upon, on the merits, and before answer, allowed the parties a proof of their respective averments. An appeal to the First Division of the Court of Session, under the 40th section of the Judicature Act, and the 73d of the Court of Session Act, 1868, was lodged against this interlocutor. When the case came into Court no appearance was made for the respondent.

Solicitor-General (Clark) and Balfour, for the appellants the Railway Company, moved the Court, that in respect of no appearance for the respondent, the appeal should be sustained, and the action dismissed, with expenses.

Lord President—If this had been a final judgment of the Sheriff, the practice of the Court might be to sustain the appeal for want of appearance, but I am a little doubtful whether we can follow that course where the judgment is interlocutory merely. The respondent, though unwilling to be dragged into this Court, and probably into the House of Lords, might be very willing to follow out his action were the Sheriff's interlocutor sustained. I am not sure whether we can grant this motion without hearing you on the merits of your appeal. We will let the case stand over for a day or two to let you consider the matter, and see if you can afford us any farther information on the subject.

When the case was again called, Counsel stated that they had no farther information to give, and the Court, intimating that they had considered the matter, without calling on Counsel to support the appeal, pronounced an interlocutor to the following effect:—"On the motion of the appellant, and in respect of no appearance, sustain the appeal and dismiss the action, with expenses."

Agents for the Appellants — Hill, Reid, & Drummond, W.S.

Friday, October 27.

FOULIS *v.* DOWNIE AND OTHERS.

Process—Reduction—Competency—Bankruptcy Act, 1856, §§ 71 *and* 170. Where a reduction was brought of the minutes of meeting of creditors held for the election of a trustee, together with all the deliverances of the Sheriff thereon, upon the ground that the said minutes were not the true minutes of meeting of the creditors held as appointed for the election of a trustee, whereas certain other minutes produced were —*held* that the rival minutes, and the facts connected therewith, having been before the Sheriff, it was clearly within the competency of his jurisdiction to determine between them, in proceeding to decide which party was trustee-elect, and that his judgment was final under § 71 of the Act of 1856.

Opinion, that even if it had been a question of competency, the proper procedure for the pursuer was by appeal under § 170; and that in the ordinary case reduction was incompetent.

This was an action of reduction at the instance of Mr Foulis, a creditor on the sequestrated estates of Messrs M'Cartney & Bairnsfather, oil manufacturers, Eskside, Musselburgh, seeking to reduce the minutes of meeting of creditors held, as appointed by the Lord Ordinary, on Monday, 26th December 1870, for the purpose of electing a trustee on the said sequestrated estates, together with all that followed thereon—namely, the interlocutors or deliverances of the Sheriff-Substitute, declaring the election of the trustee, confirming him in his office, and granting act and warrant in his favour.

The circumstances, as stated by the pursuer, were, that at the said meeting there were present Mr Kilgour, as mandatory for the pursuer, and also certain other creditors; that the pursuer was creditor to the extent of £650, while the whole debts of the other creditors only amounted to about £240; that at the said meeting Mr Kilgour, as mandatory for the pursuer, and on the principle that the preses and clerk of the meeting shall be elected by the majority of the creditors in value, proceeded to nominate himself preses of the meeting, and Andrew Morrison, writer in Edinburgh, as clerk thereof. Whereupon, and on the said Mr Kilgour maintaining that he was entitled to act as preses of the meeting, and have the minutes written out by the clerk nominated by him, Mr M'Caul, a mandatory for certain other creditors and at the same time law agent for the bankrupts, suggested to the meeting to adjourn into another room. That the rest of the creditors present did go into another room, where they proceeded to elect the defender Mr Downie as trustee on the estate, and to approve the said James M'Caul as his cautioner. Minutes of the said pretended adjourned meeting were written out, and lodged with the Sheriff-clerk in due form. In the meantime Mr Kilgour proceeded to elect Mr Wm. Mackay to be trustee on the sequestrated estates of the bankrupts, and to approve of Mr James Barton as his cautioner. Minutes of the meeting were written out by the clerk appointed by Mr Kilgour, and also lodged with the Sheriff-clerk in due form. That when parties came to be heard before the Sheriff on these rival minutes, he "was pleased, most erroneously and contrary to law, to proceed on said pretended minutes, and he accordingly pronounced, on 30th December last, an interlocutor, in which he declared the defender the said Alexander Downie to have been duly elected trustee on said sequestrated estates, in terms of the statutes. Further, on or about 30th December last, the said Sheriff-Substitute, in respect of a bond of caution, in terms of the said pretended minutes, and of the statutes, having been lodged for the said defender, as trustee on the sequestrated estates, confirmed the election of the said defender as trustee, and allowed an act and warrant to go out and be extracted accordingly, and which act and warrant was accordingly extracted."

The pursuer's pleas in law were, *inter alia*—"(1) The said pretended minutes, setting forth that the defender the said Alexander Downie had been elected trustee on said sequestrated estates, and that the other defenders had been elected commissioners thereon, not having been the minutes of the meeting appointed to be held by said interlocutor or deliverance of 15th December 1870, and advertised in the *Edinburgh* and *London Gazettes* as aforesaid, they ought to be reduced. (2) The said interlocutors or deliverances of the Sheriff-Substitute, declaring and confirming the defender the said Alexander Downie as said trustee, and the said act and warrant in his favour as such trustee, and the said interlocutor or deliverance declaring the election of the said other defenders as said commissioners, having proceeded on said pretended minutes, they ought also to be reduced."

The Lord Ordinary (MURE), on 3d June 1871, pronounced the following interlocutor:—"Finds that the action is excluded by the provisions of the Bankruptcy (Scotland) Act, 1856; therefore dismisses the action, and decerns.

"*Note.*—During the debate, and when afterwards examining the record in this case, the Lord Ordinary was at first disposed to think that he would not be warranted in holding, without enquiry into the facts alleged in the record, that the Court of Session had not jurisdiction to entertain the present action, because, *ex facie* of the pursuer's allegations, the proceedings tend to shew that on the occasion in question the majority in number of the creditors present, by adjourning to another room than that in which they first assembled, succeeded, at a meeting from which the pursuer was excluded, in preventing him from exercising his vote as the alleged largest creditor in value.

"On further consideration, however, of the record and documents lodged to satisfy the production, the Lord Ordinary has come to the conclusion that, as what is sought to be established under the conclusions of the action amounts substantially to a review of the interlocutors of the Sheriff, declaring and confirming the appointment of the trustee and commissioners in a sequestration, which are expressly declared to be final, 'and in no case subject to review in any Court, or in any manner whatever,' the jurisdiction of the Court is excluded from dealing with the case.

"The matter in dispute between the parties, viz., which set of the minutes is the minute of the meeting appointed to be held in Dowell's Rooms for the election of trustee, was one which it was, in the opinion of the Lord Ordinary, competent for the Sheriff to deal with; and it appears, as well from the averments on record as from the terms of the interlocutor of the Sheriff under reduction, that the question now raised was duly submitted to his consideration, and dealt with by him without objection as one which he had jurisdiction to dispose of. In these circumstances, the Lord Ordinary does not see how he can entertain the present action without disregarding the very clear and express provisions of the statute as to the finality of the Sheriff's judgment declaring the election of trustees, which have been inserted for the first time in the Act of 1856, and seem to proceed upon the footing that it is for the interest of all parties in such cases that the decision of the Sheriff, in the matter of the election of trustee and commissioners, should not, as in the Act of 2 and 3 Vict. cap. 41. be subject to review."

Against this interlocutor the pursuer reclaimed.

SCOTT and GRANT for him.

ORPHOOT for the defenders and respondents.

Authorities—*Rankine* v. *Douglas*, 19 July 1871, 8 Scot. Law Rep. p. 696; *Brown* v. *Lindsay*, 7 Macph. 595; *Buchan* v. *Bowes*, 1 Macph. 922.

At advising—

LORD PRESIDENT—The facts in this case are few and simple. The estates of Messrs M'Cartney & Bairnsfather, and of the individual partners of that firm, were sequestrated on 15th December 1870 by an interlocutor of the Lord Ordinary on the Bills, and in that deliverance was contained in the usual form a remit to the Sheriff, and an appointment of a day for the meeting of creditors in order to elect a trustee. That interlocutor was pronounced under the authority of the Bankruptcy Statute, and was undoubtedly both competent and regular. Consequently, the meeting of creditors having been held, the proceedings had to be reported to the Sheriff, before whom the sequestration had now come to depend, in order to his declaring the person chosen to be trustee, and confirming him in his office. Where there is either competition for the office, or objection to the candidate, the Sheriff and the Sheriff only is entitled to decide.

Now, there came before the Sheriff on 30th December 1870 Mr Alexander Downie, C.A., Edinburgh, who produced what he alleged to be the minutes of the meeting of creditors, which bore that he had been unanimously elected trustee. Then came also before the Sheriff a Mr Kilgour, and he produced other minutes of meeting, which he alleged to be the minutes of the meeting of creditors held in terms of the above mentioned interlocutor of the Lord Ordinary, and which bore that a Mr Mackay had been elected trustee. The Sheriff heard parties upon the question, which of these two minutes were in law the minutes of meeting of creditors; and he decided in point of law in favour of Mr Downie's minutes, and accordingly proceeded to declare Mr Downie himself duly elected trustee. Mr Downie, as trustee-elect, immediately found caution, and then came back to the Sheriff and obtained confirmation in common form. The Sheriff's act and warrant, subsequently issued on being entered in the Register of Sequestrations, became Mr Downie's title as trustee to all the bankrupts' estate, and as such is to be received in all courts of law in the United Kingdom. Then, on a subsequent day, 15th February 1871, the Sheriff declared certain persons to have been duly elected commissioners on the sequestrated estates, all in terms of the Bankruptcy Statutes. There was then, as far as I can see, a complete sequestration in full working order, and the trustee in that sequestration was duly vested with the bankrupts' estate. But before the last interlocutor mentioned, the present action was raised, and the proposal of the pursuer of it is to set aside all these deliverances of the Sheriff, and the minutes of meeting upon which they proceed. And the ground on which he proposes to do this is, that the minutes, which set forth that the defender the said Alexander Downie had been elected trustee on said sequestrated estates, were not in truth the minutes of the meeting held for the purpose of such election, the true minutes of such meeting being those which bore that Mr Mackay had been elected trustee. Now, the Sheriff has rejected these latter and preferred Mr Downie to the trusteeship. The question before us is, therefore, whether this action is maintainable at all? I am clear in my own mind that it is quite incompetent. The deliverance of the Sheriff declaring a party to be duly elected trustee is by the 71st section of the Act of 1856 made final, and that in very strong and distinct terms. Whenever, therefore, the Sheriff, acting under that statute, declares a person elected trustee, and does nothing in that deliverance except what it was competent for him to do, no appeal lies from him in any form to any court whatever. But it is said that this deliverance was not within the competency of the Sheriff, because there was no proper competition before him, and no proper question of personal objection, and it is contended that the only questions on which the Sheriff's deliverance is final are questions of competition and personal qualification of the trustee-elect. Now, I can find no such limitation in the statute. On the contrary, I think the Sheriff has

ample jurisdiction to decide whatever questions arise in the course of the trustee's election. But it appears to me, farther, that the question which the Sheriff decided here was one perfectly within his competency to decide. I do not know how else the question could well have been disposed of. He could not proceed to declare the election of either party as trustee without deciding this question. The first point was to satisfy himself which were the true minutes of meeting, Where there is competition for the office of trustee, the first thing to be done to extricate his own jurisdiction is to examine the minutes of meeting and decide upon their validity. That being so, I am of opinion that the section of the Act of Parliament referred to renders his judgment on the whole matter final and conclusive.

It is a totally different thing when it can be alleged that the Sheriff is not deciding something within the competency of his own jurisdiction. It may be added that the present action of reduction comes in questionable shape and at a questionable time. For the matter is allowed to go beyond the mere election of the trustee; the Sheriff is allowed to go on and complete the title of the trustee, and set the sequestration going in full working order, and then this proceeding is brought, truly to reverse the original decision as to the trustee's election. I am quite satisfied therefore that the Lord Ordinary's interlocutor should be adhered to.

LORD DEAS—I entirely agree with your Lordship that the judgment of the Sheriff was quite competent, and therefore excluded from review in any way. But supposing that there were some question as to the competency of the Sheriff's decision, it would then come to be a question, whether the proper course would not have been to appeal within the ten days, instead of, as here, letting things run on, and after a lapse of time bringing a reduction. After the case of *Rankine*, I should be disposed to say it was. I am far from holding that a reduction would not in any case be competent, but I think only where something new emerges after the expiry of the time allowed for appeal.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for the Pursuer—James Barton, S.S.C.
Agent for the Defender—John Auld, W.S.

Saturday, October 27.

SECOND DIVISION.

WATT *v.* LEGERTWOOD & DANIEL.

(*Ante*, vol. v, p. 329; vol. vii, p. 527.)

Process-Caption—Contempt of Court—Damage. A petition for interdict was presented in the Sheriff-Court. The Sheriff stated that he would refuse the petition, and the petitioner's agent thereupon carried off the petition against the wish of the Sheriff, who desired to write his deliverance upon it. On the motion of the Sheriff-Clerk, the Sheriff granted a caption for the recovery of the petition, without giving the agent any notice, and the agent was sent to jail on the caption. *Held* that a caption was not the proper mode of forcing back the process, as no receipt had been given for it and 24 hours' notice was required before issuing the caption; that the Sheriff should have issued a summary warrant to bring the agent before him; and action of damages against the clerk dismissed, as no greater amount of damage had been sustained than if a summary warrant had been issued.

This was an action of reduction and damages for the wrongous issuing of a process caption. The facts of the case appear sufficiently from the former reports, and the following interlocutor of the Lord Ordinary (MACKENZIE):—

"*Edinburgh, 24th November* 1870.—The Lord Ordinary having heard counsel and considered the closed record, productions, and whole process, sustains the first plea in law stated for the defenders: dismisses the action, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax, and to report.

"*Note.*—The pursuer concludes in his summons for reduction of a process-caption, obtained and executed against him by the defender Mr Daniel, and for damages, on the ground that Mr Daniel wrongfully and illegally applied for and obtained that process-caption, and incarcerated the pursuer thereon; and that the defender Mr Ligertwood, the Sheriff-clerk, is liable for the acts of Mr Daniel, who is his Depute. The pursuer maintains that the process-caption was illegally and incompetently granted, because (1) The petition, for recovery of which the caption was issued, was not a process, but was withdrawn by him before any procedure took place upon it, and was thereupon the private property of the pursuer, or of his client, and not under the control of the Sheriff-clerk, who was in no way responsible for it; (2) The pursuer never borrowed or granted a borrowing receipt for the petition referred to; and (3) The process-caption was obtained without any notice having been given to the pursuer that a complaint craving the issue of such a writ had been or was to be presented.

"1. The Lord Ordinary is of opinion that the petition was, at the time that the pursuer took it away, not the property of pursuer, or of his client, and not within their control. The petition prayed for an interdict against Mr Alexander Edmond, the respondent therein, and also that immediate interdict should be granted. It is stated by the pursuer that a caveat having been lodged for Mr Edmond, the pursuer and Mr Edmond's agent met in the Sheriff clerk's office, that they went with Mr Daniel, the Sheriff-clerk Depute, before the Sheriff-Substitute of Aberdeenshire, who perused the petition, heard him and Mr Edmond's agent thereon, and stated that he would not grant the interim-interdict. The Lord Ordinary considers that there was, according to the pursuer's own statement, a judicial application laid before and considered by the Judge Ordinary of the bounds—a competent judge, who heard the parties, and pronounced a judicial decision on the application for interim-interdict. Mr Edmond the respondent was entitled to have that decision refusing interim-interdict written out and signed by the Sheriff-Substitute; and if the pursuer declined to proceed farther with the application, Mr Edmond had right to move that an interlocutor should be pronounced, dismissing the application, and finding him entitled to the expenses to which he had been put in opposing it. It is said that by immemorial practice in Aberdeenshire such a petition was the property of the petitioner, and might be disposed of by him as he pleased. Even supposing this averment to be true, it cannot affect the disposal of the present case, because such a practice, if it