the Act of 1885, sec. 14, and on the question put by the Sheriff. But as the appellant's counsel declined to maintain it, and rested his case on an objection which was not open to him, I think that our proper course is to refuse to entertain that objection and to find that the only objection stated in the case is abandoned, and accordingly to return no answer to the question stated.

LORD SKERRINGTON—I concur.

The Court found it unnecessary to answer the question of law in the case, and dismissed the appeal.

Counsel for the Appellant—A. M. Anderson, K.C.—W. T. Watson. Agent—Alex. Ramsay, S.S.C.

Counsel for the Respondent—C. Johnston, K.C—Cochran Patrick. Agents—Russell & Dunlop, W.S.

COURT OF SESSION.

Thursday, November 25.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MACLACHLAN *v.* MAXWELL.

Bankruptcy—Sequestration—Affidavit and Claim to Vote and Rank Containing Valuation of Security—Intimation by Trustee to Take over Security—Corrective Claim to Rank Re-valuing the Security Lodged before Payment Tendered on Basis of Original Valuation—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 62 *and* 65.

The Bankruptcy (Scotland) Act 1856, sec. 62, allows the trustee in any case where an oath specifying the value of a security has been made use of in voting, "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. . . ."

Section 65 enacts—"To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw 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."

A creditor in a bond and disposition in security for £700, on 16th September 1904, the day appointed for the election of a trustee, lodged an affidavit and claim in his debtor's sequestration, in which he deponed that the bankrupt was due him £700 with £8, 14s. 10d. of interest, and that he valued his security over the subjects bonded at £583, 6s. 8d., leaving a balance of £116, 13s. 4d., for which he claimed to vote and rank on bankrupt's general estate. On 13th October the trustee wrote to him that the commissioners had that day resolved to take over, in terms of section 65 of the Bankruptcy (Scotland) Act 1856, the security, and demanded a conveyance of it on paying the specified value out of the first of the common fund. On 21st October the creditor, under explanation that he had lodged the first claim for voting purposes only and had *per incuriam* included a claim for ranking, lodged a corrective affidavit and claim in which he valued the security at £698, 14s. 10d. On 28th December an actual tender was made by the trustee of £583, 6s. 8d. No ranking was made by the trustee.

Held that the words "on payment" meant an actual tender, and consequently that the intimation by the trustee of 13th October did not make a concluded contract so as to prevent the creditor revaluing the security subjects and remodelling his claim.

Opinion reserved (*per* Lord President) on whether the trustee's having made a ranking, if that had been the case, would have made a difference.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), secs. 62 and 65, is quoted in the rubric.

John Maclachlan, Sydney Villa, Tignabruaich, Argyllshire, raised an action against John Maxwell, builder, Maryhill, Glasgow, in which he sought declarator that he was in right of a bond and disposition in security for £700 over certain subjects in Maryhill, granted by the defender in favour of the pursuer to the extent of £500, and in favour of another, whose right the pursuer had subsequently acquired, to the extent of £200, and that he was entitled, in accordance with the powers and the statutory provisions applicable to the rights of a heritable creditor, to sell the security subjects.

The defence was that the pursuer was bound to assign the bond and disposition in security to the defender on payment of £583, 6s. 8d., being the value which the pursuer placed upon the security subjects in the affidavit and claim after mentioned.

The defender's estates were sequestrated on 6th September 1904, and on 16th September, the day appointed for the election of a trustee, the pursuer lodged the following affidavit and claim—"Depones that John Maxwell, builder, Maryhill, Glasgow, was, at the date of the sequestration of his estates, and still is, justly indebted and resting-owing to the deponent the sum of Seven hundred and eight pounds fourteen shillings and tenpence, conform to account or state of debt. Depones that no part of said sum has been paid or compensated; that no security is held for the same except the heritable subjects in Crosbie and Barra Streets, Maryhill, Glasgow, conveyed or assigned to the deponent in security of a loan to the bankrupt of Seven hundred

pounds, and interest and penalties thereon, conform to bond and disposition in security for Seven hundred pounds, granted by bankrupt in favour of deponent and Lachlan Maclachlan, Seaview, Tignabruaich, and to which the deponent has since acquired the said Lachlan Maclachlan's right by assignation in his favour, duly recorded; that the deponent values his security over said subjects at the sum of Five hundred and eighty-three pounds six shillings and eightpence sterling, leaving a balance of One hundred and sixteen pounds thirteen shillings and fourpence, for which he claims to vote and rank on bankrupt's general estate, over and above his right to get payment of the interest out of the rents of the subjects; and that there are no other obligants for the debt than the said bankrupt."

On 13th October the trustee on the sequestrated estate wrote to the pursuer the following letter—"Dear Sir,—As trustee on the sequestrated estate of John Maxwell, builder, Maryhill, Glasgow, I hereby intimate that the commissioners, by minute dated to-day, resolved to take over, in terms of section 65 of the Bankruptcy (Scotland) Act 1856, the security over subjects Crosbie and Barra Streets, Maryhill, Glasgow, in your name, which security was valued in your affidavit, of date 14th September 1904, at £583, 6s. 8d., and I therefore demand, at the expense of the estate, a conveyance or assignation of said security on paying the specified value out of the first of the common fund." Along with that letter there was no actual tender of the money.

On 21st October the pursuer, under explanation that he had lodged his first claim for voting purposes only, and had *per incuriam* included a claim for ranking, lodged a corrective affidavit and claim, in which he claimed for the same debt, but valued his security at £698, 14s. 10d. instead of £583, 6s. 8d.

On 28th December the trustee's agents wrote to the pursuer's agents the following letter—"Dear Sirs,—A meeting of commissioners was held in the above sequestration a day or two ago, and we were instructed to intimate to you that the trustee is now in a position to make payment to your client Mr John Maclachlan of the sum of £583, 6s. 8d., being the amount of the value placed by him upon his security over the above subjects in his affidavit of date 14th September last. Intimation was sent to your client on 13th Octr. last, and in terms thereof your client is requested to convey his security to the trustee. Please acknowledge this intimation as sufficient."

No ranking on the claims in the sequestration was made, and on 2nd October 1905 the defender was discharged on payment of a composition, and was thereafter reinvested in his estate. On 9th December 1905 the trustee granted to the defender an assignation of any right of claim which accrued or belonged to him, as trustee, by the lodging of affidavits and claims of creditors owning securities.

On 19th June 1909 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor—". . . Finds, declares, and decerns in terms of the declaratory conclusions of the summons: *Quoad ultra* continues the cause. . . ."

Opinion.—"The pursuer being in right of a bond and disposition in security for £700 granted by the defender, asks for declarator that he is entitled to exercise his statutory powers of sale. The defence is that the pursuer is bound to assign the bond and disposition in security to the defender on payment of the sum of £583, 6s. 8d., being the value which the pursuer placed upon the security subjects in an affidavit and claim lodged by him in the defender's sequestration on 16th September 1904. The defender was discharged on 2nd October 1905 on payment of a composition. Two questions have to be decided—(1) Whether the trustee in the defender's sequestration put himself in a position to demand an assignation of the bond and disposition in security on payment of the said sum of £583, 6s. 8d.? And (2) whether this right, if it belonged to the trustee, is now vested in the defender?

"The defender's estates were sequestrated on 6th September 1904, and on 16th September 1904 the pursuer lodged with the trustee an affidavit and claim, in which he valued his security at £583, 6s. 8d. He alleges that this affidavit and claim *per incuriam* bore to be for the purpose both of voting and of ranking, whereas it was intended to be only for the purpose of voting; but he does not allege that the trustee was cognisant of the mistake. On 13th October 1904 the trustee wrote to the pursuer a letter intimating that the commissioners had resolved to take over, in terms of section 65 of the Bankruptcy Act 1856, the security subjects valued in his affidavit at £583, 6s. 8d., and demanding 'a conveyance or assignation of said security on paying the specified value out of the first of the common fund.' The pursuer thereupon withdrew his claim, and lodged a corrective affidavit and claim for ranking, in which he placed a much larger value upon the security. The question is whether he was within his right in doing so.

"For the reason already indicated, I disregard the suggestion that the valuation was not binding upon the pursuer, in respect that it was framed *per incuriam* as a valuation for ranking as well as for voting. I am also unable to sustain the pursuer's contention that the trustee was not entitled to call upon the pursuer to assign his security until after he had adjudicated upon the pursuer's claim. Further, I agree with the opinion of Lord Kincairney in *Macdougall's Trustee* v. *Lockhart*, 1903, 5 F. 905, to the effect that the pursuer is not entitled to maintain that at the time when the trustee called upon him to assign the security there was no 'common fund' available for payment of the price. I am, however, of opinion that, upon a sound construction of section 65 of

the Act of 1856, the trustee acquires no right to the security, except on payment of the specified value, or, what is the same thing, on tendering payment. I have come to the conclusion that the letter of 13th October 1904 was not a valid exercise of his statutory option on the part of the trustee, in respect that he did not tender immediate payment of the specified value, but merely payment 'out of the first of the common fund'—in other words, payment if and when such a fund should emerge. The defender alleges that he tendered payment of the £583, 6s. 8d. on 28th December 1904, but the pursuer had by that time lodged his corrective affidavit and claim.

"The defender founded upon the case of *Macdougall's Trustee* as establishing that the letter of 13th October 1904 constituted a binding contract between the pursuer and the trustee in bankruptcy. In that case the Lord Ordinary (Kincairney) decided that a creditor was not entitled to put a new valuation upon his security after his claim had been admitted to a ranking. The Judges of the Second Division disagreed with the Lord Ordinary in this view, and held that a creditor may withdraw his claim at any time before receiving payment of a dividend. But they adhered to the Lord Ordinary's judgment upon a ground which was not argued in the Outer House, and of which no indication is to be found in the written pleadings, viz., that the trustee had intimated to the creditor that he would take over the security in terms of section 65, and that this intimation was three days' earlier than the creditor's withdrawal. The terms of the intimation are not discoverable, but I assume that their Lordships of the Second Division were satisfied that the trustee had validly exercised his statutory option. Having regard to the fact that the intimation was made three weeks after the trustee had admitted the claim, it may, I think, be assumed that it contained in substance, though possibly not in form, a sufficient tender to the creditor of the sum specified by him as the value of his security. Some of the learned Judges who gave opinions in *Macdougall's* case assimilated the creditor's affidavit and claim to an offer, and the trustee's intimation to an acceptance of that offer. With every respect, it seems to me that the legal fiction of an offer and acceptance introduces serious complications into what would otherwise be a simple question, viz., whether the trustee had validly exercised his statutory option so as to preclude both himself and the creditor from resiling. In the first place, an acceptance of an offer to assign a heritable security would require to be either probative or holograph, whereas no such solemnities are required by section 65 of the statute, or were adopted in the present case. In the second place, difficulties will arise if the attempt be made to write out *ad longum* the terms of the supposed offer by the creditor. It will be found either that the offer is an idle one or that it commits the creditor to a heavier burden than the statute imposes upon him.

"For these reasons I am of opinion that the trustee in the sequestration never placed the pursuer under obligation to grant an assignation in his favour. Even if I had come to the opposite conclusion I should have held that the right to demand an assignation in terms of section 65 was not vested in the defender, seeing that in his offer of composition he expressly stipulated that he should have the same right as his trustee to have any security valued by a creditor assigned to him in terms of section 62 of the Bankruptcy Act. Under section 62 the defender must have paid, not merely the specified value of the security but 20 per cent. in addition. It was probably unnecessary for the bankrupt in his offer of composition to make any reference to the assignation of securities, but if he chose to do so and limited himself to the rights vested in the trustee under section 62, I am of opinion that his creditors, including the pursuer, are entitled to maintain that the bankrupt, after his discharge, is not entitled to exercise the rights conferred upon his trustee by section 65.

"I shall accordingly grant declarator in terms of the conclusion of the summons, and *quoad ultra* continue the cause."

The defender reclaimed, and argued—The intimation by the trustee of 13th October made a concluded contract—it was the acceptance of the pursuer's offer of 16th September—and the pursuer could not thereafter revise his claim. Reference was made to *Macbride* v. *Stevenson*, March 14, 1884, 11 R. 702, 21 S.L.R. 486; *Russell* v. *Daniel & Green*, March 19, 1868, 6 Macph. 648, 5 S.L.R. 389; *Henderson's Trustee* v. *Auld & Guild*, July 6, 1872, 10 Macph. 946, 9 S.L.R. 598; *Macdougall's Trustee* v. *Lockhart*, June 9, 1903, 5 F. 905, 40 S.L.R. 655.

Counsel for the pursuer were not called upon.

LORD PRESIDENT—[*After narrating the facts*]—The question argued before your Lordships was whether it was possible for the pursuer to put in a new affidavit and claim, or whether the intimation by the trustee of October 13th made a concluded contract and rendered it impossible for the pursuer to remodel his original claim. I think this question is solved by considering the general scheme of the Bankruptcy Act in this matter.

A sequestration is a process for the distribution of a bankrupt's estate equally among his creditors, and the Bankruptcy Act convenes the creditors, appoints them to elect a trustee, and provides for the trustee ingathering the estate, finding out what assets there are, and arranging a scheme for their division among the creditors who have lodged claims. No creditor is obliged to rank, and if a creditor holds security sufficient to cover his debt, it is useless for him to appear in the sequestration; but if his security will cover some but not all of his debt, he will appear, but the Act provides that his claim shall only be for the balance. It is clear that it is in the interest of the security holder to value his security low in order to get a dividend

on a larger balance; but to counteract that manœuvre there are provisions in sections 62 and 65.

[*His Lordship quoted sections* 62 *and* 65 *as quoted in the rubric*].

The first thing to be noticed is that a greater latitude is given to the creditor in his valuation for voting purposes than in his valuation for ranking. The reason is obvious. A creditor may have to put in an affidavit for voting without having time to consider the matter carefully, and accordingly he is not to be tied down to his valuation within a margin of twenty per cent. But afterwards when he lodges his claim for ranking he has had time to consider the matter, and he is tied down to specifying his security at its true value.

Then comes the question arising on the words of sec. 65—what is the condition on which a creditor is bound to grant a conveyance? It is "on payment." It is argued by the defender that it is enough if the trustee says he will pay without actually tendering payment.

I agree with the Lord Ordinary that "payment" means actual payment. As I have pointed out, the question of securities only arises if the creditor claims, and the object of these sections is to prevent him claiming too much after taking benefit of his security. The statute does not prevent a creditor who does not claim from selling his security and repaying himself, and a creditor may do that even after lodging a claim, as was decided in the case of *Henderson's Trustee* v. *Auld & Guild*, 1872, 10 Macph. 946. What ought to stop him is nothing else but payment, otherwise a mere intimation would prevent a creditor from dealing with fluctuating securities like stocks and shares. He might think that the time for dealing with them was the present, but if the argument for the defender were right he would be debarred from selling them by the obligation to transfer, and would run the risk of seeing them fall in value although there might never be a common fund out of which he could get payment.

Accordingly I think it is quite clear that payment is the only condition upon which the trustee can demand a conveyance or assignation. I think the reference in section 65 to the "common fund" is intended to enable the trustee to make a preferential payment to the secured creditor, otherwise his hands might have been tied by other sections. I agree with the Lord Ordinary that the trustee's intimation put no nexus on the security, and that as the time had not come for a scheme of ranking the creditor was entitled to correct his valuation. I desire to reserve my opinion as to whether he could have done so if there had been a ranking; it was the opinion of Lord Kincairney in the case of *Macdougall's Trustee* v. *Lockhart*, 1903, 5 F. 905, that he could not, but the Inner House went upon another ground of judgment—that payment had been tendered.

I am of opinion that the Lord Ordinary was right, and that we should adhere to his interlocutor.

LORD KINNEAR—I agree and have nothing to add.

LORD JOHNSTON—In order that on behalf of the bankrupt estate a trustee should effectually take the benefit of the provision of the 65th section of the Bankruptcy Act 1856, it is, I think, necessary that he should do more than intimate, as the trustee did here on 13th October 1904, a resolution of the commissioners to take over security subjects.

On the other hand, as the subject is a heritable subject, it cannot be transferred without allowing time for the necessary conveyancing. I do not think that the trustee in intimating the resolution was bound there and then to tender his cheque in payment. It is enough that he do what the trustee here did on 28th December, having intimated already, or if not, intimating then the resolution to take over, at same time to intimate his readiness to pay in exchange for a conveyance and to call on the creditor to convey, it being implied that the usual arrangements for settlement in such circumstances will be made.

Until the trustee has to this extent and effect tendered payment the creditor is, I think, free not only to correct his valuation but to protect himself if he thinks proper from loss of market by sale over the heads of the trustee and the creditors.

In saying this, which is I think enough for the decision of the case, I desire to reserve my opinion as to whether the trustee and creditors are entitled to snatch an advantage out of an incautiously worded and premature affidavit and claim, at a point of time when no one was as yet really thinking of a ranking of claims, and whether the creditor is not entitled to rectify his mistake even after an astute trustee has attempted as here to take him at his word.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—M'Kechnie, K.C. — Malcolm. Agents—Carmichael & Miller, W.S.

Counsel for the Defender and Reclaimer—Constable, K.C.—Wilton. Agents—T. S. Paterson & Davidson, W.S.

Wednesday, December 15.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

GARSCADDEN *v.* ARDROSSAN DRY DOCK AND SHIPBUILDING COMPANY, LIMITED.

Retention—Lien—Ship—Lien for Repairs—Dispute as to Account—Expenses of Process.

A vessel was sent to a shipbuilder's yard for the execution of certain repairs. When these had been completed a dispute arose as to the amount of the shipbuilder's account, and he refused to deliver the vessel.