by the short shipment; comprised partly of the expense of sending the balance of the cargo by another vessel, and partly of loss of market through the delay in its arrival. I consider the amount of damages rightly estimated by your Lordship.

Agents for Appellants—Murdoch, Boyd & Co., S.S.C.

Agent for Respondents—D. M. & J. Latta, S.S.C.

Wednesday, July 19.

RANKINE *v.* DOUGLAS.

Process—Suspension—Bankruptcy Act, 1856, §§ 71, 72, 170. Where the meeting of creditors to elect a trustee had fixed the amount of caution to be found, but omitted to approve the sufficiency of that offered in terms of the 72d section of the Act, and the Sheriff in a competition for the office of trustee had found one of the candidates duly elected, but ordered him to call another meeting to have the caution offered opproved of. *Held* (1) that review of this judgment was not excluded by the finality clause of the 71st section of the Act; and (2) that appeal under the 170th section was the proper mode of review, and suspension incompetent.

Opinion, that suspension would be competent where the judgment was complained of as incompetent by reason of excess or defect of jurisdiction.

This was a note of suspension presented against George Douglas, trustee on the sequestrated estate of George Stiven, bleacher at Murton Mill, Forfar, by James Rankine, merchant in Dundee, an unsuccessful competitor for the trusteeship. The note set forth—"That the complainer is threatened to be charged, at the instance of the said George Douglas, to make payment of the sums decerned for in a judgment by the Sheriff-Substitute of Forfarshire at Forfar, dated 1st June 1871, by which 'the Sheriff-Substitute having heard parties' procurators on the notes of objections lodged to the appointment of George Douglas and James Rankine to the office of trustee on the sequestrated estate of George Stiven, and having made avizandum with the affidavits, minute of meeting of creditors, and whole process, sustains the objections to the appointment of the said James Rankine, repels the objections to the appointment of George Douglas, and declares him to have been duly elected trustee; but, before confirmation, appoints him, at his own expense, to call another meeting of the creditors for the purpose of deciding on the sufficiency of the caution to be offered by him, as required by the Act; finds the unsuccessful competitor, James Rankine, liable in expenses, of which allows an account to be lodged and taxed, and decerns:' most wrongously and unjustly, as will appear to your Lordships from the annexed statement of facts and note of pleas in law."

The minutes of the meeting called for the purpose of electing a trustee showed that four creditors, to the amount of £146, voted for Mr Douglas, and two creditors, to the amount of £432, for Mr Rankine; that objection was taken to the election of Mr Rankine by Mr Douglas and those who voted for him, on the ground that his debt consisted of a large illiquid claim of damages against the bankrupt. "The meeting fixed that the trustee to be confirmed should find caution for his intromissions and the performance of his duties to the extent of £100 sterling; and Henry Nicol, one of the creditors, being proposed as cautioner for the said James Rankine, the meeting declared themselves satisfied with the sufficiency of the cautioner. The meeting thereafter proceeded to the election of three commissioners, and nominated and appointed the said James Young, George Douglas, and James Scott, to be commissioners, with all the powers conferred by the statute." It will thus be seen that though the amount of caution to be found by the trustee was fixed at the meeting, no cautioner was proposed by Mr Douglas, or approved of by the meeting.

The proceedings at this meeting were brought before the Sheriff on a competition for the office of trustee, in which process he pronounced the interlocutor sought to be suspended. The following note was appended:—"Two creditors only vote for James Rankine. It is true their claims are so large that they constitute a majority in value. But the Sheriff-Substitute thinks there are circumstances connected with their votes and claims that make it desirable not to appoint their candidate to the office of trustee." (*The Sheriff-Substitute here detailed the circumstances which led him to reject Mr Rankine*). "He therefore selects Mr Douglas as trustee; the objections to him are more technical than essential, and can be got over by his resigning his commissionership and supplying an omission at the meeting of creditors, where he did not nominate a cautioner. This can be done to the satisfaction of the creditors before confirmation."

The complainer pleaded, *inter alia*:—"1. The judgment complained of ought to be suspended as incompetent and *ultra vires*, in respect—(1) It declares the respondent to have been duly elected trustee, who had not complied with the statutory requirement of offering caution, and having its sufficiency decided on at the meeting for the election of trustee. (2) It declares the respondent, who had been elected commissioner, and accepted and holds that office, to have been duly elected trustee. (3) It sustains the objection to the appointment of the complainer, who had in all respects complied with the statute, and had been duly elected trustee in terms thereof. (4) It appoints the respondent to call a meeting of creditors for the purpose of deciding on the sufficiency of the caution to be offered by him, a meeting not authorised by the Act."

The respondent pleaded, *inter alia*:—"1. The interlocutor of the Sheriff-Substitute is final."

The Lord Ordinary on the Bills (MACKENZIE) refused the note of suspension, and added the following note to his interlocutor:—"The note of suspension is presented against the deliverance of the Sheriff-Substitute of Forfar, declaring the respondent to be duly elected as trustee in the sequestration of George Stiven. Besides various alleged irregularities in the proceedings, the complainer avers that the respondent did not offer caution at the meeting for the election of a trustee, so as to enable the creditors to decide at that meeting on the sufficiency of that caution, in terms of section 72 of the Bankruptcy (Scotland) Act, 1856; and he pleads that this was fatal to the election of the respondent as trustee.

"The Lord Ordinary is of opinion that he is not

entitled to consider and decide the question raised by the complainer, because the Bankruptcy (Scotland) Act, 1856, commits to the Sheriff, where there is competition for the office of trustee (sects. 69 and 70), the decision of the question who has been elected trustee, and provides (sect. 71) that 'the judgment of the Sheriff, declaring the person or persons elected to be trustee or trustees in succession, shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any Court, or in any manner whatever.' The judgment complained of being thus declared final, and in no case subject to review in any manner whatever, the Lord Ordinary does not see how he can review that judgment in the present case, or get behind the statutory finality for that purpose."

Against this interlocutor the complainer reclaimed.

Orr Paterson for him.

Birnie for the respondent.

At advising—

Lord President—The interlocutor of the Sheriff which is sought to be suspended is one pronounced in a competition for the office of trustee in a bankruptcy, in which he sustains the objections to the appointment of the present complainer, and repels those to the appointment of the present respondent, and declares him duly elected trustee; "but, before confirmation, appoints him, at his own expense, to call another meeting of the creditors for the purpose of deciding on the sufficiency of the caution to be offered by him, as required by the Act," and finds the complainer, as the unsuccessful competitor, liable in expenses. The objection to this judgment upon the merits is that the person whom the Sheriff declares duly elected did not comply with the 72d section of the Bankruptcy Act, which requires that the creditors shall, at the meeting for the election of a trustee, not only fix the sum for which caution shall be found by the trustee, but shall also decide on the sufficiency of the caution offered. The interlocutor is sought to be suspended, on the ground that no caution was offered by the respondent, or approved of by the meeting of creditors. If we were to pass the note, the result must be that the case proceeds in the ordinary course of suspensions on a passed note; a lengthy litigation might ensue, and in the meantime the conduct of this sequestration is at a dead lock—nothing can be done for want of a trustee. I cannot help thinking that such a result would be very inconsistent with all the provisions of the Bankruptcy Act, one of whose marked aims is despatch; and I should be very sorry to find that we were committed to such a judgment. The ground on which we are asked to suspend is that the judgment of the Sheriff-Substitute is utterly incompetent and in excess of his jurisdiction. I am of opinion that, if there is any incompetency in the judgment, it is not of that nature at all. The only incompetency properly so called was in the conduct of the trustee elect and the creditors, at the meeting for the election of a trustee, neglecting the statutory requirements about caution. There was none in the Sheriff. His jurisdiction, when the competition for the trusteeship came before him, was undoubted. He was bound to pronounce upon it. But it is not an objection to the jurisdiction of the Sheriff that is here insisted upon, it is truly one to the conduct of the creditors, and to the Sheriff-Substitute's interlocutor, sustaining the election of a trustee in the face of such incompetent conduct at the election. We do not need here to decide what was the proper course for the Sheriff to take. If he went wrong in the matter, which was one undoubtedly within his jurisdiction, and was competently brought before him, then one of two things follows, either his interlocutor is final, or there is a statutory remedy under the Act, and none else. If the judgment was not final, it was appealable under the 170th section of the Act, and the complainer, not having availed himself of his opportunity under that section, is not entitled to any review whatever; for, though this case takes apparently a different form, it is really review that is desired. There is no question of quashing the judgment, but simply one of review on the merits. I therefore think the Lord Ordinary was right in refusing the note.

Lord Deas—The 72d section of the Act enacts that the amount of caution shall be fixed, and the caution offered approved of. At the meeting of creditors in question they did fix the sum for which caution should be found, but did not decide upon the sufficiency. The Sheriff-Substitute nevertheless found Mr Douglas duly elected, but required him to call another meeting to approve of the caution. The Lord Ordinary holds that the 71st section of the statute makes the Sheriff's judgment final, and excludes him from considering whether what the Sheriff-Substitute did was competent and regular or not. I am not prepared to concur in that ground of judgment. I think it is perfectly competent to come to this Court in proper form against a judgment of the Sheriff which is not under the statute, notwithstanding the 71st section. Assuming, therefore, that the Sheriff-Substitute had not power to do what he did, it was quite competent for the complainer to come to this Court and get the matter set right. I assume in this case that the Sheriff-Substitute did act beyond his powers, and I think it is very difficult to say that that assumption is not well founded. But, merely assuming that it was incompetent for him to do what he did, it was only incompetent in the sense that he was misconstruing the statute. I do not think that the finality clause in the 71st section prevents the complainer coming here. But the question is, whether there is any other mode of coming here except that by appeal, as provided by the 170th section. The mode chosen by the complainer is that by ordinary suspension, and I do not think that that is competent and allowable under the statute. The object is despatch; and the 170th section, which allows review by appeal, provides as a condition that the note of appeal shall be lodged within eight days of the deliverance. I think it would be most inexpedient to hold that under this method of review by appeal you cannot bring up an objection of the nature of that before us as well as any other. If you get the length of holding that such review could be had, it is very easy to see why every other species of review should be excluded. The object of the provision is, as I have said, despatch; and it is not therefore wonderful that the note of appeal should require to be lodged within eight days, and the appeal be summarily disposed of. Whereas, were we to allow suspension, the note would have to be passed, the record made up, and procedure go on, with all the steps and delays of an ordinary process. In the mean time what is to become of the sequestration, the proceedings in which are hung up by the suspension. The statutory remedy

for all objections I hold to be appeal, and therefore I think the Lord Ordinary right in refusing this note of suspension.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Complainer—J. & A. Peddie, W.S.
Agents for Respondent—W. & J. Burness, W.S.

Wednesday, July 19.

CARTER (PENDREIGH'S TRUSTEE) *v.* DEWAR.

Landlord and Tenant — Bankruptcy—Meliorations. Where a lease stipulated that a certain sum was to be laid out by the tenant in restoring building, which sum was to be repaid by the landlord at the expiry of the lease, and interest was to run in favour of the tenant at the rate of 1½ per cent upon the sum from the date of the outlay during the remainder of the lease, and the lease was brought to an abrupt conclusion by the bankruptcy of the tenant in terms of a clause of irritancy,—*held* that the peculiarity of the stipulation took the case out of the general rule, that the tenant having failed to perform his part of the contract forfeited all claim under it, and could only fall back upon an equitable claim for meliorations so far as the landlord was *lucratus;* but that a debt was created between the landlord and the tenant with a postponed term of payment. The case, however, being one in bankruptcy, present payment under discount was ordered.

A contract of lease between the deceased James Dewar of Vogrie, and James Pendreigh, of the firm of J. & G. Pendreigh, of the mill and mill lands of Catcune, contained the following clause—"And in respect the mills, kilns, steam-engine, boilers, stones, meal, flour, and barley mill, and machinery and whole other apparatus particularly specified in the said inventory thereof annexed hereto, are in a good and sufficient state of repair, and in good working order, the said James Pendreigh binds and obliges himself and his foresaids to keep and maintain the same in the same good and sufficient state during the currency of this lease, and to leave the same in that state at the expiry hereof, excepting all ordinary tear and wear, that is, deterioration by ordinary use and working of the subject during the currency of this lease; declaring always, in regard to any additions made to or on the mills hereby let, either in regard to buildings, machinery or apparatus, that the tenants shall have no claim against the landlord for the value thereof, neither shall they be entitled to remove the same, or any part thereof, at the expiry of the present lease, but that the same shall become the property of the landlord. Further, in respect that the steading of offices situated on the lands hereby let is not in a good state of repair, the said James Pendreigh binds and obliges himself and his foresaids to expend the sum of £200 sterling in rebuilding and repairing the same, according to plans to be approved of by the said James Dewar, which sum of £200 sterling shall be repaid to the said James Pendreigh or his foresaids by the said first party or his foresaids at the expiration of this lease, and on which sum the said first party or his foresaids shall pay to the said second party or his foresaids interest at the rate of £1, 10s. sterling per centum per annum from the time when said sum shall be expended as aforesaid until payment thereof at the expiry of this lease as aforesaid." And also the following—"And in case the tenant or his foresaids, or any of them, shall during the currency hereof become bankrupt or insolvent under any of the insolvency or bankrupt statutes in force at the time, or if he or they shall execute any voluntary trust-conveyance, or otherwise divest themselves of their property for behoof of their creditors, then, and in any of these events, this lease shall, in the option of the landlord, become *ipso facto* void and null as if the same had never been entered into, and all right, title, or management of or in the said lands competent to the tenant and his foresaids under this lease shall cease and determine, and the same is hereby declared to be forfeited to the landlord accordingly; and it shall be lawful to him to resume possession of the whole subjects let, and that *brevi manu,* and without any declarator or procedure at law to that effect."

The entry to the mills was at Whitsunday 1861, and to the lands at the separation of the crop of that year. The term of the lease was nineteen years, and the last payment of rent at Martinmas 1880. The stipulated sum of £200 was expended by the tenant upon the offices in terms of the above clause in the lease, and interest thereon was paid by the landlord down to Whitsunday 1867. Messrs J. & G. Pendreigh, and Mr James Pendreigh as an individual, became bankrupt in March 1869, and Colonel Dewar, who had succeeded his brother James Dewar in the estate of Vogrie, availed himself of the irritancy contained in the above quoted clause of the lease, and resumed possession on 15th December 1869. The pursuer, the trustee upon Pendreigh's estate, thereafter brought the present action against Colonel Dewar to enforce his claim to be repaid the £200 stipulated for in the lease, with legal interest from the 15th December 1869, and also the stipulated interest from Whitsunday 1867 to Whitsunday 1869, at the rate of 1½ per cent.

The pursuer pleaded—"(1) The said deceased James Dewar having bound himself, his heirs, executors or assignees, in repayment at the expiration of said lease of the said sum of £200 and interest, and said lease having thus come to an end the defender, as representing the deceased James Dewar, his brother, is liable to make payment to the pursuer of the sums libelled."

The defender pleaded—"(1) The lease having become extinct through the bankruptcy of the tenant, and all the stipulations contained therein rendered 'void and null,' the pursuer has no claim for recovery of the sum sued for. (2) Further, he is not entitled to payment of that sum from the defender, in respect—(1) It was not in any event demandable till the expiration of the natural term for which the lease was granted; (2) It was to be paid in consideration of fulfilment by the tenant of the obligations undertaken by him; (3) By the tenant's bankruptcy the pursuer has been deprived of the benefit of the stipulations in the lease in favour of the tenant."

The Lord Ordinary (ORMIDALE) sustained the defences, and assoilzied the defender from the conclusions of the summons, adding the following note:—"The Lord Ordinary thinks it clear that by the expression 'expiration of the said lease' in the contract of lease in question, was meant its