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

state. . . . It was after the works were dismantled by the removal of the machinery belonging to the trustee that the appellants made a re-valuation of the security, and from no fault on the part of the trustee, the selling value of the security-subject may have been considerably depreciated."

He also pleaded — "Under the Bankruptcy Statutes the appellants are not entitled to put a new valuation on a security after having lodged a claim for ranking with a different valuation of the same security, and after having been found entitled to and drawn a dividend on such a claim after a deliverance by the respondent."

The Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Recals the deliverance appealed against: Finds that the appellants were and are entitled to re-value the security held by them over the estate of the bankrupt, and to be ranked for the balance of their debt after deduction of such re-valuation, and subject to the various corrections specified in the trustee's deliverance upon the appellants' first claim in the sequestration: Further, finds that the appellants have already been paid a first dividend on their claim, and are not entitled to any equalising dividend: Remits to the trustee, with instructions to rank the appellants accordingly: Finds the appellants entitled to expenses, &c.

"*Opinion.*—The circumstances out of which the present appeal arises are correctly stated by the respondent in the deliverance appealed against. But I am of opinion that that deliverance is erroneous in law, and ought to be recalled.

"The appellants base their right to reduce the value originally put by them on their security on the last clause of the 62d section of the Bankruptcy Act of 1856 [quoted *infra*]. The respondent argues that the section referred to relates to questions of voting, and not of ranking or claiming dividends. It is quite true that the earlier part of the 62d section, as well as section 61, refer to valuations by the creditor for the purpose of voting, and to the right of the trustee or creditors to take over the security at the value put upon it, with the addition of 20 per cent. But the part of section 62 on which the appellants rely does not limit the right of a creditor to re-value merely for the purposes of voting. It provides that a creditor 'may at any time before he has been required to convey or assign' his security correct his valuation 'by a new oath, and deduct such new value from his debt.' The appellants have not been asked to assign their security, and they are therefore, so far as time is concerned, entitled to re-value their security. The purpose or effect of such re-valuation is not a matter with which the section in question deals in express terms, but when it authorises the creditor to deduct the new valuation from his debt it appears to me to authorise the creditor to all the rights, whether of voting or ranking, to which in respect of the debt so ascertained he is by law entitled. One of the legal rights is to draw a dividend in respect of his debt, and I think the appellants are entitled accordingly to draw a dividend on the debt ascertained after deduction of the new valuation.

"The respondent maintains that it gives the appellants an unfair advantage to allow them to draw a dividend on the basis of one valuation of their security, and thereafter draw another dividend on a lower valuation. This is no argument if the statute allows it. But apart from that, the body of the creditors can protect themselves, if they think the valuation too low, by calling upon the appellants to assign their security at the value put upon it.

"There are some other points of difference between the parties in reference to the affidavit in question, but these, I was informed, would be arranged."

The trustee reclaimed, and argued—The 62d section of the Bankruptcy Statute of 1856 [*vide infra*] applied to claims for voting purposes only. The 65th section contained no such privilege of re-valuation, and therefore it must be read as impliedly withholding any right to re-value after a claim was once made. The trustee suffered prejudice because he could not now take up the security. If there was a doubt as to the construction of the statute, the interpretation should be adopted which tended to a fair distribution of the estate among all the creditors. Assuming the re-valuation otherwise competent, it was not in this case the right of the appellants, because the decrease in value was due to their fault.

Authorities—Bell's Comm. (5th ed.) ii. 718 and 736 (dealing with the corresponding sections of the Act 54 Geo. III. cap. 137, viz., secs. 24 and 50); *Monkhouse* v. *M'Kinnon*, January 28, 1881, 8 R. 454.

Replied for the bank—Re-valuation was a right secured by the 62d section. If not, then it was to be implied from the 65th section [quoted *infra* in opinion of Lord President], as it was a right which must be expressly excluded if it were meant to be so, on the principle that a creditor was free except where the Act imposed restrictions. *Res judicata* could not be pleaded against the bank, because the statute regarded the payment of each dividend as a separate transaction. Therefore even if sections 62 and 65 did not apply, the creditor had a right to re-value as regarded subsequent dividends. Decrease in value of security was not due to fault of bank.

Authorities—*Henderson's Trustees* v. *Auld & Guild*, 1872, 10 Macph. 946; Bell's Comm. (5th ed.) ii. 426; *Stewart* v. *Ferguson*, 1882, 19 S.L.R. 429; sections 123, 126, 127, 130, 132, and 133 of Bankruptcy Act 1856.

Section 62 of the Bankruptcy (Scotland) Act 1856 provides—"It shall be competent to the trustee, with consent of the commissioners, within two months after an oath specifying the value of a security or obligation or claim in the several cases before mentioned has been made use of in voting at any meeting, or in assenting to or dissenting from the bankrupt's composition or discharge; and it shall also be competent to the majority of the creditors (excluding the creditor making such oath) assembled at any meeting, and during such meeting—to require from the creditor making such oath a conveyance or assignation in favour of the trustee of such security, obligation, or claim, on payment of the specified value, with twenty per centum in addition to such value; and the creditor shall be bound to grant such conveyance or assignation at the expense of the estate: Provided that where a creditor has put a value on such security or obligation, he may, at any time before he has been required to convey and assign as aforesaid, correct such valuation by a new oath, and deduct such new value from his debt."

At advising—

LORD PRESIDENT—The appellants in this case lodged an affidavit and claim with the trustee originally on 5th April 1884, and in that affidavit and claim they valued the security-subjects at £5000. The claim was admitted. The trustee did not exercise the right of taking the security-subjects at the valuation put upon them. Accordingly, the appellants received payment of the first dividend of 5s. per pound on the amount of their claim, less £5000. Afterwards they found, they say, that they had overvalued the security-subjects, and they found it necessary to put in a second claim with the view of drawing a second dividend. Although the cause of the depreciation in the security is not stated by the appellants it is brought out in the answer which the trustee makes to the 2nd article of the appellants' condescendence, and it is there stated that the security became of much less value in consequence of the trustee having had to sell off the machinery.

The question comes to be, whether with the view of drawing a second dividend the appellants are entitled to alter their claim by putting a lower valuation on the security-subjects? Of course if there is nothing in the statute to restrain them, there is no ground at common law, because there is nothing more equitable than that a debt when it has depreciated shall be stated at its true value.

We therefore come to the consideration of the statute in order to ascertain whether it imposes any such restraint on the appellants. The 62d section has been founded on as giving them an express right to alter the valuation as they propose, but I am not able to read the section in that light. I think it refers to claims lodged with a view to voting. The special rules as to voting begin at section 59 and end at section 64.—[*His Lordship here read sections* 59, 60, 61, *and* 62]. Now, I think it impossible to read these words otherwise than applying to claims made for purposes of voting, and nothing else.

This case therefore must, I think, be considered with reference to the 65th section, and as unaffected by sections 59 to 64. This (the 65th) section says—"To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to claim a dividend, he shall on oath put a specified value on such security, and deduct such value from his debt, and specify the balance, and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security at the expense of the estate on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and in either case the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects."

Now, it is contended by the trustee that when a valuation is put on a security under this section, with a view to a ranking, this is a final proceeding which cannot be gone back upon,—that it fixes the value of the security once for all, and absolutely excludes re-valuation. Now, I do not say this is not a possible, though perhaps it is a rather strained, construction of the statute. But at all events I am clearly of opinion that a restriction such as this must be put on the creditor either by express words or by clear implication, for it is a restraint in prejudice of his rights at common law. Therefore I adopt the view Professor Bell took of the corresponding clause of the Act of 1814 (Bell's Com. (5th ed.) ii. 426), where he says—"If a division is to be made before the sale, the trustee in making up his scheme of ranking and division must put such value on the securities as he thinks to be justly their worth, and deducting that from the amount of the whole debt of the holders of the securities, leave it to them to object. If the worth become thus a subject of dispute, the claimant must follow out the directions of the Act by swearing to what he holds to be the value." . . .

Now that is directly in point, and is in accordance with the equity of the case.

I am therefore of opinion that the Lord Ordinary's interlocutor is right, and that a creditor, although he has on one valuation received payment of a first dividend, is entitled to re-value his security with the view to a second dividend. This is made more manifest when we consider the provisions of the statute with reference to proceedings as to a second dividend, because under sections 130 and 131 these proceedings are separate and distinct. The trustee, along with the commissioners, has to determine whether the estate can afford a second dividend, and with a view to that must make up a new list of creditors, among whom all those who have not before claimed may come in and get an equalising dividend. The new list when made up is published, and creditors in any way aggrieved have the same right of appeal as in the case of a first dividend. I think therefore that in this separate proceeding parties may claim with as little restriction as at the first stage, and consequently that the proceedings of the Commercial Bank in the present case were justified. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD MURE concurred.

LORD SHAND—I have always understood that it was in the power of any creditor in a sequestration, prior to the time when the trustee takes up the claims to make his deliverance on them, to withdraw any claim made and substitute a new one for it, and that the rule was unaffected by payment of a dividend. In the argument which has been addressed to us on the statute I have not heard anything to cause me to alter this opinion.

The question therefore comes to be, whether a creditor who has a security over part of a bankrupt's estate is in any different position. There is, I think, no distinction possible. Of course the trustee has it in his power to take over the security, and thus exclude re-valuation, but until he does so the right of the creditor to withdraw and re-value is unimpaired. As regards the first dividend it is so, and I see no ground for limitation of this right when a second dividend is claimed.

I am therefore of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD ADAM—The Lord Ordinary has decided this case on a construction of the 62d section of the Act. I agree with your Lordships in thinking that that section does not apply to the present case, but only to the lodging of claims for the

purposes of voting. I agree, however, with the Lord Ordinary's decision upon other grounds.

It has always been my understanding that in a sequestration a creditor might lodge and withdraw affidavits and claims until, as Lord Shand says, they were taken up by the trustee to be adjudicated on, or until they were taken over by him at the valuation put on them. If this be so, the question comes to be, has the creditor not the same power with regard to a second dividend? There is nothing in the statute restricting his right to withdraw. The only restriction is at the end of the 62d section—[*reads*]. If, then, the creditor can lodge a claim for the second dividend, is he not entitled in doing so to take into account the altered circumstances affecting his security? I do not say there may not be circumstances in which the depreciation of the security is due to the fault of the creditor, but where there is no fault on his part he is in precisely the same position as when lodging his first claim. For these reasons I think the appellants were entitled to re-value their security.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Jameson—Goudy. Agents—Watt & Anderson, S.S.C.

Counsel for Defenders (Respondents)—Dickson—Wood. Agents—Melville & Lindesay, W.S.

Friday, November 27.

FIRST DIVISION.

[Lord Trayner, Ordinary.

ASSETS COMPANY (LIMITED) *v.* GUILD (POTTER'S TRUSTEE).

Bankruptcy—Trustee's Commission—Fixing Remuneration of Trustee where only One Creditor—Directors of Limited Company—Ultra vires—*Transaction—Bankruptcy (Scotland) Act* 1856, *secs.* 125, 141.

The assets of a bankrupt who had been sequestrated under the Bankruptcy (Scotland) Act 1856, and whose sole creditor was the City of Glasgow Bank and liquidators, became vested, by virtue of a private Act of Parliament, in the Assets Company. The date of vesting was 30th December 1882. Between March 1879 and January 1880 there had been paid to the trustee upon the sequestrated estate four sums of commission, amounting together to £742, which were duly fixed by the commissioners in terms of the Bankruptcy Act. In April and July 1880 the trustee received two sums of £500 each, and in October 1881 and July 1882 two further sums of £250 each, to account of his commission, with the sanction and authority of the commissioners. In January 1881 the trustee received a further sum of £1050, in terms of an agreement with the liquidators of the bank, which was sanctioned by the Court. After the Assets Company had acquired the estates, negotiations were entered upon with a view to the final settlement of accounts between the trustee and the company. As the result of these negotiations, which were conducted by the manager and law-agent of the company on the one hand, and the trustee on the other, the two former reported to the Finance Committee of the company that £1750 should be paid the trustee "for the balance of his commission." This was approved of by the committee on 12th March 1883, and of the same date confirmed by the company's directors. The trustee took credit for this amount in his accounts.

On 4th November 1884 the Assets Company presented a petition to the Lord Ordinary on the Bills, under section 86 of the Bankruptcy (Scotland) Act 1856, in which they averred that the commission charged was excessive; that the act of their directors in fixing the trustee's commission was illegal, because under the provisions of the 141st section of the Bankruptcy Act the commissioners were the only persons who could legally fix the trustee's commission; that it was *ultra vires* of the directors to do so; and that even if the agreement was valid, the words "balance of his commission" did not imply a ratification by the directors of what had been done in fixing the previous commissions. The petitioners asked the Court to fix the trustee's whole commission at £949, 19s. 3d. From a report by the Accountant in Bankruptcy, to whom a remit was made, it appeared that the commission paid to the trustee amounted in all to more than £5000; that the sums ingathered by the trustee amounted to £114,983, 8s., and that there was also a heritable property, valued at £75,000, which was by agreement made over to the Assets Company. *Held* (1) that the agreement between the directors and the trustee amounted to a transaction which could not be re-opened; (2) that in fixing £1750 as the "balance" of commission the directors of the petitioners' company had ratified the fixing of the previous commissions; (3) that it was not illegal for the directors to fix the trustee's commission, because there was not at the date when they did so a going sequestration in the proper sense of the term, the Assets Company being the only creditor; and (4) that under the articles of association the directors of the company had power, as a necessary act of management, to fix the commission. Petition *refused.*

Opinions expressed that the commission allowed was excessive.

The estates of Lewis Potter, merchant in Glasgow, one of the directors of the City of Glasgow Bank, were sequestrated under the Bankruptcy (Scotland) Act 1856 on 1st November 1878, and J. Wyllie Guild, chartered accountant, Glasgow, was appointed trustee.

The City of Glasgow Bank and the liquidators thereof were ranked as creditors on the estate for £6,356,683. The other claims on the estate amounted to £78,599, 19s., and by an agreement executed in March 1880 these claims were acquired by the bank and liquidators, who were thus left the sole creditors upon Lewis Potter's estate.

By virtue of the City of Glasgow Bank (Liquidation) Act 1882 (45 and 46 Vict. cap. clii.) the Assets Company (Limited) were vested with all the assets of the City of Glasgow Bank, the liqui-