and is now before us. The question is, whether the respondent has a title as sub-lessee. The respondent pleaded, among other pleas, that the application was incompetent in the Sheriff-Court, inasmuch as the question raised was one pertaining to heritable right and involving a judgment of heritable title. They do not seem to have insisted very seriously on this plea in the Inferior Court, and they have not insisted on it here. If it had been urged I think it would have been very strong. I am not sure that it is not *pars judicis* to give effect to such a plea whether urged or not; but I shall, in the circumstances, rest satisfied with saying that I have very great doubts if it was competent to try the question in the Sheriff-Court.

On the merits, I entirely agree with the Sheriff in the conclusion at which he has arrived. There is no doubt that negotiations for a lease were going on for a considerable time between the parties, and certainly some possession was given before both signatures were obtained to the lease. Stones were laid down upon the ground which was the subject of the lease—a very unequivocal form of possession where the subject was a building lease. The sub-lease was executed by the sub-tenant in April 1870, and would have been executed by the trustees of the landlord at the same time but for the fact that one of them was abroad. It was in these circumstances that possession was allowed before the sub-lease was executed by the trustees. If it had been executed by the trustees, of course no leave would have been necessary. Two duplicate sub-leases were put into the hands of the landlord's agent in order to obtain the signatures of the trustees. He got the signatures adhibited, and the question is, what ought then to have been done with the two deeds. One of course was to be retained by the landlord's agent, and the other ought to have been handed (perhaps I should not say delivered) to the sub-tenant. The agent, however, withheld the other deed on the ground that he was not satisfied that the sub-tenant had sufficient means to carry out the purpose of the lease—that is to say, the agent took it upon him, at that stage, to introduce a suspensive condition of the lease. Now that was a position entirely untenable. He was bound to hand over the deed to the sub-tenant. The position assumed by the landlord seems to have proceeded upon an erroneous conception of delivery. The law of delivery of mutual deeds is distinct enough—viz., that whoever holds the deeds holds it for and against all parties. But it is contended that where a mutual deed is executed in duplicate there must be delivery of both deeds as if each were a unilateral deed, or as if one contained the obligations come under by the one party, and the other those binding on the other party. But this is not so. In the present case both deeds, after execution, were in the hands of the landlord's agent. But when a deed is executed in duplicate, both copies are usually in the hands of the same party at first, and clearly the one does not require delivery. Only one therefore, on the contention of the petitioner, required delivery. But how does this stand? The one is in a position not requiring delivery, and is therefore complete, and could be enforced; but the other, requiring delivery, is incomplete till delivery, and therefore cannot be enforced. So that, according to this view, the one party to the contract would be bound while the other remained free. This is manifestly an untenable position, and is founded on a misapprehension of the 6th exception mentioned by Erskine to the doctrine that deeds are not obligatory on the granter before delivery. That exception is in these terms—"Mutual obligations or contracts signed by two or more parties for their different interests require no delivery, because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself, it must also be effectual to the rest." That is the very doctrine applicable to this case; each deed is complete in itself. But if the proposition of the petitioner were to be given effect to, it would be sanctioning the very reverse of the doctrine laid down by Erskine.

The question as to whether the deed was a delivered deed while still in the hands of the agent, is not of much importance. If it was not, then the agent was bound to deliver forthwith. At the same time, I rather think it had the effect of a delivered deed. On these grounds, I am of opinion that the judgment of the Sheriff is quite sound.

Lord Deas concurred. On the question of competence, his Lordship observed:—In the circumstances of the case as pleaded, the question of form is not necessarily before us for decision, but if it had been before us I would have had the greatest difficulty in not sustaining the plea of incompetency. Apart from the question whether the Sheriff has jurisdiction in this matter, though a grave consideration, I have this difficulty, that a summary removal, which this really is, is only possible where there is no shadow or pretence of a title, the intending party being in the position of a mere squatter, which is a very different case from the present.

Lord Ardmillan and Lord Jerviswoode concurred.

The Court accordingly sustained the judgment of the Sheriff, and dismissed the appeal.

Counsel for Petitioner—Solicitor-General (Clark) and Watson. Agent—L. M. Macara, W.S.

Counsel for Respondent—Lord Advocate (Young) and Robertson. Agents — Keegan & Welsh, S.S.C.

Saturday, December 6.

SECOND DIVISION.

[Sheriff of Midlothian.

APPEAL—PARTRIDGE.

Bankruptcy (Scotland) Act, 1856, *sec.* 16.

Held that section 16 of the Bankrupt Scotland Act recognised the competency of granting a petition for the appointment of a judicial factor on an estate after sequestration, but before the appointment of a trustee.

This was an appeal from the deliverance of the Sheriff of Midlothian on a petition presented to him by Frederick John Partridge, of the firm of Matthew, Wright, & Partridge, London, and his mandatory, with consent and concurrence of Peter Cunningham, Stockbroker, Edinburgh. The peti

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 douht. 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,' i. 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 ncompetent.

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,—Assoilzies 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 t up from the sea, and they entered into a contract