

Tuesday, July 4.

FIRST DIVISION.

[Lord Johnston, Ordinary.

FERGUSON'S CURATOR BONIS.

Administration of Justice—Refusal to Obtemper Decree to Deliver Document—Warrant to Messengers-at-Arms to Search and to Open Lockfast Places—Judicial Factor—Curator Bonis—Nobile Officium.

A *curator bonis* to one *incapax* having failed to recover from the wife of his ward a policy of assurance belonging to the curatorial estate, which had to be realised for the proper execution of the curatory, obtained against her a decree for its delivery and charged thereon, but the decree was not obtempered. The curator presented a note to the Lord Ordinary, craving the Court to ordain the defender to appear and bring the document in question, or, alternatively, to grant warrant to messengers-at-arms to search for and take possession of the policy, and if necessary for that purpose to open all shut and lockfast places.

His Lordship having reported the note to the Division, the Court granted warrant in terms of the second alternative of the prayer.

On 3rd September 1903 Charles Simon Romanes, C.A. in Edinburgh, was appointed *curator bonis* to John Scotland Ferguson, formerly spirit merchant in Airdrie, whose estate, *inter alia*, consisted of a policy of assurance for £300 granted by the Prudential Assurance Company, Limited, Holborn Bars, London, over the life and in favour of the said John Scotland Ferguson, numbered 151,334. The curator having entered upon office realised part of the estate. Debts due by the curatory estate, however, remained unpaid, and the curator was without sufficient funds to meet them, or to satisfy the creditors, who were threatening diligence. It was therefore essential to the fulfilment of his duties that the curator should realise the value of the said policy, which was, however, in the possession of Mrs Marion Jack or Ferguson, his ward's wife, who resided with her husband at Airdrie. Mrs Ferguson consistently refused to deliver it to him in spite of his repeated requests. The curator therefore brought an action for its delivery, and after appearance had been made but no defences lodged, obtained a decree in absence on 5th April 1905. On 4th June 1905 a charge was given on this decree, but though the days of charge expired, the decree was not obtempered. The curator had obtained a warrant to imprison, but from his experience he was satisfied that such a proceeding would be ineffectual without power to search for the document.

In these circumstances the curator presented a note to the Lord Ordinary on the Bills (LORD JOHNSTON) setting forth the facts, and craving his Lordship to ordain

“the said Mrs Marion Jack or Ferguson to appear personally before your Lordship on a date to be fixed by your Lordship, and that within the Parliament House, and to bring with her, exhibit, and produce before your Lordship the said policy of assurance, or otherwise to grant warrant to messengers-at-arms to search for, recover, and take possession of the said policy of assurance, and if necessary for that purpose to open all shut and lockfast places, and to deliver the said policy of assurance to the said Charles Simon Romanes as *curator bonis* foresaid.”

The Lord Ordinary made verbal report to their Lordships of the First Division stating that in his opinion he had not power to grant the warrant craved.

LORD PRESIDENT—The note which Lord Johnston has reported sets forth that a *curator bonis* appointed by the Court of Session found it necessary to obtain delivery of a policy of assurance, part of the property of the ward. The policy was in the possession of the wife of the ward, who refused to deliver it. In these circumstances the *curator bonis* raised an action against the ward's wife to ordain her to deliver to him the policy. Decree was pronounced in absence, and a charge given on the wife to deliver the policy. This charge was not obtempered. The *curator bonis* obtained warrant to imprison on the expiry of the charge, but was of opinion that personal diligence against the wife without power to institute a search would not lead to the recovery of the document.

Lord Johnston has had the matter before him, and reports that if the order is to be obeyed other means than imprisonment must be used to get the document. I am of opinion that the order of the Court must be obeyed and the document produced. Imprisonment in such cases is not only *in modum pœnæ*; its object is to compel performance, and here, if, as we are informed, it would fail in that object and the document would not be forthcoming, we must have recourse to other means. I am of opinion, therefore, that we should grant warrant to messengers-at-arms to search for the policy, and if necessary to open all shut and lockfast places.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

“The Lords, on the verbal report of Lord Johnston, Ordinary, and having considered the note for the *curator bonis*, with relative statement by the *curator bonis*, grant warrant to messengers-at-arms to search for, recover, and take possession of the policy of assurance for £300 mentioned in the said note granted by the Prudential Assurance Company, Limited, Holborn Bars, London, over the life of the *incapax* John Scotland Ferguson, numbered 151,334, and if necessary for that purpose to open all shut and lockfast

places, and to deliver the said policy of assurance to the petitioner Charles Simon Romanes, as *curator bonis* to the said John Scotland Ferguson.”

Counsel for the Petitioner—A. M. Anderson. Agents—Balfour & Manson, S.S.C.

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FIRST DIVISION.

BARON DE BILDT, PETITIONER.

Process—Proof—Evidence Required by Foreign Tribunal—Petition for Appointment of Sheriff-Substitute to Examine Witnesses—Competency—Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. c. 113), sec. 1.

A petition under the Foreign Tribunals Evidence Act 1857, section 1, having been presented, in which it was asked that the examination of certain witnesses should be ordered before a certain Sheriff-Substitute, whom failing such person as their Lordships should appoint, *held* that the appointment of the Sheriff-Substitute was not competent, as the Act did not contemplate the examination before a court, and *remit made* to a member of the bar.

The Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. c. 113), section 1, enacts—“Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter is pending is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly. . . .” Section 2—“A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by Her Majesty, . . . that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic agent, . . . and that such court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified.” . . . Section 6—“Her Majesty’s Superior Courts of common law at Westminster and in Dublin respectively, the Court of Session in Scotland, and . . . shall respectively be courts and judges having authority under this Act. . . .”

Baron de Bildt, Minister Plenipotentiary of His Majesty the King of Sweden and Norway to the Court of St James, pre-

sented a petition to the Court of Session, in which he stated that in an action in regard to a civil or commercial matter presently pending in the Town Court of Halmstadt, in the kingdom of Sweden, being a Court of competent jurisdiction, between James Stiven of Dundee, plaintiff, and Alfred Johansson of Halmstad aforesaid, defendant, the said Court was desirous of obtaining for use in such action the testimony upon oath of the following persons, viz.—John Sorby of Millhouse, Tayport, Fife, and David Ferguson of Ogilvy Street, Tayport, Fife; and, after narrating the provisions of the Foreign Tribunals Evidence Act 1856, that he made application to have the said witnesses examined before the Sheriff-Substitute at Dundee, whom failing such other person as their Lordships might appoint.

The petition had appended to it a certificate, as required by the Act, signed by the petitioner. The prayer was—“May it therefore please your Lordships to order the examination of the said John Sorby and David Ferguson upon oath before the said Sheriff-Substitute, whom failing such other person as your Lordships shall appoint; and further, to appoint the said Sheriff-Substitute or such other person to examine the said witnesses upon the questions contained in the Letter of Request by said Town Court of Halmstad, and translation thereof, and to command the attendance of the said witnesses at such place and at such time or times and at such hour or hours as the said Sheriff-Substitute may fix, upon giving the said witnesses forty-eight hours’ previous notice of the day and hour fixed, to give evidence in the said suit, and also to bring with them, exhibit, and produce before the said Sheriff-Substitute, upon oath, all such writings and documents as they may have in their hands, custody or keeping, which they may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are or may be; and further, to dispense with the adjustment of interrogatories, and to grant authority to messengers-at-arms to cite the said witnesses to appear at the place and date so fixed and give evidence in the said suit; or to do further or otherwise in the premises as as your Lordships may seem proper.”

LORD PRESIDENT—This petition raises a question of practice which I think ought to be dealt with, because it involves a proceeding which might be appealed to as a precedent for the practice to be followed in similar cases. The petition is presented by the Baron de Bildt, who is Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Sweden and Norway to the Court of St James, and the object of it is to obtain the testimony of two witnesses, who appear to be Scotsmen, and who are easily available at Dundee. Their testimony is required for a civil action which is at present in dependence in