the Society, is the interest allowed by Scotch banks on sums standing at the credit of current accounts kept with them: Repel the answers for the respondents David Gordon M'Lellan and William M'Geoch junior, . . . in so far as the said respondents, who are both borrowing and non-borrowing members of the Society, seek to have the whole instalments respectively paid on all the shares held by them, whether advanced or unadvanced, imputed towards extinction of the advances made to them respectively by the Society; and find and declare that the liquidator is entitled to place the respondent David Gordon M'Lellan in Section B of the list of contributories annexed to the said note, ... in respect of the 20 shares held by him in the Society upon which no advance has been made, and in section D of said list in respect of the remaining 20 shares held by him therein, representing the advance of £500 made to him by the Society: . . . . Sustain the answers for the respondents William M'Geoch junior, John Caldwell and others, Elizabeth M'Lachlan and others, Thomas Morrison and another (M'Birnie's Trustees), and David Watson and others, . . . in so far as the said respondents object to the liquidator debiting them with fines; and find and declare that the liquidator is not entitled to charge fines against any of the members whose names are included in the list appended to the said note, . . . other than the fines entered in the passbooks of the members prior to the liquidation: Repel the answers for the respondents John Caldwell and others, . . . in so far as the said respondents contend that they withdrew prior to 13th May 1882 the shares held by them respectively in the Society; and find and declare that the liquidator is entitled to place them in section B of the said list of contributories in respect that they had not given timeous notice of their intention to withdraw the said shares prior to said 13th May 1882: . . . . Sustain the answers for the respondents David Gordon M'Lellan, William M'Geoch junior, Thomas Morrison and another (M'Birnie's Trustees), and David Watson and others, . . . in so far as these respondents object to the liquidator debiting the balances due by them on their respective bonds with interest half-yearly from and after Martinmas 1882 until the bonds be fully paid, the interest being charged with interest from the date when due till payment; and *quoad ultra* repel the said answers in so far as they relate to the said question: Find and declare that the said respondents are liable in simple interest at 5 per cent. on the balances respectively due by them to the Society, as at Martinmas 1882, from that date till payment, and decern."

Counsel for the Liquidator—R. Johnstone—Ure. Agent—David Turnbull, W.S.

Counsel for the Respondents—D.-F. Mackintosh, Q.C.—Strachan. Agents—Mackenzie & Black, W.S.

Saturday, June 25.

FIRST DIVISION.

[Lord Trayner, Ordinary.

M'GEORGE AND OTHERS *v.* PATON AND OTHERS.

Bankruptcy—Sequestration—Appeal—Reclaiming-Note—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 169 *and* 171.

Held that the provisions of the Court of Session Act 1868 were not applicable to reclaiming-notes presented in the course of a process of sequestration, and that these were regulated solely by sections 169 and 171 of the Bankruptcy (Scotland) Act 1856.

Bankruptcy — Sequestration — Appeal — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 138, 139, *and* 169—*Competency.*

In a process of sequestration a note of appeal under section 169 of the Bankruptcy Act was lodged with the Lord Ordinary on the Bills by certain creditors who had voted against an offer of composition by the bankrupt. An objection was taken to the competency of the appeal in view of the provisions of sections 138 and 139. Appeal *held* competent.

The estates of James Clark M'George, hosiery manufacturer, Dumfries, were sequestrated by the Sheriff of Dumfries upon 17th November 1886.

At the second general meeting of creditors, held on 30th November 1886, the bankrupt made offer of a composition of 5s. per pound. The meeting entertained the offer, and at a subsequent meeting, held upon 21st January 1887, the creditors by an apparent majority resolved that the offer should be accepted.

On March 19, 1877, an appeal was presented under section 169 of the Bankruptcy (Scotland) Act 1856 to the Lord Ordinary on the Bills by certain creditors who voted for the rejection of the offer of composition, craving the Court to find that the statutory majority of legal votes had not been given in support of the resolution, to accept the composition, to recal the resolution, and to direct the trustee to proceed with the sequestration in terms of law. Section 169 is quoted in the opinion of the Lord President, *infra.*

The respondent pleaded, *inter alia*—(1) That the appeal was incompetent in respect of the provisions of section 138 and 139 of the Act of 1856.

Section 137 provides that an offer of composition, with security for payment, may be made at the meeting for the election of the trustee.

Section 138 provides—"If at the meeting held after the examination of the bankrupt, a majority in number and nine-tenths in value of the creditors there assembled shall accept such offer and security a bond of caution for payment of the composition, executed by the bankrupt or his successors, or the partners of a company (as the case may be), and the proposed cautioner shall be forthwith lodged in the hands of the trustee, and the trustee shall thereupon subscribe and transmit a report of the resolution of the meeting, with the said bond, to the Bill Chamber Clerk or Sheriff-Clerk, in order that the approval of the Lord Ordinary or Sheriff (whichever may be selected by the trustee) may be obtained

thereto; and if the Lord Ordinary or the Sheriff, after hearing any objections by creditors, shall find that the offer, with the security, has been duly made, and is reasonable, and has been assented to by a majority in number and nine-tenths in value of all the creditors assembled at the said meeting, he shall pronounce a deliverance approving thereof; provided that he shall hear any objection by opposing creditors, and if he shall refuse to sustain the offer or reject the vote of any creditor, he shall specify the grounds of refusal or rejection." Section 139 provides that an offer of composition may also be made at the meeting after the bankrupt's examination, and that if this is accepted a bond of caution shall be lodged, and a report made, and a deliverance pronounced, all in the same manner and to the same effect as is before provided.

On 4th June 1887 the Lord Ordinary (Trayner) repelled the first plea-in-law for the respondents.

"*Opinion.*— . . . It is objected by the respondents that this appeal (which is brought under sec. 169 of the Bankruptcy Act 1856) is incompetent, and they maintain that the only competent mode in which the appellants can obtain a review of the resolution, or a consideration of the legality of the votes by which that resolution was carried, is by appearing before the Sheriff when the resolution is reported to him by the trustee as provided for by sections 138 and 139 of the Act. I think there can be no doubt that the appellants could have stated all the objections to the resolution which they now state, before the Sheriff on the report of the trustee, if they had been pleased to adopt that course. But the fact that the Act in section 138 provides a certain remedy will not of itself make it incompetent for the appellants to resort to another remedy also provided by the Act. The remedy provided by section 138 is nowhere declared to be the only mode by which a creditor may bring a resolution to accept an offer of composition under review. On the contrary, section 169 authorises an appeal against any resolution which the creditors may adopt at meetings held by them, without exception. That being so, I cannot hold an appeal incompetent which the Act expressly allows. I may refer to the case of *Tennant* v. *Crawford*, 5 R. 433, as deciding the principle on which I proceed in repelling the objection to the competency of this appeal." . . . .

The respondent reclaimed.

When the case appeared in the Single Bills, an objection was taken to the competency of the reclaiming-note on the ground that the interlocutor of the Lord Ordinary was not one which could competently be reclaimed against without leave in terms of sections 28 and 54 of the Court of Session Act 1868.

Argued for the reclaimers—The sections of the Court of Session Act regarding reclaiming-notes against interlocutory judgments related only to cases initiated in the Court of Session, and so had no application to Bill Chamber causes. In the present case it was a resolution of creditors in a sequestration which was under consideration, and the procedure in such a case was under the provisions of the Bankruptcy Act of 1856, especially sections 169 and 171. The present reclaiming-note was competent without leave.

Authorities—*Gow* v. *Bell*, November 14, 1862, 1 Macph. 25; *Grant* v. *Wilson*, December 1, 1859, 22 D. 51; *Davis* v. *Hepburn*, November 30, 1866, 5 Macph. 80; *Scott's Trustees* v. *Scott*, January 17, 1885, 12 R. 540; Mackay's Pract. i. 565.

Replied for the respondents—It was necessary to read sections 169 and 171 of the Bankruptcy Act along with the provisions of the Court of Session Act 1868. A reclaiming-note such as the present was regulated by the provisions of the Court of Session Act, even though it was in a Bill Chamber cause.

Authorities—*Joel* v. *Gill*, January 11, 1860, 22 D. 357; *Arnold* v. *Winton & Company*, March 11, 1852, 14 D. 768.

Lord President—This reclaiming-note is presented against an interlocutor pronounced by the Lord Ordinary in the Bill Chamber in an appeal under section 169 of the Bankruptcy Act of 1856.

The appeal to the Lord Ordinary was against a resolution of creditors in a process of sequestration, which resolution was carried by an apparent majority in favour of accepting a composition offered by the bankrupt. Now, section 169 provides that "it shall be competent to appeal against the resolutions of the creditors at meetings either to the Lord Ordinary or the Sheriff, provided a note of appeal shall be lodged with and marked by one of the clerks of the Bill Chamber within fourteen days after the date of the meeting at which the resolution objected to has been passed, or (as the case may be) in the hands of and marked by the Sheriff-Clerk within the like period." . . . Now, I do not think it can be disputed that this is an appeal under this section of the statute, but the question rather is, when the Lord Ordinary has pronounced an interlocutor in such an appeal, how is his judgment to be brought under review, and that, I think, is provided for by section 171. The intermediate section—section 170—deals with the mode of bringing under review judgments of the Sheriff, and so is not of importance in the present inquiry. The words of section 171 are these—"Where any judgment of the Lord Ordinary is to be brought under review of the Inner House, the same shall be done by a reclaiming-note in common form presented within fourteen days of the date of the judgment,—and such reclaiming-note shall be disposed of by the Inner House as speedily as the forms of court will allow."

These sections of the Bankruptcy Act have not been repealed by any subsequent statute, and they are binding upon us in all appeals taken in the course of a sequestration. With reference to the sections of the Court of Session Act to which we were referred, it seems to me that they are not applicable as they relate only to ordinary actions in the Court of Session.

Upon that ground, therefore, I think the objections which have been taken to this reclaiming-note are unfounded.

Lords Mure, Shand, and Adam concurred:—

The Court repelled the objections to the competency of the reclaiming note.

Upon the case appearing in the Summar Roll it was argued for the reclaimers that the appeal to the Lord Ordinary on the Bills was incompetent under sections 138 and 139. If an appeal was allowed under section 169, then the

rights of the trustee under section 138 were destroyed. It was against the spirit of the statute that creditors should be allowed to carry away the process to another Court, and so tie the hands of the trustee, and prevent him selecting his Judge as allowed by the Act, and lodging his report. The class of appeals which were sanctioned by section 169 were appeals on the merits, not appeals about votes. The effect of this appeal was to take out of the hands of the trustee those very matters which the statute intended he should deal with—*Miller* v. *Dodd*, November 27, 1862, 1 Macph. 67; Alexander's Forms, p. 443.

Replied for the respondents — The statute provided a double remedy under sections 138 and 169; the words of the latter section were very broad, and gave a right of appeal to any party interested. The right of appeal was allowed when an offer of composition was refused, and it would be anomalous to say that there was to be no right of appeal when an offer of composition was accepted. As a matter of practice such appeals were common in the Sheriff-Court—*Smith* v. *Crystal*, July 11, 1848, 10 D. 1474; *Latta* v. *Bell*, July 4, 1862, 24 D. 1248; *Lee* v. *Ferrier*, October 23, 1883, 11 R. 26; *Robertson* v. *Robertson's Trustees*, December 19, 1885, 13 R. 424; Goudy on Bankruptcy, p. 164.

At advising—

Lord President—I cannot say that I entertain any difficulty or doubt upon the question of competency.

The words of the 169th section are very broad and general, and give the right of appeal to any party interested, whether creditor or bankrupt, or anybody else, against the resolution of creditors at a meeting.

Now, what we have here is undoubtedly a resolution of creditors, and the point to be determined upon the merits, as I understand it, is whether that resolution was carried by a requisite number and value of the creditors present, so that, *prima facie*, the words of section 169 clearly cover the case. But it is said that in consequence of provisions made about the way in which this resolution is to be carried into effect by sections 138 and 139, there is a sort of implied exception in the case of resolutions of this kind from the general rule of section 169. I cannot see that there is any sufficient ground for such an argument. No doubt the resolution has *prima facie* been carried. Then by the provisions of section 138 the trustee has to report either to the Lord Ordinary or to the Sheriff, and it would be quite competent when the case comes before the Lord Ordinary or the Sheriff on that report to raise such a question as we have now before us. That must undoubtedly be conceded. But it does not by any means follow that because there is such a remedy to a person dissatisfied with the resolution, that therefore he has not also the separate remedy of coming into this Court by appeal. The one is not in the least degree inconsistent with the other. There are two modes in which he may obtain the redress which he desires—both of them are competent, and there is nothing anomalous in so holding.

In short, it appears to me that there is no sufficient ground alleged or suggested for saying that this case does not fall under the words of section 169.

Lord Shand—As the result of the argument which has been submitted to us, I have come to be of the same opinion. The language of section 169 is very general in its terms, and applies to all resolutions of creditors. Now, clearly this is a resolution within the meaning of the words of that section, so therefore the only question comes to be, whether, owing to the circumstance that other sections of the statute can be made applicable, the provisions of section 169 are to be set aside in the case of a resolution of creditors accepting an offer of composition by the bankrupt.

There are at least three different matters about which creditors in a sequestration may have to come to a resolution, and which afterwards may have to be reported by the trustee for judicial approval. Such are, first, the resolution with regard to the election of a trustee at the first general meeting; second, the resolution as to personal protection; and third, the resolution as to composition, with reference to each of which those dissatisfied can obtain redress by lodging objections to the report. Now, it is no doubt true, as pointed out in the course of the discussion, that the resolutions referred to in sections 138 and 139 require formal approval by the Sheriff or the Lord Ordinary; but be that as it may, it appears to me that the creditors should have any benefit which they can derive from section 169, looking to the generality of its terms. The argument upon this point is strengthened by what we have been informed is the practice in this matter throughout the country. Upon these grounds I am for holding this appeal as competent under section 169.

Lord Adam—What we are here dealing with is an appeal under section 169 against a resolution of creditors. That section, among other matters, relates to appeals against the resolutions of creditors, but it has been argued to us that there are two classes of resolutions, some of which require judicial confirmation, and that in the case of such resolutions no appeal can competently be taken. I can see no ground in the statute for drawing any such distinction, and that being the view which I take of this matter, I concur with your Lordships in holding that this resolution of creditors to accept an offer of composition was appealable.

Lord Mure was absent.

The Court adhered.

Counsel for the Reclaimers—Pearson—Goudy. Agent—N. B. Constable, W.S.

Counsel for the Respondent—Ure. Agents—Webster, Will, & Ritchie, S.S.C.