Friday, March 17.

FIRST DIVISION.

PENNEY (ACCOUNTANT OF COURT), REPORTER.

Process — Judicial Factor — Diversity of Practice in Sheriff Courts—Application by Accountant of Court for a Rule—Judicial Factors Act 1880 (43 *and* 44 *Vict. cap.* 4), *sec.* 4, *sub-sec.* 7.

Circumstances in which the Court, on a report by the Accountant of Court under section 4, sub-section 7 of the Judicial Factors Act of 1880, laid down a rule to secure uniformity of practice in proceedings in judicial factories in the Sheriff Courts.

Judicial Factor—Sheriff—Jurisdiction.

Where a factor appointed by a Sheriff has died, been removed, resigned, or become incapable, and where the ward has removed outwith the jurisdiction of the sheriff who made the appointment, the application for the appointment of a new factor must be presented in the Sheriff Court in which the original appointment was made.

Section 4, sub-section 7 of the Judicial Factors Act of 1880 provides as follows—"It shall be the duty of the Accountant, when it appears to him that there is a diversity of judgment or practice in proceedings in judicial factories in the Sheriff Courts which it would be important to put an end to, to report the same to the First Division of the Court of Session, specifying the proceedings in which such diversity appeared, and asking for a rule to be laid down to secure uniformity of judgment or practice in such proceedings, and the Court shall consider such report, and if they shall see fit shall lay down such a rule accordingly, which rule the several sheriffs and their substitutes shall be bound to observe."

On 8th March 1893 J. Campbell Penney, Accountant of Court, presented a report under the above sub-section, stating that there appeared to him to be "a diversity of judgment or practice in proceedings in judicial factories in Sheriff Courts relative to the application for the appointment of a new factor when the ward has been removed out of the county in which the original petition was presented." He asked that a rule should be laid down to secure uniformity of practice in such proceedings.

In support of his application the Accountant referred to two cases which had occurred in the Sheriff Courts. In the first of these cases the original appointment of a factor was made in the Sheriff Court of the Lothians and Peebles, and the factor having become insane, his appointment was recalled and he was discharged by the same Court. Before the conclusion of these proceedings the ward had removed to Stirlingshire, and a petition for the appointment of a new factor was thereafter presented to the Sheriff of that county, and this petition was granted. In the second case the original appointment was made in the Sheriff Court of the Lothians, and the ward, who was a lunatic, was subsequently removed to Aberdeenshire. The factor having thereafter died, a petition for his discharge and for the appointment of a new factor was presented in the Sheriff Court of the Lothians, but the Sheriff held that the application for the new appointment should be made in the Court of the Sheriff within whose jurisdiction the ward was then resident. The agent in the curatory then consulted the Sheriff of Aberdeen, who expressed a verbal opinion that an application to him was not competent, in respect the original application had been made in the Sheriff Court of Edinburgh.

Section 4, sub-section 1, of the Judicial Factors Act of 1880 provides—"Until otherwise prescribed, proceedings for appointment of judicial factors in the Sheriff Court shall commence by petition to be presented to the sheriff or sheriff-substitute of the county in which the pupil or insane person is resident, as nearly may be in the form in use in ordinary actions in that court, and shall thereafter be conducted therein as nearly as may be in the same form and manner in which proceedings under the recited Acts are conducted before the Lord Ordinary."

Counsel for the Accountant submitted that the more convenient course would be that applications for the appointment of new judicial factors should be made in the sheriff court in which the original appointments had been made. Under section 2 of the Act of Sederunt of 14th January 1881, applications for special powers, recal, removal, discharge, and other purposes were made in the Sheriff Court where the original appointment had been made, although the ward might have removed out of the jurisdiction of that court. No advantage could be gained by drawing a distinction between such applications and an application for the appointment of a new factor. Such a distinction would render separate proceedings in different Sheriff Courts necessary for the discharge of the original factor and the appointment of his successor, and would entail extra expense, which would press very heavily on small estates. When jurisdiction had once been established, the place of the ward's residence appeared to be quite immaterial.

At advising—

LORD ADAM — The 7th sub-section of section 4 of the Judicial Factors Act of 1880 provides that when there is a diversity of judgment or practice in proceedings in judicial factories in the Sheriff Courts which it would be important to put an end to, then the Accountant of Court shall report the same to the First Division of the Court of Session, and ask for a rule to be laid down to secure uniformity of judgment or practice in such proceedings. From the report now before us it appears that such a diversity of practice has arisen in the Sheriff Courts of Scotland in this way—The factor on an estate dies or is removed, and a new factor is required. In some

courts the Sheriff holds that the new appointment must be made, not in the subsisting factory, but in a new petition altogether in the Sheriff Court of that part of the country where the ward is resident. In others the Sheriff holds that the appointment should be made in the original petition in the Court where the first appointment was made, even though the ward has gone to reside elsewhere.

Now, it appears to me that we have perfect authority to decide this matter, and that it is entirely for us to say what should be done. Mr Strachan has stated reasons of convenience why the practice should be to have the new appointment made in the Sheriff Court in which the original appointment was made, and that appears to me to be the right course. It is to be noted that with regard to orders required in existing and going factories this rule is already recognised. That is shown by the fact that by an Act of Sederunt regulating that matter, even though the ward has changed his residence and gone to reside in another jurisdiction, all the proceedings are to take place in the original existing factory. That being so, it appears to me that the proceedings for the appointment of a new factor should also take place in the Sheriff Court in which the original appointment was made, for the reasons stated by Mr Strachan, and also because one of the first duties of a new factor will always be to audit the accounts of the old factor, and that must necessarily take place in the old factory and original jurisdiction. I am therefore of opinion that we should lay down the rule in the way proposed by the Accountant.

Lord M'Laren—Under the Judicial Factors Act of 1880, which was intended to lessen the expenses of management of estates of small value, jurisdiction is determined by the residence of the person whose property is to be taken care of. It does not appear that when jurisdiction is once constituted by a factor being appointed, and the funds or property being placed under judicial supervision, that a change of residence on the part of the ward makes any difference. It would be no ground for transferring the factory proceedings that the ward had been sent to reside in a different county. Now, I cannot see, if that be so, why the death or resignation of the person in administration should make any difference. The jurisdiction over the ward himself when once constituted being in no way dependent on his continued residence within the county, I do not think that a change in the administration, when that is necessary, should affect the jurisdiction.

Lord Kinnear and the Lord President concurred.

The Court pronounced this interlocutor:—

"The Lords of Council and Session (First Division), in pursuance of the powers vested in them by section 4, sub-section 7 of the Judicial Factors (Scotland) Act 1880, upon a report made to them by the Accountant of Court dated 8th March 1893, direct and appoint that in every factory where the factor has died, been removed, resigned, or become incapable, and where the ward has removed outwith the jurisdiction of the Sheriff who made the appointment, all applications for a new appointment of a factor shall be presented in the Sheriff Court in which the original appointment was made."

Counsel for the Accountant of Court—Strachan. Agents—Gill & Pringle, W.S.

Saturday, March 18.

FIRST DIVISION

WHITE, PETITIONER.

Sequestration — Petition for Discharge— Report by Trustee not Obtainable—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 146.

Section 146 of the Bankruptcy Act 1856 provides that it shall not be competent for a bankrupt to present a petition for his discharge until the trustee in his sequestration shall have prepared a report with regard to the conduct of the bankrupt and his compliance with the provisions of the Act.

Where the trustee in a sequestration had disappeared, and his address could not be ascertained, the Court, in a petition by the bankrupt for his discharge, accepted a report of the Accountant in bankruptcy in place of the report by the trustee required by the above section.

Andrew Aiton White, whose estates were sequestrated in June 1885, presented a petition for discharge in October 1892.

The petitioner stated that he was "now desirous of being finally discharged of all debts due by him before the date of the said sequestration, in terms of the 146th of the Bankruptcy (Scotland) Act 1856. . . . That no dividend has been paid out of the estates of the petitioner, but this has arisen from circumstances for which he cannot justly be held responsible. That the petitioner believes that the trustee left this country some time ago, and that if alive he is now resident in America or elsewhere abroad. The petitioner has made extensive anxious inquiries with the view of procuring his address, but he has hitherto been unsuccessful. He has, therefore, been unable to obtain from the trustee the statutory report specified in the said 146th section of the Bankruptcy (Scotland) Act 1856."

The petitioner craved the Court to appoint the petition to be intimated on the walls and in the minute-book, and to be served edictally on David Rollo, the trustee on the petitioner's sequestrated estates, and to ordain him to lodge answers if so advised within eight days; thereafter to ordain the said trustee within six days to prepare and deliver to the petitioner a