procedure by putting their disposition on record. They took no such step, and accordingly their right was a personal one in 1873, when the defender bought the estate of Craigrothie. The only ground which is suggested on which their right can prevail against the real right of the defender is that the clause of warrandice in the disposition in his favour must be held to except the grant in the pursuers' favour. I am unable to accept that construction of the clause of warrandice. I agree with Lord Adam that the "feu-rights" which are excepted in the clause must be rights which are capable of being brought into competition with the right granted to the disponee. If we were to take the opposite view, the result would be that no buyer could contract in safety upon the faith of the records, but every buyer would run the risk of being evicted by parties holding latent personal rights not appearing upon record. We must assume—because there is no averment to the contrary—that the defender knew nothing of this right when he purchased the property. He therefore bought the estate in the faith that no rights existed except such as appeared in the record, and the question which has arisen is, as Lord Adam has said, whether, in a competition of title, a personal right, which is older in date, can prevail against his real right. I am perfectly clear that that is not a question capable of discussion.

On the second point, as to the effect of the Statute of 1872, I also agree.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers—Rankine—A. M. Anderson. Agents—Gray & Kinnison, S.S.C.

Counsel for the Respondent—N. J. D. Kennedy. Agents—Martin & M'Glashan, S.S.C.

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*Monday, August* 26.

## OUTER HOUSE.

[Bill Chamber.

## THE COMMERCIAL BANK OF SCOTLAND *v.* TOD'S TRUSTEE.

*Bankruptcy—Partnership—Separate Firms with Same Partners.*

Where two firms, although consisting of the same partners, carry on separate and distinct businesses, the estates of the two firms must in bankruptcy be treated as separate estates.

James Alexander Molleson, C.A., Edinburgh, trustee on the sequestrated estate of Messrs William Tod Junior & Company, paper-manufacturers at Springfield, Polton, and William Tod & Son, paper manufacturers, St Leonards, Lasswade, issued a circular and deliverance upon 8th March 1895. In this circular he intimated that a dividend would be paid to their creditors whose claims had been admitted to a ranking.

In a note prefixed to the state of claims, the trustee narrated the following facts:—"The firm of William Tod Junior & Company prior to the date of the sequestration carried on business as paper manufacturers at Springfield Mill, Polton, and the firm of William Tod & Son carried on business at St Leonards Mill, Lasswade. At the date of the sequestration John Tod and William Leonard Tod were the only partners of both firms, and sequestration was awarded on a petition by both firms, and by John Tod and William Leonard Tod as partners thereof. The businesses conducted under these separate firm names were conducted at separate premises and different sets of books and bank accounts were kept. Although a number of persons having accounts with William Tod Junior & Company, had also accounts with William Tod & Son, the customers and creditors of the two businesses were not identical. In these circumstances the trustee has had to consider whether the businesses have to be wound up in bankruptcy as one estate, or whether they have to be separately treated and distributed as two estates. Looking to the circumstances that the same individuals were, at the date of the sequestration, carrying on both businesses although under different firm names, that sequestration was awarded on a single petition, and that the trustee was appointed by a single act and warrant, and on a single estate, the trustee is of opinion that he must treat the estates of William Tod Junior & Company and William Tod & Son as forming one sequestrated estate, and rank the creditors on William Tod Junior & Company and William Tod & Son, on that estate according to their several rights and interests, and he has proceeded on that footing in the following adjudication on claims."

The trustee's deliverance was as follows:—"The firms of William Tod Junior & Company and William Tod & Son had accounts with the Commercial Bank of Scotland, Limited, on which at the date of the sequestration there was a balance due to the bank by William Tod Junior & Company of £19,111, 1s. 6d., and there was a balance due by William Tod & Son of £12,076, 13s. 6d. A cash-credit bond by William Tod Junior & Company was granted in 1866, the partners of the firm then being William Tod junior, John Tod, and Andrew Tod. In 1889 William Tod, John Tod, and William Leonard Tod were the partners of both firms. The bank held the subjects at Springfield, which belonged to William Tod junior, in security of the debt due by William Tod Junior & Company under the cash-credit bond granted in 1866, and in 1889 the bank obtained from Mr John Tod a conveyance of the property at Lasswade belonging to him in security of the debt due by William Tod & Son. In 1889 the bank appear to have made an arrangement for securing the debts due by both firms over both proper-

ties, and obtaining the personal obligation of each firm for the total indebtedness of both firms, and in order to carry out this arrangement the bank obtained from Messrs William Tod & Son a guarantee for the obligations of William Tod Junior & Company, and from William Tod Junior & Company a guarantee for the obligations of William Tod & Son. The claims lodged by the bank are framed on the footing that the two firms are separate concerns, and that the two estates fall to be wound up in bankruptcy as separate concerns, and that the bank are entitled to be ranked on the estate of each firm, not only for the debt primarily due by that firm, but under the guarantees already referred to for the debt primarily due by the other. Certain deductions and valuations appropriate to the theory on which the claims are stated are made in the claims, and the bank claim to be ranked on the estate of William Tod Junior & Company for £24,431, 12s. 5d., and on the estate of William Tod & Son for £21,187, 15s. From the documents produced by the bank, it appears that in 1889, when the bank's securities were consolidated, the same individuals (William Tod junior, John Tod, and William Leonard Tod) were carrying on business under the two firm names of William Tod Junior & Company and William Tod & Son. William Tod, otherwise named William Tod junior, died in 1892, and as explained in the trustee's general note, to which reference has already been made, the same parties (John Tod and William Leonard Tod) were carrying on business under the two firm names at the date of the sequestration. In these circumstances the trustee cannot admit the claim of the bank to what approaches a double ranking, but treating the estates of the firms of William Tod Junior & Company and William Tod & Son as one sequestrated estate, the trustee admits the bank to a ranking as ordinary creditors for the sums of £19,111, 1s. 6d., and £12,076, 13s. 6d., making together the sum of £31,187. 15s., and *quoad ultra* he rejects the claim."

Against this deliverance the Commercial Bank appealed to the Lord Ordinary on the Bills, and "craved that the trustee might be ordained to treat the said estates as forming two separate sequestrated estates, and to rank the appellants as creditors on the said sequestrated estates, and to make payment of the dividends corresponding to the debts for which the appellants claimed in their oaths upon the said respective estates to be ranked."

On 25th August 1895 the Lord Ordinary on the Bills (Low) pronounced the following interlocutor:—"Sustain the appeal, recal the deliverance of the trustee appealed against, and remit to the trustee to proceed in terms of the finding of the Lord Ordinary that the partnerships of William Tod Junior & Company and William Tod & Son are separate and distinct partnerships."

*Note.*—"The question raised in this appeal is whether the firm of William Tod & Son and William Tod Junior & Company should be dealt with in the sequestration as two separate partnerships or as truly only one partnership.

"The parties were agreed that all the facts which can be ascertained bearing upon the question are stated in the condescendence and answers, and there is no dispute between them regarding these facts. They therefore asked judgment upon the averments in the record.

"The trustee has held that the two estates must be treated as forming one sequestrated estate, and chiefly upon this ground, that at the date of the sequestration the same individuals were the partners of both firms.

"The law applicable to such cases is stated by Mr Bell in his Commentaries (vol. ii. p. 515-16), and except his statements and the decisions to which he refers I know of no authority upon the point.

"Mr Bell says that although an individual cannot form different establishments in trade, having each a separate stock, and debts peculiar and distinct, a plurality of partners may do so. 'And,' he adds, 'these companies may hold separate estates, and be liable each to sequestration by itself, provided that there is a real and perceptible distinction of trade and establishment between them.'

"The respondents' counsel pointed out that in all the cases cited by Mr Bell, the debts and funds of the two firms were massed together as one, and that there is no reported case in which two firms, the partners of which were the same, were dealt with in bankruptcy as having separate estates. He therefore argued that when two companies had the same partners their estates must, in bankruptcy, be dealt with as one estate.

"In my opinion the decided cases support Mr Bell's statement of the law.

"In *Bertram, Gardner, & Company*, which is only reported by Mr Bell in a footnote, six gentlemen entered into partnership to carry on trade in London and Edinburgh, but they resolved to conduct business under one name in London and under another in Edinburgh, 'either of which firms might be subscribed by any of the said partners.' Mr Bell says that the Court found that there was no distinction between the companies, which shows that although the partners were admittedly the same, the question was whether the companies were or were not distinct.

"In *The Royal Bank of Scotland* v. *Stein, Smith, & Company*, January 20, 1813, F.C., six gentlemen had entered into a contract of copartnery to carry on the same trade in Edinburgh and London, although in Edinburgh they used the name of Scott, Smith, Stein, & Company, and in London of Stein, Smith, & Company. From the opinions it appears that after these facts had been ascertained none of the Judges had any doubt that the two firms were one and the same, and the question discussed was whether it was competent to award sequestration in Scotland after a Commission of Bankruptcy had been issued in England. It is clear, however, that the learned Judges discussed that question upon the footing that it had been estab-

lished by the production of documents that the two firms, besides having the same partners, were truly one company carrying on the same business in Edinburgh and London.

"The next case is *Williams* v. *Inglis, Borthwick, & Company*, June 13, 1809, F.C. The circumstances were these—Inglis and Gilchrist carried on business as bankers under the firm of Inglis, Borthwick, Gilchrist, & Company, and also a business as linen-drapers under the firm of James Inglis & Company. The trustee upon the sequestrated estate of one Williams brought an action against the banking firm for payment of a sum of money at Williams' credit in a deposit account, to which the defenders pleaded compensation in respect of bills granted by Williams to the firm of linen-drapers for goods supplied. The Court sustained the defence.

"The opinions of the Judges are not given, and the report does not state whether there was any connection between the two firms except the identity of partners. Further, the defenders in the case argued that the same partners could never constitute two distinct companies. The respondents therefore founded upon the case as an authority for saying that if two companies consist of the same partners, their estates must in bankruptcy be dealt with as one estate. If that was the view taken by the Court, then I do not think that it is consistent with the case to which I have referred, or with the case of *Forrester*, which I shall notice presently. I am not, however, satisfied that the Court went upon the identity of partnership alone. The rubric is, 'a company having two different firms or names may compensate a debt by one firm with a credit of the other firm.' According to the reporter's view, therefore, the point decided was not whether there were two companies or only one, but whether there being only one company carrying on business under two firms, a debt due to one firm could be set off against a debt due by the other.

"There is finally the case of *Forrester* v. *Sir W. Forbes & Company*, which is reported only by Mr Bell.

"The circumstances appear to have been very special. I gather that Peter and Francis Forrester had originally carried on two businesses as P. & F. Forrester. Subsequently they assumed a partner into one of the businesses, which was then called Forrester & Company. The assumed partner, however, died or resigned, and when the bankruptcy occurred matters had in fact reverted to their original position, although the business continued to be carried on under different names. In these circumstances the Court regarded the case as if the company in which there had been a third partner had never existed, and held that the mere fact that the name of the company had been retained was not sufficient to establish a solid distinction between the companies.

"Mr Bell says that 'the opinion of the Court in general was, that in law two or more companies can exist separately and independently of each other in debts and funds, although composed of the same individual partners; but that it is not sufficient to produce this effect that the firms be different—the companies must be essentially different.'

"I am therefore of opinion that the fact of identity of partners is not conclusive, and that the inquiry still remains whether the companies are essentially different, or, as Mr Bell puts it, whether there is a real and perceptible distinction of trade and establishment between them.

"Now, I think that it is very important to observe that in the present case, originally, the two firms of William Tod & Son and William Tod Junior & Company were entirely separate and distinct. The former firm came into existence in 1858, when William Tod senior, who carried on business as a paper-maker at St Leonards, Lasswade, took his son William Tod junior into partnership. In 1866 William Tod junior purchased Springfield Paper Mill, and entered into a partnership with his brothers John and Andrew, for the purpose of working that mill under the firm of William Tod Junior & Company. So long as that state of matters continued there is no dispute that the two firms were entirely distinct.

"In 1868, however, William Tod senior retired from business, and William Tod junior assumed his brothers as partners of William Tod & Son. From that time until 1886 the three partners had the same shares in the profits of both businesses. The businesses, however, were all along conducted as separate, each having their own bank account, their own books, staff, trade representatives, line of business, and so forth.

"In 1886 the three brothers entered into an agreement, which they prepared themselves without the aid of a man of business, in regard to the two partnerships. In it the two businesses are dealt with as separate. Articles 1 and 2 deal with William Tod Junior & Company, and article 3 with William Tod & Son. Both partnerships are renewed for ten years. In William Tod Junior & Company, three-sevenths of the profits are allocated to William Tod, three-sevenths to Andrew Tod, and one-seventh to John Tod; while in William Tod & Son, William Tod and Andrew Tod each get one-seventh of the profits, and John Tod five-sevenths. There was thus a difference introduced in the shares of the profits which the partners drew from the two firms. Further, as regards William Tod Junior & Company, it was provided that in the event of the death of William Tod, his capital should remain in the business, and his son William Edward Tod should be entitled to take his place. In like manner, in the event of the death of Andrew Tod, his capital was to remain in the business, and his son William Leonard Tod was to be entitled to take his place, drawing, however, in his own right only one-third of the three-sevenths of the profits to which his father Andrew Tod was entitled, the remaining two-thirds being paid to Andrew Tod's testamentary trustees.

There were no similar provisions applicable to William Tod & Son, the agreement as regards that firm dealing only with the division of profits.

"Andrew Tod died soon after the agreement was entered into. His son William Leonard Tod took his place in both firms, and his trustees received payment of two-thirds of the profits to which Andrew Tod had been entitled under the agreement in both firms. It therefore seems to have been assumed that the provisions in the agreement in regard to the death of Andrew applied to both firms, although in the agreement they are enacted only in regard to William Tod & Son.

"In 1892 William Tod died. His son William Edward Tod appears not to have taken his father's place in either firm, but his testamentary trustees took part in the management of the business of both firms. They appear to have done so in pursuance of a clause in William Tod's settlement, authorising them to carry on, for behoof of his estate, the businesses at Springfield and St Leonards.

"In 1893 Andrew Tod's trustees all resigned except John Tod, and a circular was issued to the creditors of William Tod Junior & Company, to the effect that the trustees who had resigned had ceased to have any interest as trustees in the firm, and that the subscribers were the sole partners of the firm. The circular was subscribed by John Tod as sole trustee on William Tod's estate, by him as an individual, and by William Leonard Tod.

"No similar circular was issued to the creditors of William Tod & Son. Apparently John Tod had been advised that by virtue of the agreement William Tod's trustees were entitled to be partners of William Tod Junior & Company, but not of William Tod & Son.

"In 1894 a petition for sequestration was presented by William Tod Junior & Company, by William Tod & Son, and by John Tod and William Leonard Tod as individual partners of these firms.

"The appellants contended that after the death of William Tod, and at the date of the sequestration, the partners of the two firms were not the same, and that William Tod's trustees were partners of William Tod Junior & Company, and not of William Tod & Son. I do not think that the terms of the agreement of 1886 made William Tod's trustees at his death partners of William Tod Junior & Company, and John Tod and William Leonard Tod seem to have taken that view when they applied for sequestration, because they describe themselves in the petition as the partners of both firms, without making any mention of John Tod in his capacity as William Tod's trustee.

"I therefore think that this case must be taken upon the footing upon which the trustee has dealt with it, namely, that the same gentlemen were at the date of the sequestration partners of both firms. But so taking it, it appears to me that the two firms were distinct and separate, and must be so dealt with in the sequestration. The firms were in their origin entirely separate, and although the partners came to be the same, the businesses remained in every other respect distinct. An alteration in the constitution of one firm would not have affected the other. If a partner of one firm had resigned, or a new partner been assumed, the other firm would not have been altered in any way. The only connection therefore between the businesses at the date of sequestration was that the partners were the same. But, as I have shown, that of itself is not sufficient to justify the treatment of the estates as one estate, and apart from the identity of partners, I think that the circumstances disclose a real distinction of trade and establishment between the companies.

"I shall therefore sustain the appeal."

Agents for the Appellants—Melville & Lindesay, W.S.

Agents for the Respondent — Skene Edwards, & Garson, W.S.

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*Wednesday, November 27.*

## SECOND DIVISION.

## CULLENS *v.* CAMBUSBARRON CO-OPERATIVE SOCIETY, LIMITED.

*Property — Feu-Disposition — Access — Implied Grant of Access.*

In 1872 a superior granted a feu to A, who was taken bound to build "a substantial dwelling-house" upon the feu, "to be used in the meantime as a bakehouse." He was also taken bound to erect a fence along the east of the feu. The feu was bounded on the east by a part of the superior's property, still unfeued, and on the west by ground already belonging to A. At the time the feu was granted, there was no existing access to A's feu from the superior's lands, but during the building of the bakehouse the superior allowed the feuar to cart materials from a public road along the side of a field forming part of his unfeued lands to the east, and the same access was afterwards used by A to cart stores to the bakehouse. There was also an access for foot traffic to the bakehouse from other lands held by A to the west, by which it was possible to bring stores to the bakehouse, but at greater labour and expense than by the cart access to the east.

In 1894 the lands to the east were feued off to B, subject to the declaration that the grant in his favour was burdened with the servitude of any legal right of access competent to A.

In an action by B to restrain A from using the cart access in question, A claimed that a grant of the access in his favour must be implied in respect (1) that a cart access was necessary to the reasonable and convenient use of