neighbour. It was a question of fact, and if facts are proved which satisfy us that a nuisance has been committed, the law follows that we must interdict it.

I cannot refrain from expressing my regret that a dispute of this kind should have arisen between respectable gentlemen who are neighbours. It does not appear to me that the reasonable convenience of the respondent in the use of his property required him to keep his hens so near his neighbour's house. I should have expected that good feeling would have led him to put the run further from his neighbour's house when the inconvenience was pointed out, and that he would thereafter have kept it in better condition. I have not formed a very favourable opinion of the complainer's manner of making the complaint. I think that he might have avoided going to the police, and rather have gone to his neighbour and asked him to be good enough to do what was necessary to remove the nuisance. And I must say, on the other hand, that I have no sympathy with the respondent in insisting in keeping his hens in face of the complaints. I think right feeling should rather have induced him to purchase his eggs in the market if he could not place the hen-run nearer to his own windows and further from his neighbour's than he had done.

The case is disposed of if we are of opinion that, looking to the place and manner of keeping the hens, serious inconvenience and nuisance has been caused.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the pursuer and defender are proprietors and occupants of conterminous dwelling-houses in Broughty Ferry; (2) that the defender has now, and for some time past has had, a hen-house and hen-run close to the mutual wall which divides the properties of the pursuer and defender; (3) that the said wall is about five feet from the pursuer's house, which directly overlooks it, and that the defender's house is distant from that wall about thirty feet; (4) that at the time this petition was presented, and for some time previously, the defender had, and has now, in the said hen-house and hen-run, hens to the number of sixteen or thereby; (5) that the said hen-house and hen-run have not been kept by the defender with proper care, and have been allowed to get into a filthy condition by the accumulation therein of dust and manure from said hens; (6) that in consequence thereof the said dust and manure have from time to time got into the pursuer's house, and have prevented him from using his larder in said house by said dust and manure settling therein; (7) that from said hen-house and hen-run, and from said dust and manure, there arise offensive exhalations and smells, which occasion great discomfort to the pursuer and the inmates of his house, and render it necessary to keep closed the windows in the pursuer's house overlooking the said hen-house and hen-run; (8) that the cackling of said hens does awaken and hinder from sleeping the pursuer and others living in family with him in his said house; (9) that the dust and manure produced by said hens, and the exhalations and smells proceeding therefrom, are dangerous to the health of the pursuer and other inmates of his house; (10) that the said hens, with the dust and manure, offensive smells, and noise foresaid occasioned by them, constitute a nuisance dangerous to health, and cause material discomfort to the pursuer and the inmates of his house, and prevent him from having the reasonable enjoyment of his own property: Find in law that the defender is not entitled to maintain or continue the said hen-house and hen-run, or keep hens therein, to the nuisance of the pursuer: Therefore repel the defences: Grant interdict in terms of the prayer of the petition," &c.

Counsel for the Pursuer—Lord Advocate, Pearson, Q.C.—Salvesen. Agents—Henderson & Clark, W.S.

Counsel for the Defender—Balfour, Q.C.—Clyde. Agent—J. Smith Clark, S.S.C.

Thursday, December 12.

FIRST DIVISION.

[Lord Low, Ordinary.

CERES SCHOOL BOARD *v* M'FARLANE AND OTHERS.

Superior and Vassal—Competition of Titles—Feu-Disposition—Clause of Warrandice—Education Act 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 38 *and* 39.

A proprietor granted to trustees a feu-disposition of land for the purpose of building a school. The trustees entered on possession of the land, but did not obtain infeftment. They subsequently transferred it, in terms of the Education Act of 1872, to a school board, who also failed to feudalise the title.

The estate from which the feu had been granted passed into the hands of a singular successor, infeft under a disposition containing a clause of warrandice, which excepted from the warrandice "all feu-rights . . . granted by me or my predecessors," but without prejudice to the right of the disponee to "quarrel or impugn the same upon any ground in law not inferring warrandice against me or my foresaids." In a competition of titles be-

tween the singular successor and the School Board, *held* (1) that the exception in the clause of warrandice did not apply to the unfeudalised personal right of the School Board; (2) that the transference, under the Education Act, to the School Board, did not feudalise the personal right held by their authors, and that the title was not valid against that of the singular successor.

In 1833 Mr William Wilson of Craigrothie granted a feu-disposition of a piece of ground on Craigrothie estate, upon which had been built a school, known as the Subscription School of Craigrothie, to a body of trustees, by whom the school was managed. The *reddendo* was one penny Scots, and the warrandice contained in the charter was at all hands and against all mortals.

No infeftment was taken on this disposition.

The school remained under the management of trustees till 1873, when it was transferred to the School Board of the parish of Ceres, in terms of the Education (Scotland) Act of 1872. No formal conveyance, however, was taken by the School Board from the trustees, and they took no steps to have their title to the ground feudalised. The estate of Craigrothie passed by various gratuitous dispositions to disponees of the original proprietor, and in 1873 it was bought by Mr William M'Farlane. In the conveyance to him the dispositive clause did not except the piece of ground feued to the School Board's authors in 1833, but the deed contained the following clause of warrandice:—"And I grant warrandice, but excepting always from the warrandice the current tacks or leases, and all feu rights and other subaltern rights of the said lands granted by me or my predecessors or authors to the tenants, feuars, and vassals thereof, without prejudice to the right of the said William M'Farlane or his foresaids to quarrel or impugn the same upon any ground in law not inferring warrandice against me or my foresaids."

The School Board being desirous of completing a full legal title to the ground occupied by them, called upon Mr M'Farlane to grant a charter of *novodamus* in their favour. He refused to grant a charter except at an annual feu-duty of £5 to be paid for the subjects, and the School Board accordingly raised an action of declarator and adjudication against Mr M'Farlane, in which they craved the Court to declare that they had the full right and title to the subjects. The defender maintained that the pursuers had no legal title capable of competing with his infeftment as a singular successor.

The Lord Ordinary (Low) on 14th November assoilzied the defender.

Note.—"The defender William M'Farlane is a purchaser of the estate upon which the pursuers' school is built, and his title has been completed by infeftment. The pursuers' title, on the other hand, is an unfeudalised feu-disposition granted so long ago as 1833.

"It is not said that the defender had any notice of the pursuers' right, or that he even knew of the existence of the school. *Prima facie*, therefore, it is a case to which the general rule that a singular successor takes the lands free from the personal obligations of his predecessor, and unaffected by burdens not appearing upon the records, applies.

"The pursuers' argument was mainly founded upon the terms of the clause of warrandice.

"That clause excepts from the disposition, leases, and feu-rights, but gives liberty to the defender to challenge leases or feu-rights on any ground not inferring warrandice against the disponer.

"The argument of the pursuers was that the defender could not challenge their right, because to do so would infer warrandice against his author.

"It may be doubted whether the pursuers have a title to state that argument, because they were not parties to the disposition, nor in any way privy to the contract between the defender and his author. But apart from that, it seems to me that a challenge of the pursuers' title on the part of the defender would not infer warrandice against the disponer. The pursuers' title is challengeable not on account of any defect in the disponer's title, or anything which he has done, but simply because the pursuers, or those in whose right they are, neglected to put their title upon record. In such a case I do not think that there could be any recourse under the clause of warrandice in the feu-disposition, because the defect in the title is entirely attributable to the grantees.

"The pursuers relied upon the case of *Wight* v. *Earl of Hopetoun*, M. 10,461. In that case, however, the ground of judgment was that Lord Hopetoun was barred *personali exceptione* from challenging the perpetual lease which was in question, it being expressly excepted in the clause of warrandice in the disposition. It appears to me that that decision has no application here, because there is no express mention of the pursuers' feu-right in the disposition, and, as I have said, it is not alleged that the defender had any notice of the existence of any right on the pursuers' part, or even knew of the existence of the school.

"I may add that I do not think that the pursuers derive any aid from the provisions of the Education Act 1872. Section 38 provides for the transference of schools in the position of that in question to the School Board. It is there enacted that the persons 'vested with the title to any such school,' may transfer 'such school, together with the site thereof, and any land or teacher's house held and used in connection therewith to the School Board,' and if the School Board, with the sanction of the Board of Education, accept such transference, 'the school with the site, and any land or teacher's house included in the transference, shall be vested in the School Board.' By the 39th section it is provided that the transference may be effected by an ordinary disposition or other deed of conveyance by the persons

vested with the title, recorded in the Register of Sasines.

"If, as in this case, the trustees of a subscription school have only a personal title, I do not think that a transference carried out under the 38th section gives to the School Board any better title than that of the trustees. I think that they only acquire right to the title as it stands in the person of the trustees. Further, the 39th section points out the way in which the School Board may complete their title. It is to be by an ordinary disposition by the persons vested in the title. If the School Board had taken a disposition from the trustees in 1873, when the transference is said to have been made, and put it upon record, there would have been no question; but, as they neglected to do so, I am of opinion that they are in no better position than the trustees would have been in if the transference had not been made, and that their sole title, in a question with the defender, is the unfeudalised feu-disposition of 1833, of which the defender is not said to have had any knowledge or notice.

"I am therefore of opinion that the pursuers are not entitled to the decree which they seek."

The pursuers reclaimed, and argued—(1) The defender took over his estate subject to the limitation that he should not impugn any "feu rights." The reclaimers' right, though not feudalised, was included in this designation. It was the duty of a purchaser to carry out all the obligations prestable on the estate he acquired—*Wight* v. *Earl of Hopetoun*, M. 10,461. (2) Section 38 of the 1872 Act vested a right in the School Board, personal, it was true, but absolute. By the 39th section there vested in them a beneficial right, and as soon as the transaction was completed they might have demanded a title from the proprietor. Accordingly there was no reason why they should not do so now. There was no duty on them to do this, though it would have been more prudent to do so; and they had not forfeited their right by their neglect.

Argued for respondent—(1) This was merely a case of competing titles, in which the pursuers set up an unfeudalised personal right against an infeft singular successor. The original proprietor did not and could not warrant his disponees against their own fault in neglecting to get infeftment. (2) The Education Act did not help the pursuers, unless it could be shown that the effect of the transference under it was to infeft them, and they could not maintain that. They gained nothing more by the transference than the personal right of their authors.

At advising—

LORD ADAM—So long ago as 1833 the pursuers' predecessors obtained a feu-disposition from the then proprietor of a small piece of land, for the purpose of building a school-house. The feu-disposition contained a clause of warrandice, and we are told no infeftment was taken on the disposition. In 1873 the successors of the original disponees, under terms of the Education Act, transferred the ground and school buildings to the pursuers, but neither were they infeft. Now, on the other hand, the property of Craigrothie estate had during this period changed hands several times, without any mention being made in the dispositions of the feu given off it in 1833. Then in 1883 Mr Frederick Honey sold it to the defender, and the dispositive clause in the disposition did not except the piece of ground occupied by the pursuers, but there was a clause of warrandice in the following terms—[*His Lordship here quoted the clause of warrandice.*] Now, it appears to me that this is simply a competition of titles. The defender is infeft in the land with a regular feudal title, and the proposal of the pursuers is to oust him from the land—for this is what their action comes to—on the ground that they have a personal title thereto. I certainly have never heard of the real title yielding to the personal in such a competition.

But the first argument advanced by the pursuers is on the clause of warrandice, and it is said that in the grant to the defender there were excepted "all feu-rights granted by me or my predecessors." Now, I think that by "feu-rights" are meant completed feu-rights, capable of being brought in competition with those disponed, and not merely personal rights, and I agree with Mr Kennedy that the exception does not apply to a case where the defect in the disponee's title arises from his own neglect in not carrying out the plain duty to himself of making his title good by infeftment.

The only other argument is based upon sections 38 and 39 of the Education Act of 1872, but it does not appear to me that these sections make any difference. If there has been a conveyance to the School Board, that cannot give to them any better title than their authors had. If the latter had only a personal title the statutory transference cannot make it a real one. I am therefore of opinion that the Lord Ordinary's judgment is right.

LORD KINNEAR—I agree. I must confess that I have some sympathy with the position of the pursuers in the case, because they and their predecessors have been in possession for many years of the land occupied by the school-house. It was given to their predecessors in 1833 by a disposition by the then proprietor of Craigrothie for the *reddendo* of a penny Scots, and they have been in possession of it ever since. The estate of Craigrothie has passed by various gratuitous dispositions to disponees of the original proprietor, but in the year 1873 the lands were bought by the present defender, who is willing to allow the School Board to remain, but only on payment of a feu-duty of £5 a-year. I am afraid that the position in which the School Board are placed must be ascribed to those who administered their affairs, because they might have made their right certain by taking infeftment from the superior, or after the alteration in our conveyancing

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.

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-