Lord Mure—I am quite of the same opinion. The obligation upon the defenders is quite clear and distinct; the rent is payable from the time that the tenants acquire possession of the mineral-field until the expiry of the lease. But the tenants are to be freed from their liabilities upon the following conditions—[*His Lordship here read the clause above quoted*]. Now, I think that the fair construction of such a clause is, that before the tenant can get quit of his obligation for rent he must have obtained a report of a mining engineer that the ironstone cannot be worked profitably, and that this arises from no fault of his. As neither of these conditions have been complied with I cannot see that there is any proper defence against the landlord's claim for rent.

Lord Shand—The right of the defenders under this lease is a right to bring it to a termination upon the emerging of two precedent conditions—the one being that the ironstone should no longer be able to be worked at a profit; the other, that this should arise from no fault of the defenders. The question in dispute is, whether there is not another condition adjected, namely, that these two prior conditions must be found by an arbiter to exist?

I am clearly of opinion that the right of abandonment emerges only after such a finding has been made by an arbiter.

If the contention of the defenders was correct, I think that such an arrangement would require to have been made a matter of stipulation, otherwise it would lead to great confusion.

It has been said that the landlord has barred himself from taking up his present position by the terms of his letters, which have been described as of a temporising character, and that though the letter of the lessees of 7th August might not, if it stood alone, be considered as distinct notice of abandonment, taken in connection with the lease it must be held as good notice under it, and that the reply to this letter was in substance this—"You need not go on with your arbitration, because we are willing to give you some modification of the terms of the lease." If the pursuer's attitude was not satisfactory to the defenders, what they ought to have done was to have proceeded to the nomination of an arbiter, and to have obtained from him a finding in terms of the conditions in the lease. In the absence of any procedure of this kind I do not see how the present claim of the pursuers can be resisted.

Lord Adam—The only defence in this case is, that the defenders were entitled to hold the lease at an end as at Martinmas 1884. Now, on the construction of the clause upon which this contention is based, I think it is quite clear that the defenders should have adopted certain procedure there laid down, and complied with certain conditions contained in it. It is admitted that the provisions have not been attended to, and therefore it is impossible for them to take advantage of these conditions to the effect of enabling them to abandon the lease—in other words, they have not availed themselves of the machinery provided by the lease for bringing it to a termination.

But the defenders further say that the pursuers are barred by their own actings from demanding the sum they now sue for. I cannot see anything in what the pursuers have done to support such a defence; while, on the other hand, if the ironstone is really so exhausted that it cannot, as the defenders allege, be worked at a profit, surely that is a matter which can be easily cleared up. I therefore agree with your Lordships that we should grant decree in favour of the pursuers.

The Court recalled the interlocutor of the Lord Ordinary, and granted decree in terms of the libel.

Counsel for Pursuers—Pearson—Macfarlane. Agents—Waddell & Mackintosh, W.S.

Counsel for Defenders — Moncreiff — Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

MENZIES *v.* GIRDWOOD & FORREST AND OTHERS.

BLACKS *v.* GIRDWOOD & FORREST AND OTHERS.

Partnership—Dissolution—Notice of Withdrawal—Sufficiency of Notice—Retiring Partner's Liability.

G, a partner of a firm, retired, the business continuing to be carried on in the firm's name. *Held*, in a question with a person who had been a customer of the firm during G's connection with it and afterwards, that G was not freed from liability for its debts incurred after he had ceased to be a partner by reason of having sent to the customer a trade circular which contained the information that he was no longer a partner, but which was mainly concerned with other trade matters.

Partnership—Election—Bar.

A creditor of a sequestrated firm claimed in the sequestration, reserving in his claim his rights against G., who had, as he knew, been a partner but had retired, and not sufficiently intimated his retiral. Subsequently the claim was withdrawn without having been ranked.

Held (*aff.* judgment of Lord Kinnear) that assuming it to be the law of Scotland that a creditor must in such circumstances elect whether to enforce the liability which the retiring partner is barred from disputing, or that of the firm from which he has retired, there had been no such election by the lodging of the claim.

Opinion (*per* Lord Kinnear) that a creditor must in such circumstances make his election.

Opinions contra per Lord Justice-Clerk, Lord Young, and Lord Craighill.

These actions were the sequel to the cases between the same parties decided in the Outer House by Lord Kinnear, whose judgment, reported *ante* vol. xxii., p. 610, 20th March 1885, was acquiesced in. The facts were reported in the previous report, but may be again briefly narrated.

R. Girdwood was a woolbroker in Edinburgh, but subsequently he had a branch business in Glasgow. In 1877 he assumed into partnership in the Glasgow branch T. Forrest, the contract to last five years, and the firm to be Girdwood &

Forrest. In 1878 Forrest purchased Girdwood's share in this business, the latter reserving right until May 1882 to re-enter the firm in certain events, but he never did so. Forrest in 1881 assumed W. W. Sykes into partnership, and the business continued under the name of Girdwood & Forrest. In 1883 Girdwood, who continued his Edinburgh business, issued from Edinburgh his annual circular. It did not bear to be a notice of dissolution of his partnership in Girdwood & Forrest, and was mainly taken up with other matters, but it contained on its second page the following notice—"I take this opportunity of informing my friends of my having retired from the firm of Girdwood & Forrest, Glasgow, and that I will now devote my whole attention to my Edinburgh wool-sales, where I will feel obliged by all consignments being addressed to me, which will have my prompt and careful attention." In May 1884 he issued another circular, which was as follows—"As a number of my friends had not observed my announcement of last May of my having retired from the firm of Girdwood & Forrest, Glasgow, I beg to repeat that notice, and to state that I will esteem it a favour by all consignments intended for me being addressed to me here, Tanfield, Edinburgh, where my business is carried on as usual." In the *Gazette* of that month there was a notice that the copartnery between R. Girdwood and T. Forrest having expired on 1st May 1882, Girdwood then ceased to have any interest therein.

The pursuers, the Blacks, sheep farmers, had consigned wool to Girdwood & Forrest for sale in November in 1882 and also in the year 1883. They knew Girdwood, and in these proceedings they averred that they believed him to be a partner of Girdwood & Forrest. The pursuer Menzies in 1884 and various preceding years had also consigned wools to that firm for sale, and the firm had accounted for all these wools except part of that consigned in 1882, the sale of which he had countermanded in consequence of the state of the market, but which had been sold subsequently, and the 1884 consignment. He also averred that he knew and relied on Girdwood, and knew nothing of his retiral.

On 11th October 1884 the estates of the firm of Girdwood & Forrest, and of the individual partners Forrest and Sykes, were sequestrated. The defender Jackson was appointed trustee thereon.

On 2d December 1884 Menzies lodged an affidavit in the sequestration of Girdwood & Forrest and of Forrest and Sykes for £172, 18s., and another for £21, 8s. 5d. These affidavits bore as follows—"Depones that no part of said sum has been paid or compensated to the said William Menzies, and that he holds no security for the same, and no other person, company, or obligant bound for the debt, or any part thereof, than the said Girdwood & Forrest, Thomas Forrest, and William Wade Sykes, save and except any claim the deponent may have against Robert Girdwood, wool broker, Edinburgh, which claim is reserved entire."

The Blacks had lodged a similar claim for £491, 6s. 7d. in October preceding. At the time of lodging these claims both Menzies and the Blacks knew that Girdwood had at this date ceased to be a partner of Girdwood & Forrest, but not the date of his so ceasing.

In December 1884 the Blacks and Menzies, in order to make Girdwood responsible for their transactions with the firm, raised actions against Girdwood & Forrest as a company, the trustee, Robert Girdwood, T. Forrest, and W. W. Sykes, as the individual partners and as individuals, and the trustee on the individual estates of Forrest and Sykes, conjunctly and severally. In that action it was proved that the Blacks had seen and read Girdwood's circular of 1884, and that both circulars were sent to Menzies. He denied receiving them. The Lord Ordinary held that the circular of 1883 was not sufficient notice of retiral, but that that of 1884 was, but assoilzied Girdwood with expenses on the ground stated in the following interlocutor of 20th March 1885 (as already reported)—"Finds that prior to November 1878 the defender Robert Girdwood was a partner of the firm of Girdwood & Forrest, wool brokers in Glasgow; that the only other partner of the said firm was the defender Thomas Forrest, and that in 1878 the said firm was dissolved: Finds that the said defender Robert Girdwood is not and never was a partner with the defenders Thomas Forrest and William Wade Sykes in the firm of Girdwood & Forrest, whose estates were sequestrated on the 11th of October 1884: Finds that the defender Girdwood is not liable jointly with the other defenders in the sum sued for: Therefore assoilzies the defenders from the action as laid," &c. His Lordship's note (*ante*, vol. xxii. p. 611) explained his view to be that whether or not Girdwood might be barred from denying liability for the debts of the firm prior to the valid circular of 1884 he was not a partner, and could not therefore be liable jointly with the firm or its partners for its debts—*Scarf* v. *Jardine*, June 13, 1882, L.R., 7 App. Cas. 345—"The doctrine laid down by the House of Lords in that case is directly applicable. Although the pursuers in the transactions out of which these actions arose were in fact dealing with the old firm, it may be their right to insist that the old firm of which Girdwood was a partner shall be held to have contracted with them, but they cannot hold their contract to have been made with both firms. They cannot therefore sue both firms together, and are put to their election and must choose between the old firm and the new. It is true that there are material differences between the English and the Scotch laws of partnership, but they are differences which in no way affect the reasoning of the learned Lords who took part in the judgment to which I have referred. The principles on which they proceeded are common to the law of both countries. The defender maintains that the right to elect has been determined by reason of the pursuers having claimed in the sequestration, but that question does not arise, and cannot be decided in this action."

It appeared from the averments in the actions now to be reported that the claims of the Blacks and Menzies in the sequestration of Girdwood & Forrest were withdrawn while the former action just referred to was in Court, and that they had never been ranked by the trustee.

The present actions were brought by the Blacks and Menzies respectively against the now dissolved firm of Girdwood & Forrest as constituted by the agreement between R. Girdwood & T. Forrest of 1877, and also against the said Robert Girdwood and Thomas Forrest, the individual partners of the said firm, as such partners and as

individuals, and also against Thomas Jackson, C.A. in Glasgow, as trustee on the sequestrated estate of the said Thomas Forrest. Against Forrest and his trustee the pursuers only asked decree of constitution of their debts, and against Girdwood decree of payment.

The defender Girdwood pleaded in both actions, *inter alia*—"(1) *Res judicata.* (4) This defender having ceased to be a partner of Girdwood & Forrest in 1878, or at least prior to 1881, he should be assoilzied. (5) In respect of the circulars referred to, and the notice given to the pursuer that Messrs Girdwood had retired from the firm, Mr Girdwood should be assoilzied. (8) The pursuer having sued Messrs Girdwood & Forrest and the two partners thereof, Messrs Forrest and Sykes, and claimed in their sequestration as condescended on, when he knew this defender had ceased to be a partner in the firm in 1878, or otherwise prior to 1881, he is not now entitled to sue this defender; *et separatim*, he is not entitled to sue all the defenders as he does in the summons, but must make his election as to whom he will sue. (10) The pursuer having elected to take as his debtor the firm of Girdwood & Forrest, of which this defender was not a member, he is barred from now suing this defender."

By minute of admissions in both actions the parties agreed to hold the proof in the former actions (which established the facts already stated) as proof in the present actions, and to admit that the consignments of wool were made by the respective pursuers on the dates and of the amounts condescended on, and sold of the dates stated in the condescendence, and that the pursuers had not received payment of the prices, and that in Menzies' case the amounts realised by the sales were the amounts sued for.

In Menzies' case the Lord Ordinary decerned against the defenders, conjunctly and severally, for £105, 14s. 3d. (being the price of consignments as sued for up to May 1884), but against Forrest and his trustee to the effect only of constituting the debt against them; *quoad ultra*, *i.e.*, with regard to a consignment made after the circular of May 1884, his Lordship assoilzied the defenders, reserving to the pursuer his claims against the sequestrated estate of the firm of Girdwood & Forrest in respect of transactions subsequent to May 1884.

In the Blacks' case his Lordship decerned against the defenders, conjunctly and severally, in terms of the conclusions of the summons, but against the defenders other than Girdwood to the effect only of constituting the debt against them.

"*Opinion.*—It was decided in the former action that the defender Mr Girdwood cannot be made liable jointly with the sequestrated firm, of which he was not a partner; but I held at the same time upon the evidence that he was barred from denying his liability as a partner of the firm of Girdwood & Forrest, which was dissolved in 1878, unless the pursuers were precluded from proceeding against him by reason of their having elected to claim against the sequestrated firm. The discussion in the present case therefore proceeded on the assumption that the pursuers are entitled to choose between the liability of the former firm and that of the sequestrated firm; and the only question for consideration is, whether they have determined their election by lodging a claim in the sequestration which they have since withdrawn. It seems to me that their claim in the sequestration can no more be held to be an election to relieve Mr Girdwood than the former action could be held to be an election to relieve the sequestrated estate. It was certainly not intended as such, because the pursuers in their affidavit gave notice that they were to claim against Mr Girdwood. They were at that time insisting on their supposed right to hold both sets of parties liable. And although a creditor in such circumstances may be barred (irrespective of his intention) from proceeding against one of the persons between whom he has a right to choose, by reason of his having in the meantime enforced the liability of the other, I do not think he can be so barred by the mere statement of a claim against each which he has not actually enforced against either. The case would have been different if the claim in the sequestration had been admitted to a ranking. But it has been withdrawn before the trustee had occasion to adjudicate upon its merits, and before anything had followed upon it to prejudice either party or to alter their position in any way. It is said that the judgment of the House of Lords in *Scarf* v. *Jardine*, L.R., 7 App. Cas. 345, is an authority to the contrary. But I cannot so read the decision. In that case it was held that the plaintiff, who had the right of election between two firms, had finally determined his election by suing one of the two, and upon their bankruptcy proving against their estate. But it does not follow that the mere statement of a claim which is not insisted in must be held as conclusive. The principle is thus explained by Lord Blackburn—'The principle running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down in a memorandum, or has indicated it in some other way, that alone will not bind him, but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election, and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.' The question therefore is, whether the pursuer's claim in the sequestration, having regard to the terms in which it was stated, and to the circumstances in which it was made and withdrawn, was or was not an unequivocal act justifying the belief that they had made their choice. For the reasons already stated I think it is not, and that it is still open to them to follow their remedy against the defender.

"Assuming the liability of the defender, there is no dispute as to the amount due."

The defender Girdwood reclaimed, and argued—The present question was *res judicata* by the former judgment of the Lord Ordinary, in which the pursuers had acquiesced. The pursuers in either case must elect whom they would sue—the old firm or the new—for the basis of their claim was contract, and they only contracted with one firm; they knew which, and it was therefore for

them to say which they claimed against. The point had never been directly decided in Scotland, though it was involved in *Ferrier* v. *Dods*, February 23, 1865, 3 Macph. 561, and in Bell's Comm. ii. 559; but it had been decided in England in the case of *Scarf*, and it was not shown that on this point the law of Scotland differed. That case was decided on broad principles of the law of partnership, and not on any specialty of English law. Besides, it was a decision of the House of Lords, and though in an English case was authority in Scotland. But whether it were open to them to elect or not, the pursuers had in fact elected to hold the new firm as their debtor by putting in the claims in their sequestration. This constituted an unequivocal act of election, which was not saved by the reservation of claims against Girdwood—Snell's Prin. of Equity, p. 227; *Priestley* v. *Fernie*, 34 L.J., Exch. 172; *Meier* v. *Kuchenmeister*, March 17, 1881, 8 R. 642.

Replied for the pursuers in both actions—The principle of election did not apply to the case. It was merely one of the ordinary liability of the partner of a firm, for a partner who had failed to give notice of withdrawal was in the same position to creditors of the firm as if he had not retired. At all events, there was no authority in the law of Scotland for the application of election to any such case, and the case of *Scarf* was a decision merely in English law, which on this point differed from our law, and was not an authority here.

At advising—

Lord Justice-Clerk—This is an important question, and not unattended with difficulty. There are several questions involved. The first question seems to be, whether there was due notice of the retirement of Mr Girdwood by a circular which has been referred to—the notice of 1883—which is in these terms. [*His Lordship read the portion of the circular of* 1883 *above quoted*]. I am of opinion that that circular was not sufficient, but I am of opinion with the Lord Ordinary that the second circular was sufficient. That second notice is in these terms, being dated in May 1884. [*His Lordship read the circular of May* 1884 *above quoted*]. I repeat I think that notice is sufficient.

But then comes the question, whether the creditor here was put to his election, and whether by claiming on the sequestrated estate of the partners who were actually in the firm he has discharged the obligation lying on Mr Girdwood? On the first of these questions I am of opinion that the law of England does not apply to this case. I think there is no doctrine in the law of Scotland corresponding to that raised upon the distinction between a claim by estoppel and a claim by contract, the effect of which I understand to be, that a creditor in right of two claims cannot claim in respect of both. He must elect which of the two he will choose, so that the other, who is not the less a debtor, is to escape altogether from the obligation which he had incurred. I do not think that is in accordance with the law of Scotland, and I am not qualified to judge of a decision in the law of England which turns on technicalities with which I am not familiar. But apart from that, and even supposing there is in our law this doctrine of election, I am of opinion that here there has been no election. I think the affidavit lodged in the sequestration of the partners of the new firm did not amount to an election, all the more that there was embodied in it a distinct reservation of any claim against Mr Girdwood on any separate ground of liability. I do not think it necessary to go into the general question which I have indicated, because I think that last ground is sufficient to free the party from the consequences of an election even if our law made that necessary. But in my opinion that is not necessary. Such a principle has not, so far as I am aware, been adopted in our law.

Upon the whole matter I agree with the result at which the Lord Ordinary has arrived.

Lord Young—I am of the same opinion.

The facts of the case are few and simple. Mr Girdwood was admittedly prior to 1878 a partner of the firm of Girdwood & Forrest. He is the Girdwood named in that firm. It is said that he retired in 1878, and I assume it, although there is a question whether his retirement was not really of later date. In 1881 Mr Forrest, with whom Mr Girdwood had been in partnership, assumed as his partner a Mr Sykes, and the business was carried on under the original name and firm of Girdwood & Forrest, Mr Girdwood himself being no longer a partner. It is quite correct legal language to say that the old company was then dissolved and a new company formed, although the new company took the name of the old. But it is familiar law that to the customers of the old company Mr Girdwood, if he gave no notice of his retirement, was liable for the debts incurred to them by the new, of which he was not a partner. And to the truth of this proposition it is quite immaterial whether Sykes was a partner of the old company or not. Had he been a partner of the old company of Girdwood & Forrest at the date of Girdwood's retirement, Girdwood's retirement would nevertheless have dissolved that company, and the continuing partnership between Forrest and Sykes would have been a new company whatever name it might take. Girdwood, notwithstanding his retirement, would have been liable, just as if he were a partner of the new company, to those customers of the old to whom he did not give notice of his retirement, and he would have been liable to those customers jointly and severally with Mr Forrest and Mr Sykes. It makes no difference to the question of his liability for the debts of the new company to those who had been customers of the old whether Sykes had been a member of the old company or not. The old company was dissolved all the same, and the new company was constituted and carried on business all the same, and according to the law, as I have always understood it, Mr Girdwood would, to the customers of the old and dissolved firm to whom he had not given notice of his retirement, have been liable for the debts of the new just as if he were a partner of it. And so there would to this extent be upon him a joint and several liability with Forrest and Sykes, the only partners of the new company.

Here Mr Menzies, who had been a customer of the old company, becomes a customer of the new, being ignorant of Girdwood's retirement, and so, I presume, thinking he is just continuing his dealings with the old. He was in fact ignorant of the dissolution of the old and the constitution

of the new. A debt is incurred to him by the new firm while this ignorance of his continues—for I agree with your Lordship that there was no notice till 1884.

The question then is, Who are the parties liable? The partners in fact of the new company with which he dealt are so undoubtedly. These are Mr Forrest and Mr Sykes, the actual partners of the new company, just as Mr Girdwood and Mr Forrest were the partners of the old. But on the rule of law which I have stated Mr Girdwood is liable also, not because he is a partner, but because having allowed his name to continue, and having given no notice to the pursuer that he had withdrawn, he is liable just as if he were, not just as if the debt had been that of the dissolved company, but just as if he were a partner of the new company. Now, what would his liability have been had he actually been a partner? "Just as if he were" means that his liability to the creditor is the same as if in fact he were a partner of the new company. In that view the partners of the new firm would be Girdwood, Forrest, and Sykes, and they are all liable to the customer. Now, that is the law of Scotland as any Scottish lawyer would have stated it, and that totally irrespective of the fact, which upon the principle of law is quite immaterial, whether Sykes was a partner of the old company which was dissolved by Girdwood's retirement, or did not join the business until after that event. And this result is illustrated very clearly by the fact, which is admitted, that if Girdwood had been sued upon his liability in the actual case which existed, there being no bar by election or otherwise, he would have had a claim of relief against Forrest and Sykes, the true debtors, his liability being not upon the fact of his being a partner, but that he had put himself in the position of being liable as if he were—that is, liable for the debts of a company of which he was not a partner. Nevertheless, if he pays all the debts of the new firm he has a claim of relief against the partners of the new firm, and his claim of relief would be against Forrest and against Sykes. A clearer illustration of the liability of all three to the creditor could not be stated.

But we are told that according to a recent decision in England the customer of an old company which has been dissolved, and who has continued to trade with the new company which succeeds it in the business, must, where he has not got notice of the retirement which constitutes the dissolution of the old, make an election between the old firm and its partners as debtors and the new firm and its partners.

I do not think it necessary in the circumstances of the particular case to decide whether that is the law of Scotland. I have probably indicated my opinion pretty distinctly that by the law of Scotland it is not a case of election or choice between the old company and the new, but of the liability of the new company with which the creditor had in fact dealt, and the liability of an individual who the creditor had reason to believe was a partner of it, though in fact he was not. I do not agree in the reasoning in the English judgment in the House of Lords as applicable to the law of Scotland. Whether it is applicable to the law of England, where the law of partnership is different from ours, and where the law as to pleading, which has been referred to, is different from ours, it is not for me to say. But I altogether dissent from it as reasoning applicable to the law of Scotland, and I take leave to repeat an observation which I have frequently made—that an English decision is not a binding authority in this Court. It may be very usefully referred to for purposes of argument and illustration. We get a great many useful hints from English law text-books and from the judgments of English Judges in English cases, and so far as the arguments and reasonings and judgments which we find there are in accordance with the genius and principles of the law which we administer, we may derive great assistance and follow them with the more confidence that they have the recommendation of being approved by men of eminence skilled in the jurisprudence of their country, which we see in a particular case to stand on the same principles as the law which we administer. But beyond this they are no authority. They are authority in the law of England. But if there is a question of English law to be determined in this Court which we have to apply in order to extricate the rights of parties before us, we do not even trust ourselves to read the English works and decisions, but refer to those who are versed in the law of England to tell us what the law is in the particular case. The judgments and decisions in the English Courts are only more frequently referred to here than the judgments and decisions of the French and German Courts, or any other Courts, because of their convenience and utility, but they are of the same nature and character as authorities. It is not that these decisions are of authority with us, but they may be useful for our instruction and as illustrations. The reasonings and arguments of eminent men will always be attended to with respect. Therefore I would by no means be prepared to bow to a decision, and still less to observations, in such a case as the case of *Scarf* v. *Jardine*, which I conceive to be at variance with the law of Scotland.

But it is perhaps sufficient for the decision of the present case to say that even if our law were so, and the customer of the new firm were put to his election, and must choose either the old firm or the new, that there was no choosing of the new firm here in the way of election and the exclusion of any claim against Mr Girdwood. I have already stated that I do not think our law involves any election, and that the partner of the old firm is liable as if he were a partner of the new—not as if the old had continued and become indebted to the creditor, for it did not, but as if he were a partner of the new firm, the undoubted debtor in the debt. That is our principle, and it leaves no room for election. Still, I repeat, I think there was here no election. The pursuer, I think, was quite well entitled, without making any election at all, to put in a claim in the sequestration of the new firm and of its partners. It was his only way of receiving such payment as they could make of their undoubted and admitted debt to him. That could by no means prejudice Mr Girdwood, even if there had been no express reservation of his claim against Mr Girdwood. Mr Girdwood could take no prejudice by it, for whatever the pursuer received in consequence could not possibly have done more than diminish his claim against Mr Girdwood. If Mr Girdwood had satisfied that claim he would have had a claim to the exact amount of his payment upon the

estate of the new firm and its partners. Now, it is something not only approaching but entering into the ridiculous to say that this claim in the sequestration, which to the extent of any payment upon it would have diminished the amount of the claim against Mr Girdwood, and which would certainly have been made by himself had the pursuer's demand been made against him in the first instance, shall have the effect of discharging him of liability altogether. For that is the proposition. If you make a claim upon the sequestrated estate of the new firm, the proceeds of which must go to Mr Girdwood's credit, and if you ever thereafter make a claim against him—of which claim he himself would have been the author if you had made the claim against him first—I say the proposition that that is to relieve him of all liability is quite extravagant. The affidavit and claim bears upon the face of it that the deponent "holds no security for the sum due him, and no other person, company, or obligant bound for the debt or any other part thereof than the said Girdwood & Forrest, Thomas Forrest, and William Wade Sykes, save and except any claims the deponent may have against Robert Girdwood, wool-broker, Edinburgh, which claim is reserved entire." To say that a claim with these words in it is an unequivocal adoption of the new firm as a debtor, and implies a discharge of Girdwood, is in my judgment extravagant. I cannot put that interpretation upon it. Therefore upon the general views applicable to the case, and upon the particular features of the case, I am of opinion that there was here no election. I repeat, that in my opinion according to the principles of the law of Scotland there is no room for election at all. It is not a case for election—the liability of the retiring partner who did not give notice to the customers of the old firm as to his not being a partner of the new firm standing upon a principle which does not put anybody to election. I am, however, content to think it sufficient for the judgment that if it was a case for election upon the principle of the case of *Scarf* v. *Jardine*—although I think it inapplicable—there was no election here.

Lord Craighill—I am entirely of the same opinion. In all that has been said by your Lordship and by Lord Young I am perfectly agreed. In the first place, it appears to me that there was no notice prior to May 1884. Upon the showing of the defender himself the notice that was given in 1883 was insufficient for its purpose, and I would have been disposed to come to the same conclusion even if there had not been this evidence furnished by the defender. I have the more confidence in my opinion seeing that that evidence has been given.

In the next place, I agree with your Lordship in thinking that if it were necessary to decide the point, the conclusion to which I would come is, that according to the law of Scotland the case was not one for election at all. The defender was a partner of the firm of Girdwood & Forrest until 1878 at all events. As between him and his copartner a dissolution with all its consequences came into operation at that time. But in the case of customers of the firm, in order, so to speak, to dissolve the connection between them it was necessary that those customers should have notice, in other words, of the fact that the defender had retired. Now, sufficient notice was not sent out till May 1884. Accordingly the question arises, what in these circumstances were the rights of customers who had claims against the concern—claims which admittedly came into existence upon the dissolution of the old firm? And what were the claims or rights of customers in regard to the defender who had retired but who had not given notice? I entirely agree with all that Lord Young especially has said in regard to that matter. I think that in all respects he is under the same liability as if he had remained a partner. I know of no other statement of the law that has ever been given by any institutional writer, or of any other opinion given in any case relative to copartnery by any of the Judges of this or any other Court in Scotland. He remains therefore under the same liability to an old customer of the firm as he would have been subjected to if in point of fact he had been a partner. If that is so, it is perfectly plain that this pursuer is entitled to ask payment from him just as if he had still been in the firm.

But it is said he is not entitled to go against the others at the same time. If that is a true statement of the law, then it cannot be true that a retiring partner not giving notice is to be dealt with as if he still remained a member of the old firm. According to my view of the law of Scotland, the creditor who is an old customer is entitled to deal with the partner who has retired without giving notice, in every way, and subject to no limitation or qualification, as if he still remained a partner. Certainly I would have been ready to give effect to these views supposing it had been necessary to rest my judgment upon the question on which I have thought it right to give my opinion, but it is not necessary in the circumstances of the case to do that, for I agree with your Lordship in thinking that even if it behoved the pursuer to make a choice between the partner who went out but gave no notice, and the partners who really constituted the new firm subsequent to the defender's withdrawal, then even in that case there has been no election. If it was necessary that there should be choice, it is open for choice now, or it was open at the time the new firm was called into existence. I do not say that in no circumstances would the giving in of a claim be insufficient as an unequivocal election, but I do say that the giving in of the claim here is not an unequivocal election. It appears to me to be as plain as anything can be that there was no intention here to elect—that the question of election was not before the mind of the pursuer at all. But apart from that, we have here a reservation in the affidavit itself. The affidavit was sworn to and given in under reservation of such claims as the pursuer had against the defender. Now, is it possible on the reading of the document as a whole to say that the man who gave in that affidavit, reserving any right he had to go against the defender, had made an election, and had resolved to hold exclusively by the others? That he had no idea of election, or of exercising his election, is quite plain from what occurred immediately afterwards. Within four days of the giving in of the affidavit in the sequestration an action was raised in this Court, not against the new firm only—not against Mr Girdwood only, but against Mr Girdwood and

the two debtors who were members of the new partnership.

And so, on the whole matter, I entirely concur in your opinion and in the judgment you have proposed.

Lord Rutherfurd Clark—I also agree that the judgment of the Lord Ordinary should be affirmed. If we are to assume that the pursuer was put to an election, I do not think it has been established that he elected to take the insolvent firm as his debtor and to discharge Girdwood. The only way in which that is said to have been done is by lodging an affidavit in the sequestration, but as that affidavit was accompanied by a distinct reservation of all claims the pursuer held against Mr Girdwood, it seems to me impossible to hold that he intended in any sense to make his election, and so discharge Mr Girdwood, while he was at the same time reserving entire all claims against him. A claim in a sequestration may be of itself sufficient to establish an election, but I do not think it can be so when the person who makes the claim at the same time declares that he is not making his election, but is endeavouring, if he is able to do so, to make out his claim against both parties.

With respect to the more general question I do not care to say much. If I had been bound to decide it, I think I would have held that the decision in the case of *Scarf* was authoritative and binding upon us, because I confess I can see no difference between our law and the law of England with respect to the question decided by the House of Lords. Therefore, had I been required to decide that question I should have followed the decision of the House of Lords. At the same time I beg leave to say, that while I would have followed the decision of their Lordships' House, I should have thought that in doing so I was departing from what had hitherto been the well-known law of Scotland.

The Court adhered in both actions.

Counsel for Pursuers—Mackintosh—Dickson. Agent—N. Briggs Constable, W.S.

Counsel for Defender Girdwood—Pearson—Low. Agents — Skene, Edwards, & Bilton, W.S.

Friday, November 27.

FIRST DIVISION.

[Lord Trayner, Ordinary.

LOCKHART (SPEEDIE'S TRUSTEE) *v.* THE COMMERCIAL BANK OF SCOTLAND (LIMITED).

Bankruptcy—Claim in Sequestration—Ranking for Second Dividend—Re-valuation of Security—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 62 *and* 65.

Held, on a construction of section 65 of the Bankruptcy (Scotland) Act 1856, that a secured creditor who has, after valuing his security, ranked for the balance of his debt, and received a first dividend thereon, is entitled, on finding that he has overvalued the security, to re-value it and make a new claim with a view to participation in future dividends.

Held that section 62 of the statute applies only to valuing of securities for the purpose of voting.

The estates of the deceased John Speedie of Eastbank, Kirkcaldy, and bleacher at Lochty Bleachfield, Kirkcaldy, carrying on business under the firm-name of John Speedie & Company, of which firm he was sole partner, were sequestrated in 1884, and James Lockhart was appointed trustee thereon. At the time of the bankruptcy the bankrupt was indebted to the Commercial Bank in sums amounting *in cumulo* to £25,779, 16s. 8d. The bank held a security over the bankrupt's works known as the Lochty Bleachfield Works.

On 5th April 1884 the bank lodged an affidavit and claim with the trustee, wherein they valued their security at £5000, and claimed for the balance of their debt. This claim was admitted, and the bank received a first dividend of 5s. per pound on amount of said claim on 6th June 1884.

On 17th April 1885 the bank, on the ground that they had overvalued their security, lodged a new affidavit and claim, valuing their security at £4000, and therefore claiming for a debt of £21,779, 16s. 8d. In the present process, however, it was admitted that in the claim the dividend paid had been omitted to be deducted, and fell to be deducted from the debt.

On 18th May 1885 the trustee pronounced a deliverance rejecting this second claim, on the ground that it was *res judicata* by his previous deliverance.

The bank appealed to the Lord Ordinary on the Bills, and maintained that they were entitled to re-value the security-subjects, and that the trustee should be instructed to rank the bank as creditors in terms of the claim, and pay their dividend thereafter accordingly.

They pleaded that "the appellants being entitled to amend their claim to the effect of substituting the true value of the security-subjects, the appeal should be sustained, and the trustee instructed to admit the appellants' new claim" (subject to the correction above mentioned

The trustee, besides narrating the prior claim and ranking thereon and dividend paid, and pleading *res judicata*, made the following explanation: —"(Ans. 2) . . . Explained further, that the value of said security-subjects at the first ranking was at least £5000, and if there is a decrease in value now, which the respondent denies, this is owing to the appellants' mode of and delay in realising said security-subjects. The said security-subjects consist of Lochty Bleachfield and machinery therein. After it had been settled by arbitration what portion of the machinery, as being moveable, fell under the sequestration, the trustee put himself in communication with the appellants with the view of getting them to purchase the machinery, plant, and utensils belonging to the estate, and made offer of them at the price of £1000, but they declined to acquire them. The trustee was therefore obliged to sell the articles in lots by public roup, which he did on 28th January 1885, and as these formed the newest and best and most indispensable portions of the machinery, plant, and utensils, the utility of the works as a going concern was greatly impaired, and the works have been left in an almost wrecked