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

natural issue at the end of nineteen years from its commencement. It follows, therefore, that as the lease came to a premature termination by the bankruptcy of the tenant, through no fault of the landlord, the pursuer can have no claim *ex contractu* for the £200 in question, for it was only on the expiration of the lease that this sum was to become payable.

"The Lord Ordinary can, however very well understand that circumstances might have occurred to have enabled the pursuer to support his claim to the £200, or part of it, on the ground of the landlord having been *lucratus* by the meliorations on which he founds. There would certainly be much equity in the claim as so supported, but, unfortunately for the pursuer, he has not averred or offered to establish that the landlord has been *lucratus*. On the contrary, after renouncing probation, the pursuer, irrespective of whether the landlord has been *lucratus* or not, insisted for judgment just as if the lease had gone on to its natural issue. But it was decided in the case of *Morton* v. *Lady Montgomerie*, 22d February 1822, 1 Sh. 344, that the pursuer's claim as thus insisted in is not maintainable. It was argued, however, on the part of the pursuer, that the present is distinguished from that case, inasmuch as here the bankruptcy of the tenant is expressly mentioned as a contingency which would terminate the lease, but the Lord Ordinary does not think that this circumstance is of any importance. And, accordingly, Professor Bell, in his Commentaries, vol. i, p. 82, and Principles, § 538, subdivision 4, as also Mr Hunter in his Treatise on Leases, vol. ii, p. 576, state the doctrine deducible from the case of *Morton* v. *Lady Montgomerie* to be that, on the principle of mutual contract, the tenant forfeits his claim to the value of meliorations which would have been available to him at the natural expiration of his lease, if it is brought prematurely to an end in respect of an irritancy, whether conventional or legal, except to the extent to which he can establish that the landlord has been *lucratus*.

Against this interlocutor the pursuer reclaimed.

WATSON and TRAYNER for him.

Solicitor-General (CLARK) and GEORGE WEBSTER for the defender.

At advising—

LORD PRESIDENT—On 19th August 1861 a lease was entered into between Mr Dewar of Vogrie and Mr James Pendreigh of the firm of J. & G. Pendreigh, by which there were let to Mr Pendreigh certain meal, flour, and barley mills, and also some adjacent land and houses. The duration of the lease was nineteen years, and it would therefore have expired at Whitsunday 1880. This lease was brought to an abrupt conclusion by the bankruptcy of Pendreigh, there being a clause in the lease which at the option of the landlord rendered it null and void upon the bankruptcy of the tenant. The landlord availed himself of that option, and the lease accordingly terminated at Whitsunday 1869. The present action is raised by the trustee in Pendreigh's bankruptcy to recover £200 from the landlord under a certain clause in the lease.

When the lease was entered into by the parties in 1861 the mills and machinery were held as in a good and sufficient state of repair, and the tenant bound himself to maintain them in the same. But the steading of offices not being in a good state of repair, and in respect of that a peculiar arrangement was entered into, whereby the tenant bound himself to expend the sum of £200 in rebuilding and repairing the same, which sum was to be repaid at the expiry of the lease, and upon which sum the landlord was to pay £1, 10s. per cent. per annum of interest from the time it should be expended until payment. Now the pursuer, as trustee on Pendreigh's bankrupt estate, demands payment of this sum of £200, with interest since 1869; and he bases his action upon the general ground that the lease has expired, and therefore that the term of payment has arrived. He says, no doubt, that the lease has not died a natural death, but that nevertheless he is entitled to immediate payment of the sum. The defender, on the other hand, contends that, on the principle of mutual contract, the sum is lost to the tenant altogether; because by the bankruptcy of the tenant he is unable to perform his part of the contract, and that therefore neither he nor anybody in his right can sue upon the contract. I confess it appears to me that neither of these views are sound or applicable to the circumstances of the case. In the first place, the termination of the lease is not, in my opinion, the expiry of the lease. The expiry of the lease in ordinary legal language means its termination by effluxion of time—we talk of the expiry of the term of a lease. That is the full expression. So we talk of the unexpired term of a lease, thereby showing that in legal language the expiry of a lease means the running out of its term of time. Now I cannot see anything in the particular terms of this lease to lead me to attach a different meaning to the expressions used. I find the word used in seven different places. In every one it is used in the same way, and therefore I cannot think that under this clause of the lease the claim which the pursuer makes has yet emerged, or the time of payment arrived. But it by no means follows from this that the trustee has no right at all under this clause, and I think that the Lord Ordinary has quite mistaken the doctrine to be deduced from the case of *Morton*. There the tenants' trustee was found not entitled to recover anything for meliorations made according to stipulation. But that was not the same case at all, and hardly to be regulated by the same principles as the present. In *Morton's* case the tenant was to lay out £1100 in the first two years of the lease. He did not lay out this £1000, but only a part of it. He left the buildings unfinished, ran away, and deserted his lease; and it was held by the Court that, having voluntarily broken his contract, neither he nor his creditors could make any claim under it. But the present is a very different case. In the first place, the tenant here has no option in the matter; he binds and obliges himself to expend £200,—no doubt at the sight of, and approval by, his landlord. This sum of money, it is agreed, shall be repaid by the landlord at the expiration of the lease; and further, upon this sum interest is to run from the date of its being laid out by the tenant during the currency of the lease. That makes a case entirely different from that of *Morton*, or any other case I have ever seen. By this clause the landlord becomes debtor to the tenant, with a deferred term of payment, interest running meanwhile. The question is, Whether such a debt as that is extinguished by the abrupt termination of the lease on the tenant's bankruptcy. I think not. I think the landlord becomes debtor to the tenant, the time of payment being deferred till the expiry of the term of the lease in its ordinary sense. Such is the measure

of the landlord's liability, and the right of the tenant and those claiming in his interest is commensurate. The right of the trustee here is to obtain payment at the expiry of the term of the lease, and 1½ per cent. in the mean time by way of interest. But it no doubt is competent, and as this is a case in bankruptcy, equitable also, that he should get present payment under discount for the years yet to run of the lease at the rate of 5 per cent., but deducting, on the other hand, from the discount interest at the rate of 1½ per cent. due by the landlord for the same term of years. This appears to me to be the only way of arriving at a just result between the parties. The working out of the actual figures is of course a mere matter of calculation. In this judgment I do not wish it to be understood that I go at all upon the footing that the bringing the lease to an end was the voluntary act of the landlord. I think, on the contrary, the termination of the lease is to be regarded as the fault of the tenant, and that the landlord could not have acted otherwise than he did.

LORD DEAS—This lease was to have nineteen years' endurance, provided that nothing occurred to render it void and null or forfeited. I agree with the Lord Ordinary that by expiration of the lease was meant the natural issue at the end of the term of nineteen years; and I go a considerable way along with him where he says that if the tenant becomes bankrupt, and consequently is not able to perform his part of the contract, the landlord is relieved. But then, while that is so, you must always look to the terms of the lease to see whether the principle is applicable to the case in question. Now the clause upon which the present dispute arises is very peculiar. It stipulates (*reads the clause as quoted supra*). Now the question is, whether the claim has not created a debt on the part of the landlord to the tenant, with the terms of payment postponed. There might have been a good deal of difficulty if it had not been for the stipulation about interest; but I think that fixed it, so that we must deal with the case as a loan from the tenant to the landlord. Looking at the peculiar terms of that clause, I think that the general doctrine relied upon by the Lord Ordinary does not apply to the case. But I farther agree with your Lordship that, though the sum is not payable till the expiry of the natural term of the lease, we may in the circumstances order present payment under discount, as proposed by your Lordship.

LORD ARDMILLAN—This action is brought by the trustee on Pendreigh's estate for payment of £200, said to be due by the defender in terms of a lease. I understand the decision of the Lord Ordinary now before us to be an entire absolvitor of the defender from the conclusion for payment. It is not a dismissal of the action as premature, or a postponement of the defender's liability for this £200 till the natural termination of the lease. It is a judicial declaration that the defender is altogether—both now and hereafter—free from any obligation to the effect concluded for. In that conclusion I cannot concur.

The lease is dated 19th August 1861, the entry having been at Whitsunday 1861; and, the endurance of the lease being 19 years, the natural termination will be at Whitsunday 1880.

I agree with your Lordships that, unless qualified by some particular words, the expression "expiry" or "expiration" of a lease means the natural termination—the running out of the period of the lease. That is, I think, the legitimate construction of the words, if there be nothing to control them. On this point I do not differ from the Lord Ordinary.

But in the present case the obligation of the landlord to repay to the tenant the £200 advanced and expended by the tenant in "rebuilding or repairing" the "steading of offices" on the mill premises is quite distinct and separate from the other stipulations. I think that the other mill-buildings, which at the commencement of the lease were in good repair, and were accepted as such by the tenant, and the "steading of offices" which were not in good repair, but which to some extent required rebuilding or repairing, must be distinguished and separately considered. It is on the "steading," which was not in good repair, and which the landlord might naturally be expected to repair, that the tenant advanced £200, which was to be repaid him at the expiration of the lease. I consider this advance to be truly a loan by the tenant to his landlord; and it was dealt with as a loan in the lease, and from the first; for interest thereon is declared to be due by the landlord to the tenant from the date of the expenditure. It is of little consequence that the rate of interest was low. There could be no interest at all till there was a debt. There was in the stipulation of interest the recognition of a debt. Assuredly there was a debt as soon as interest commenced. But if it was a debt, then the landlord, who was the debtor, could not by his own act escape from the obligation.

The lease did not at once become void and null on the tenant's bankruptcy. It only became voidable in the option of the landlord. The landlord exercised his option, and elected to make void the lease. He was entitled so to do; it was his privilege to declare it void; and he did bring the lease to an end. It was his act. He was debtor to the tenant in this £200, and as debtor he had been paying interest on the debt. It is said for him that he is no longer debtor. The Lord Ordinary has assoilzied him from all claim. On what ground I cannot understand. The landlord, by the exercise of his own option, has closed the lease before its natural expiry. Did he, by his own act shake himself free from his own debt? Did he get rid of his obligation by terminating the lease before its natural expiry? I think not. I cannot bring my mind to that conclusion, which seems to me unreasonable, and most inequitable. As soon as it is ascertained that this £200 advanced by the tenant was a loan by him to the landlord—a debt on which interest was due—then the case is at an end in so far as regards the obligation to repay—considered, of course, apart from the question as to the period of payment. That the landlord should take the buildings erected with the tenant's money, advanced to him on loan, and not repay the loan, is contrary to justice. That, on the creditor's misfortunes, the debtor should declare himself free from his debt, would be a proceeding, and a result, more profitable than creditable—"Why, that indeed were frugal honesty—a thrifty saving knowledge. When the debt grows burdensome, and cannot be discharged, a spunge will wipe out all, and cost you nothing."

This is really the import and the result of the Lord Ordinary's interlocutor, in which I think there

must be some mistake. I cannot suppose it possible that the landlord means seriously to plead that he is to take to himself the buildings erected or repaired by the tenant's expenditure of this £200, and yet, be under no obligation to repay it, but be released by his own option, and his own act, in availing himself of the opportunity arising on the bankruptcy of the tenant. The landlord was quite entitled to terminate the lease; but he is not, I think, entitled to plead that by doing so he has got quit of his obligation.

But a different question may be raised. It may be said—"True, the obligation subsists, but the time for exacting payment has not arrived, and will not arrive till the natural expiry of the lease."

I am disposed to think that this is a sound view of the terms of the lease, and of the nature of the obligation.

The lease cannot be correctly described as reaching its expiry when, in the option of the landlord, it was prematurely terminated on the bankruptcy of the tenant. The pursuer, Mr Carter, himself speaks of "the unexpired portion of the lease." (Letter of 2d November 1869, p. 24.)

Accordingly, the result—the legal and equitable result—is, in my opinion, that the landlord is now under obligation to pay, and will, at the time when this lease would naturally have expired, viz., at Whitsunday 1880, be bound then to pay this £200, with interest thereon from the date of expenditure till payment at the rate of £1, 10s., per cent. per annum. When this obligation—existing now, but prestable in 1880—is judicially ascertained and declared, it will be available as a fund of credit to the trustee for the creditors of Pendreigh, the tenant; and the adjustment of the matter for present payment by a calculation of discount to the landlord, on the one hand, and interest at £1, 10s., per cent. till 1880, on the other hand, may be safely left to Mr Carter and the agents for the defender.

Lord Kinloch—I am of opinion that the Lord Ordinary has arrived at a wrong conclusion in this case; and that Colonel Dewar, the landlord, is indebted to the pursuer, as representing the tenant, in the sum of £200 concluded for.

I conceive the obligation for this £200 contained in the lease to stand on an entirely different footing from any general obligation for payment of meliorations. The landlord becomes specially bound to pay this sum to the tenant at the expiry of the lease "in respect that the steading of offices situated on the lands hereby let is not in a good state of repair, and the said James Pendreigh binds and obliges himself and his foresaids to expend the sum of £200 sterling in building and repairing the same, according to plans to be approved of by the said James Dewar." The landlord further became bound to pay to the tenant yearly interest on this sum at the rate of £1, 10s. per cent. "from the time when the said sum shall be expended as aforesaid, until payment thereof at the expiry of this lease as aforesaid." The tenant binds himself to keep the steading in good repair, and to deliver it in such repair at the end of the lease.

I consider the advance of this £200 to be in substance just a loan by the tenant to the landlord, repayable at the end of the lease, with interest in the meantime paid to the tenant, the lender. It was in substance the landlord who was to erect the steading, which was to become his when the lease expired. The tenant simply lent the landlord money for this purpose, at an extremely modified rate of interest; and at the end of the lease the loan was to be repaid, and the landlord was to get the steading in good order made over to him.

So viewing this transaction, I think the tenant's right of repayment was not forfeited or affected by his sequestration, and by the landlord taking advantage of an option given him in the lease to terminate the tenancy on that event. That the landlord so chose to terminate the lease cannot, I think, entitle him to shake himself clear of the obligation to pay his debt to the tenant. This is not, I think, one of those prestations on the part of the landlord which are held not demandable unless the tenant fulfil all his obligations down to the natural expiry of the lease. It was a special debt contracted for a special purpose. The counterpart of the loan by the tenant was the erection of a suitable steading, which was to become the landlord's property. This counterpart was fulfilled by the tenant; and on the landlord bringing the lease to a close he obtained the stipulated equivalent in the possession of the renovated steading. I am of opinion that he is bound to pay the debt contracted to the tenant, by which all this was accomplished.

Further, I am of opinion (and on this point I differ from your Lordships), that the landlord was bound to pay this debt so soon as by his own act he brought the lease to a termination, and that he is not entitled to suspend payment till the natural expiry of the lease at the end of nineteen years. With reference to the payment of this debt, I think the expiry of the lease is its termination in any way, and emphatically its termination by the act of the landlord himself. I can see no ground on which the landlord is entitled to have the debt kept up at the reduced interest of 1½ per cent. after the tenant has nothing more to do with the farm. By bringing the lease to a termination, I think the landlord obtained all the equivalent for which he stipulated when coming under this obligation; he got his land into his own hands to let anew as favourably as he could, and he obtained the steading in its renovated condition, with which to furnish an inducement to a new tenant. He thus, I think, obtained the *quid pro quo*, and having got the one, I think he must pay the other. I am of opinion that the defender was bound to pay this debt so soon as he brought the lease to a termination, with interest at 1½ per cent. to that date, and legal interest subsequently till payment. When payment is made all interest will cease.

Agents for Pursuer—Waddell & M'Intosh, W.S.
Agents for Defenders—Macnaughton & Finlay, W.S.

Wednesday, July 19.

SECOND DIVISION.

BARSTOW (PARK'S CURATOR) *v.* BLACK AND OTHERS.

(*Ante*, p. 213, and vol. vii, p. 381).

Heir-at-Law—Heir of Provision—Truster's Debts. Circumstances in which *held* that a testator did not intend to relieve his heir-at-law of debts so as to make them burdens on his heir of provision.