite clear that there were no dealings between the bank and the registered company at all. I think the pursuers' case must fail, and that because the statement made by them in condescendence 3 is not true, while the facts stated in the answer are true.

Lord Craighill—I have come to the same conclusion without difficulty. I agree with your Lordship in the chair and with Lord Young that the contract alleged by the bank in their defences is proved by the communications when the account was opened, and by subsequent operations by the parties upon the account. Now, it is said that even if this defence were good down to the time of the registration of the company, it will not hold good after registration had taken place. But the contract between the bank and the parties who lodged the money, was not paralysed nor nullified by registration. The contract was not nullified until it was brought to a close by an agreement between the persons who were parties to it, and in fact it continued till the liquidation of the company. What was paid was paid to the parties who were entitled to operate upon the account under the contract. The question is one of contract between the bank and those who opened the account, and it having been an integral part of the contract that the money should be paid out upon the cheques of Struthers and Gardner, although the name of a limited company was in the heading of the account, that condition remained operative to the end. I therefore agree with your Lordships that the bank is entitled to our judgment.

Lord Rutherfurd Clark—The money which is sued for in this cause was lodged in the Clydesdale Bank, and the first, indeed the only question is, on what contract was the money lodged there. For of course there must have been a contract. I think it has been proved that each sum was paid in upon a contract that it should be paid out upon cheques signed by Struthers and Gardner. That being so, there is an end to the difficulty, because the money was paid out in terms of the contract under which it was deposited, and such a payment is necessarily a discharge to the bank.

The Court issued the following judgment:—

"Recal the interlocutor appealed against: Find in fact, first, that the company in the record referred to as the pursuer's company, and which was incorporated on 4th December 1883, did not keep an account with the defenders, and that the sums paid into the credit of the account to which the pass-book refers, amounting *in cumulo* to the sum of £1153, 13s. 9d. as per said pass-book, were not paid to the credit of the pursuer's company, or so received by the defenders; second, that the account to which the said pass-book refers was in October 1883 opened with the defenders by A. J. Struthers in name of the 'Struthers Patent Diamond Rock Pulverising Company, Limited,' being the name which he proposed giving to a projected company which he was then promoting, and that the object and purpose of the account was, that it should be immediately operative as a current account in the manner contracted and agreed between the said A. J. Struthers and the defenders; third, that it was contracted and agreed between them that the said account should be operated on by cheques signed by A. J. Struthers and W. L. Gardner, and that it was operated on accordingly in pursuance of the said contract and agreement upon which it was opened and kept until the whole of the sums paid in to the credit thereof were exhausted, with the exception of a balance of £1, 19s. 3d.; fourth, that the defenders had no contract or dealing with the pursuers' company, and had no notice of the incorporation, or of the existence thereof, until the foresaid account with the exception of the said balance was exhausted: Find in law that the contract and agreement on which the said account was opened, kept, and operated on as aforesaid was legal, and that the pursuers have no claim against the defenders in respect of all or any of the sums paid in to the credit thereof and drawn out again: Therefore sustain the defences, and assoilzie the defenders with expenses in both Courts."

Counsel for Pursuers (Appellants)—D.-F. Balfour, Q.C.—Graham Murray. Agents—Gill & Pringle, W.S.

Counsel for Defenders (Respondents)—Moncreiff—Readman. Agents—Morton, Neilson, & Smart, W.S.

Friday, January 15.

FIRST DIVISION.

[Lord Fraser, Ordinary.

NISBET HAMILTON *v.* NORTH BRITISH RAILWAY COMPANY.

Railway — Mines and Minerals — Stone — Construction of Line—Railway Clauses Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

In 1846 a railway company constructed a line on lands which they had acquired under compulsory powers. Part of the line ran through a cutting in the rock. In 1870 the company commenced to remove the stone which had been left on the side of the line within the limits of the lands taken, because, as they alleged, it was liable to come down, and so rendered the line unsafe. The proprietrix of the adjoining lands, from whose predecessors in title the railway company had taken the lands on which the railway was formed, claimed the value of the stone so taken away, on the ground that under section 70 of the Railway Clauses Act, "mines and minerals" unless expressly conveyed, were excepted from the conveyance to the railway company, and that the stone in question came under the description "mines and minerals," and had not been expressly