

tion set forth that the estates of James Kirk, grocer, Edinburgh, were sequestrated on 29th November 1873, but that a trustee could not be appointed under the sequestration before the 10th of December; that there was great danger that the estate should be delapidated and dissipated before a trustee could be appointed, and that the petitioners, as creditors on the estate, and in virtue of sections 16 and 20 of the Bankruptcy (Scotland) Act, 1856, craved the Court to appoint a judicial factor to take charge of the estate.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—

*Edinburgh, 2d December 1873*—The Sheriff-Substitute having heard the petitioners' solicitor; Finds that the statute does not authorise the appointment of a judicial factor after sequestration; Therefore refuses the desire of this petition, and decerns.

*Note*—The present application is founded upon sections 16 and 20 of the statute. Of these two provisions the latter merely empowers the Sheriff in general terms 'to take such measures in the meantime as may be necessary for preserving the debtor's estate and effects within his jurisdiction, under the provisions of this Act.' The power to appoint a judicial factor is to be found only in section 16.

"It cannot be said that the terms of this section are free from doubt. Appointment of a judicial factor may be prayed for in the petition for sequestration itself, where the applicant is a creditor. It may be prayed for in a separate petition. But the introductory words of the section seem to imply that the time at which such an appointment is competent can only be found in the interval, longer or shorter, as the case may be, between presentation of the petition for sequestration and the award of sequestration. It is competent to appoint a judicial factor 'whether sequestration can forthwith be awarded or not,' before sequestration. There is certainly no express power given to make such an appointment after sequestration.

"Protection of the estate after sequestration, and before the election of a trustee, is expressly provided for by section 17th."

The petitioner appealed to the Court of Session under section 170 of the Bankruptcy Act. Nicol Bailie & Co., as creditors in the estate, appeared and supported the interlocutor of the Sheriff-Substitute, and maintained that as no affidavit or vouchers had been lodged with the petition, it was incompetent.

At advising:—

LORD JUSTICE-CLERK—I think the 16th section of the statute gives no countenance to the view that the Court are excluded from making provision for interim management of an estate after sequestration, but before the appointment of a trustee. The office of interim factor was abolished, which would not have been done unless the Legislature had provided for interim management in such a case. There is no limit in point of time in section 16. Only two alternatives are mentioned, and in either a petition such as this is competent. With regard to an affidavit, it must be lodged.

LORD COWAN—I concur with your Lordship that the 16th section recognises the competency of the Court granting such a petition as this, and such an appointment may be especially necessary after sequestration, but before a trustee is appointed.

The affidavit ought to have been produced as the proper evidence of the petitioner being a creditor.

LORD BENHOLME and LORD NEAVES concurred.

The Court reversed the interlocutor of the Sheriff and granted the prayer.

Counsel for Appellant—Crichton. Agents—Pearson & Robertson, W.S.

Counsel for Objectors—Robertson. Agent—D Hunter, S.S.C.

• *Saturday, December 6.*

## FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

GWYNNE *v.* WALKER & CO.

*Contract—Construction.*

Under a contract between an engineer and a sugar refiner for the supply of a locomotive boiler—held that the peculiar application of the water in the defenders' manufacture should have been made a condition of the contract, and that the boiler delivered was conform to the contract.

The summons in this suit, at the instance of John & Henry Gwynne, hydraulic and mechanical engineers, London, against John Walker & Co., sugar refiners, Glasgow, concluded for payment of £125, with interest, being the agreed on price of a locomotive boiler with tubes and fittings, which was made by the pursuers, and duly delivered to the defenders. The defence was, that the boiler being insufficient for the purpose for which it was intended, the defenders were entitled to reject it, and did timeously reject it.

After a proof, the Lord Ordinary pronounced the following interlocutor:—

*Edinburgh, 5th June 1873.*—The Lord Ordinary having heard the counsel for the parties, and having considered the closed record, proof, and process,—Assolizies the defenders from the conclusions of the summons, and decerns: Finds the pursuers 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 defenders are sugar-refiners in Greenock, where they carry on an extensive trade, refining about 1000 tons of sugar weekly. In refining sugar a large and continuous supply of cold water is required for the purpose of creating a vacuum, by condensing the steam which rises from the pans in which the sugar is boiled, and of thus enabling the manufacturer to boil the sugar at a low temperature. If the supply of cold water is not continuous, the temperature in the pans rises, the sugar becomes carbonised and discoloured, and its value in the market lessened. The quantity of water required by the defenders for condensing purposes is about 1000 gallons per minute, or 60,000 gallons an hour, and their daily work lasts about eighteen hours.

"The defender Hugh William Walker depones that 'an intermission of half a minute in the supply of water would raise the temperature and discolour the sugar.'

"As the supply of such a large quantity of water from land sources was very costly, the defenders resolved to obtain an adequate supply by pumping it up from the sea, and they entered into a contract

in November 1869 with Messrs Hastie, Kincaid, & Donald of Greenock for one of the pursuers' patent centrifugal pumping-engines. This engine was to be supplied with steam from one of the boilers in the defenders' works, with an available pressure of steam of about 40 lbs. By the contract between the pursuers and Messrs Hastie, Kincaid, & Donald, the pursuers undertook that their pumping-engine should be capable of discharging 60,000 gallons of sea-water per hour to a height of 52 feet, through 700 yards of 15-inch piping. The pursuers gave distinct directions that the suction-pipes, which were to be laid by another contractor, should have a gradual fall towards the river, that the sweeps or bends should be very easy and as few as possible, and that the joints should be carefully made.

"The pipes were laid so as to discharge the water at a height of 62 feet, and not of 52 feet, as specified in the contract; and they were 750 yards in length, being 50 yards longer than was specified in the pursuers' contract. On the pursuers' pumping-engine being attached to these pipes, it proved insufficient to discharge the stipulated quantity at that height, or even at the height of 52 feet. On 22d August 1870 the pursuers wrote to Hastie, Kincaid, & Donald,—'We are in receipt of your favour of 20th inst., and note that you cannot get the pump to work. You state that you cannot get more than 40 lbs. steam; but unless you can get 60 lbs. pressure, we are sure it will not work.' The pursuer Mr John Gwynne thereafter visited the works, and on 24th October 1870 the pursuers again wrote Hastie, Kincaid, & Donald that they were not to blame, as there were 'more horizontal pipes, more verticle lift, and not so much steam pressure as was arranged.' As regards the steam pressure, the pursuers were in error, because Hastie, Kincaid, & Donald informed them by their letter of 5th November 1869, before ordering the pumping-engine, that 'the available pressure would be about 40 lbs.' The pursuers, in their said letter of 24th October 1870, then stated, 'Our Mr J. Gwynne understood that there was 19 feet vertical suction, and 46 feet vertical discharge, total 65 feet, 13 feet more than was agreed; also that there was 820 yards of horizontal pipes, 120 yards more than specified. Although there is so much difference in our contract and what you expect us to do, still we do not wish to leave you in a difficulty, as we are most anxious to do everything in our power to make the pumping-engine give Messrs Walker & Co. satisfaction. We should strongly recommend Messrs Walker & Co. to put up a tubular boiler (locomotive), that would work up to 60 or 70 lbs. pressure, which would make the pumping-engine discharge 2000 gallons per minute if required.' A considerable amount of correspondence passed thereafter between the parties, in which the pursuers, with good reason, blamed the pipes as not air-tight, and leaking, and in which they referred to one of their pumping-engines then in use at Chatham Dockyard. On 2d February 1871 Hastie, Kincaid, & Donald wrote to the pursuers that the defenders were 'willing to keep the pump if some arrangement can be come to with regard to the additional cost of the boiler;' and the pursuers, in answer, wrote referring to the leakage of the pipes, and stated that, 'even with the defective laying of the pipes, we believe the engine and pump capable of doing the work we stated, could we get the proper pressure in the cylinder.'

"Mr Hugh William Walker and the defenders' manager, Mr Mackenzie, thereafter went to London and met the pursuer Mr John Gwynne, and also saw the pursuers' pumping-engine and locomotive boiler in operation at Chatham. After Mr Walker's return to Greenock, the defenders entered into a contract with the pursuers for a locomotive boiler for the pump, at the price of £125, the condition of which (as stated in their letter to Hastie and Co., dated 22d February 1871, which was sent to the pursuers) is that 'the pump gives full satisfaction, both as regards its economical working and as to the quantity of water thrown.'

"The locomotive boiler thus ordered was thereafter fitted up in the defenders' works; and having been rejected by them on the ground that it was insufficient for the purpose for which it was ordered, the present action has been raised to obtain decree for £125 as the price thereof.

"The Lord Ordinary is of opinion that it is proved that the locomotive boiler which was supplied by the pursuers in the circumstances above mentioned is insufficient to keep their pumping-engine working, so as to give a continuous supply of water to the defenders, for condensing purposes, in the stipulated quantity of 60,000 gallons per hour. After being in operation for about four hours, the fire-bars of such a boiler become choked with clinkers and ashes, which interfere so materially with the passage of air through the fire-bars as to render their removal necessary. If not removed the fire would not burn with sufficient intensity to keep up the requisite pressure of steam; and as the clinkers and ashes continued to accumulate, the heat of the fire and the pressure of steam would become less. Now, it is proved by a great number of witnesses thoroughly acquainted with locomotive boilers that the clinkers and ashes cannot be removed from the fire-box of such a boiler in less time than from twenty minutes to half an hour, during which time the furnace door is open, and that the pressure of steam in the boiler will fall during this cleaning to such an extent as to be insufficient to work the pumping-engine, and to make it keep up the continuous supply of water required by the defenders for condensing purposes. The pursuer Mr John Gwynne and his under-foreman, Manwaring, deponed that the fire-box of their locomotive boiler could be cleared of ashes and clinkers by a skilled stoker without losing the requisite pressure of steam, and that the pumping-engine could be kept working during the cleaning, so as to give the requisite supply of water continuously. But their evidence on this point stands alone, and it is completely disproved by the numerous and experienced witnesses adduced by the defenders. The Lord Ordinary does not think it necessary to refer in detail to the evidence of these witnesses. After carefully considering it, he considers that it is clearly proved that a locomotive boiler is wholly unfitted to keep up for more than about four hours such a pressure of steam as is required to make the pursuers' pumping-engine deliver the quantity of water for which the defenders stipulated. It is proved that the pumping-engine supplied by the pursuers at Chatham Dockyard required to be stopped every four hours for the purpose of cleaning the clinkers and ashes out of the fire-box of the locomotive boiler. The pursuers did not work the engine supplied to the defenders for more than three hours, a trial which was, the Lord Ordinary thinks, altogether insufficient; and

the result of that short trial was, that the fire was getting dirty and the pressure of steam was falling towards its close.

"Now, the pursuer Mr John Gwynne admits that he was aware that it was for the condensing purposes of a sugar-refinery that the defenders required 60,000 gallons of water an hour, and that a continuous supply of cold water is necessary for these purposes. He also admits that Mr Walker, at his interview with him, told him that they wanted a continuous supply. The boiler, for the price of which the pursuers now sue, is not of a kind or capacity which will, according to the evidence, enable their pumping-engine to deliver that quantity of water continuously. The Lord Ordinary considers that it is proved to be wholly insufficient for the defenders' purposes, and that with it the pumping-engine cannot fulfil the condition of the contract under which the boiler was, on the pursuers' recommendation, purchased, namely, to give full satisfaction as to the quantity of water thrown.

"The pursuers maintain that the suction-pipes are not air-tight, and that the inefficiency of their pumping-engine is materially affected when this is the case. The pipes, as originally laid, were neither air nor water tight, as the joints were not made tight; but these pipes were all lifted, and were relaid in March 1872, and they were securely and efficiently joined by experienced pipe-layers. After being relaid, the sea end was plugged, and they were tested and found perfectly tight. This was immediately before the trials of the pursuers' boiler and pumping-engine in May 1872, so that these trials were not injuriously affected by the state of the pipes. The pipes were again tested on Monday the 26th of May last by skilled witnesses, who deponed that they are, in their opinion, for all practical purposes, air and water tight. There was a loss of one ten-thousandth part of the water in the pipes in an hour. But that loss, these witnesses consider, may be accounted for by the water escaping at the valve at the sea end of the pipe, in consequence of sand or other foreign substance getting into it, which escape it is impossible to prevent in small quantity when the pump is not working. Farther, the insufficiency of the pursuers' boiler—which has been in the opinion of the Lord Ordinary proved—arises from its inability to keep up a constant pressure of steam sufficient to ensure delivery of the stipulated quantity of water for a longer period than four hours or thereby at a time, an inability occasioned by the necessity to clear the fire-box of clinkers and ashes after the fire has burned for that period. So that even with the most perfect pipes, and with no foreign substance interfering with the close fitting of the valve, the pursuers' boiler cannot fulfil the condition under which it was bought. The same remark applies also to the objection stated by the pursuers, that the delivery pipe is sixty-two feet above the water, instead of fifty-two feet, as mentioned in the contract for the pumping-engine, and that the pipes are fifty yards longer than those therein mentioned. The last objection is also met, the Lord Ordinary conceives, by the fact that this additional height and length were known to the pursuers when they entered into the contract for the boiler, and that in their letter of 24th October 1870, above quoted, in which a greater height and length were mentioned than actually exists, they recommended a locomotive boiler, which they stated would make

their pumping-engine discharge 2000 gallons per minute if required.

"Another objection urged by the defenders was, that the boiler and pumping-engine required two stokers and an engineman, and that they therefore did not fulfil the condition of the contract as to economical working. The Lord Ordinary is not satisfied that this objection is well founded; and he considers that the boiler and pumping-engine can be efficiently worked with one stoker and one engineman, which is the usual provision for a locomotive boiler and engine."

The pursuers appealed.

At advising—

LORD JUSTICE-CLERK—1. The original contract made with Hastie & Co. was to furnish a pump which, driven by an engine working under 40lbs. of steam pressure, should discharge 1000 gallons of water a minute, at the height of 52 feet above the point at which it entered the pipe, the water to be drawn through 700 yards of pipe. As regarded the original contract, I do not think these conditions were varied.

2. The point at which the water was to be discharged was heightened by the defenders, who raised the cistern to 62 feet. I do not find that the pursuer undertook that his pump should raise the water to this level under only 40lbs. pressure of steam power. But he afterwards did undertake that it should do so under a pressure from 60lbs. to 70lbs.

3. The defenders undertook entirely in the first instance the laying of the pipes and the supply of steam power. As regarded the pump, I do not find that the pursuer came under any obligation or gave any guarantee on these matters. He guaranteed that under the application of a given amount of steam power the pump should discharge the stipulated amount of water at the stipulated height.

4. The pump, when tried in October 1870, failed to raise the stipulated amount of water to the original height stipulated. It may have done so occasionally; but practically it failed to do so. The cause of its failure is another question.

5. I think that both parties were under the impression that the failure of the pump arose mainly from want of sufficient steam power, and under that impression the pursuer proposed to furnish, and the defender agreed to accept, a locomotive boiler, after inspecting a similar boiler at the pursuer's works at Chatham, capable of producing steam to the extent of a pressure of from 60lbs. to 70lbs. The bargain is expressed in the letter of February 2, 1871, and those following. It is for the price of this boiler, which was to be furnished at half-price, that the present action has been brought. Under the terms of these letters I am of opinion:—

(1) That the pursuer undertook that this locomotive boiler should be well and sufficiently constructed, and capable of doing all which a boiler of that size and construction is calculated to effect.

(2) I think that he guaranteed that it should be capable of producing steam power to the extent of a pressure of from 60lbs. to 70lbs., and

(3) That under that pressure the pump should discharge 1000 gallons of water a minute at the height of 62 feet. We have no evidence as to "economical working" on which we can found any conclusion.

On the other hand, the defender undertook to

give the machinery a trial within a reasonable time.

It is maintained for the defender, in argument, although that is not stated on the record, that it was also implied in this contract that the boiler should be capable of producing steam to the extent mentioned without intermission for a period of 18 hours.

I am of opinion that no such condition was attached to the contract, and that the peculiar application of the water in the defender's manufacture was a matter with which the pursuer, as an engineer, had no concern, unless it had been clearly explained and explicitly made a condition to which he expressly assented. I think it proved that no such condition was imposed or undertaken. It is never referred to in the condescendence, nor is it even mentioned in the record. Further, the defender has endeavoured to prove that no locomotive boiler could have fulfilled this condition, or could have been of any use to them. If it were so, I think the risk lay with them, if the pursuer furnished the article they ordered. I am not impressed by the evidence of Mr Gwynne on this subject. He might very well have regarded continuous service as not excluding some temporary intermission. The defender, on the other hand, had the opportunity at Chatham of seeing the working of a locomotive boiler precisely similar, and no objection on that head prevented the completion of the contract.

6. The boiler was supplied in May 1871. It is now quite clear, although the truth was only partly suspected before, that the pipes were at first so insufficiently laid that it was impossible for the pump furnished by the pursuer to have a fair trial. They were raised and relaid in March 1872. It follows (1) That it does not appear whether the pump, under a pressure of 40lbs. of steam, would have fulfilled the original conditions. It never was tried. (2) That had the pursuer known the actual state of the pipes, he probably would have made no new bargain for the boiler until they were properly laid. And (3) that from causes for which the defenders are responsible, the boiler was not tested in terms of the contract, but the trial of it was delayed for a year.

7. The defenders wrote on the 10th of May finally rejecting both the pump and the boiler. I do not see on what ground it could be said that the pump had failed to fulfil the conditions guaranteed: for the trial which was afterwards made, on the 24th of May, showed that if the application of steam had been continuous the pump could have raised more than the stipulated amount of water to the stipulated height. Much argument was stated on the terms of the stipulation that the pump and boiler should be satisfactory to the defender; but that satisfaction had regard expressly, first, to the working being economical, and second, to the quantity of water. And as to these, (1) There is no ground for saying that the working was not economical, and this was not maintained as a distinct and separate defence. And (2) the second depends entirely upon the quantity of water stipulated for by the contract, and this was fully satisfied.

8. All the trials were imperfect, and the last was stopped by the pursuer himself. We cannot tell for how long the boiler would have maintained the pump at the requisite power, but I think it must be assumed against the pursuer that it could not have done so for 18 hours without some intermis-

sion. It certainly has not done so or for any period approaching it; and if that result was guaranteed, the guarantee has not been fulfilled. From these facts I am of opinion:—

(1) That there is no ground for holding that the pumping apparatus has been proved inefficient.

(2) That the pursuer gave no guarantee that the boiler would produce steam power to the stipulated extent for 18 hours, or for any specific time without any interval for cleaning; and that in all respects it was conform to contract.

(3) That the trial was delayed, owing to the fault of the defenders, beyond a reasonable period.

I therefore am for altering the interlocutor of the Lord Ordinary, and for giving decree for the amount sued for.

The other Judges concurred.

Counsel for Pursuers—Millar, Q.C., and Burnet.  
Agents—Adam & Sang, W.S.

Counsel for Defenders—Solicitor-General and Marshall. Agent—J. Patten, W.S.

Tuesday, December 9.

## SECOND DIVISION.

[Sheriff of Forfar.]

TOSH (OGILVY'S CURATOR) v. OGILVY.

*Evidence—Deposit-Receipt—Indorsation—Intromission—Lunatic.*

A endorsed a deposit-receipt which she delivered to B, her brother, with whom she resided. B endorsed the receipt to a bank and got payment of the money contained therein, which he stated he handed to A. Thereafter A became insane, and a *curator bonis* was appointed to manage her estate. In an action at his instance against B for payment of the sum of money contained in the receipt,—*Held* that B had failed to prove that he had discharged himself of his intromissions with the sum in question, and that he was liable in payment to the curator.

The summons in this suit, at the instance of Alexander Tosh, accountant in Dundee, as *curator bonis* to Miss Jane Ogilvy, sometime residing in Roods, Kirriemuir, now an inmate of the Royal Lunatic Asylum, Montrose, against James Ogilvy, residing at Corgibben, Cortachy, in the county of Forfar, concluded for payment of £296, "unlifted and received by the defender for and on account of the said Jane Ogilvy, from the branch of the National Bank of Scotland at Kirriemuir, upon or about the 31st day of July 1868, and which was contained in a deposit receipt granted by the said bank in favour of the said Jane Ogilvy, of date the 13th July 1868, which receipt the defender caused or procured the said Jane Ogilvy to indorse and deliver to him, and which sum of money contained therein he uplifted and received from the said bank on delivery by him of the said deposit receipt so indorsed, with the indorsation also of his own name added thereto, and which sum of money the defender failed to pay or account for to the said Jane Ogilvy, and it is accordingly still due and resting owing by him, with interest on the said sum of £296 from the said 31st day of July 1868 till payment, as also with expenses."

The Sheriff-Substitute (ROBERTSON), after a