It was argued that the ground over which the pursuers claim right included a portion of the bleaching-green, and that it is not included in their lease. I do not think that this is so. But we are not much concerned with this question. There is no complaint that the right of bleaching has been interfered with. If the contention of the defender were well founded, it could only prove that the pursuer had no title to a small portion of the ground on which they are in use to play, but the defender would take no benefit thereby. The true question is, whether the defender can play golf beyond the usual course, and inconsistently with the settled usage. This I think he cannot do.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal, Find in fact (1) that the golfing course of the Links of St Andrews is defined and marked out by march stones; (2) that the piece of ground described in the prayer of the petition does not form part of the course; (3) that since the term of Martinmas 1880 the St Andrews Ladies' Golf Club, the association represented by the pursuers, has had exclusive possession of the said piece of ground under a lease granted by the proprietor thereof to the pursuers, and had such possession during the thirteen years preceding the said term under a missive of lease with him: Find in law that the defender is not entitled to disturb the said association in their possession of the said piece of ground: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against: Find the pursuers entitled to expenses in this Court."

Counsel for Appellant—M'Kechnie—Dickson—Salvesen. Agents—Mitchell & Baxter, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Gillespie. Agents—Mackenzie & Kermack, W.S.

Saturday, May 14.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MASTERTON AND ANOTHER *v.* ERSKINE AND OTHERS.

Judicial Factor—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 29), *sec.* 164—*Recal.*

In a petition under the 164th section of the Bankruptcy (Scotland) Act 1856, for the appointment of a judicial factor upon the estate of a person who had died intestate, the petitioners were heritable creditors upon the estate, with concurrence of the widow of the deceased. They stated that there was no one interested in the estate then resident in Scotland to administer it. On 6th November 1886 a factor was appointed. Subsequently two brothers of the deceased came to Scotland from America, one of whom was appointed executor-dative of the deceased, the other being his heir-at-law. On 2d December 1886 they presented a petition for recal of the factory, stating that they were willing to administer the estate for behoof of all concerned, and that after deducting the petitioners' debts there was a considerable surplus. The heritable creditors and the factor lodged answers objecting to the recal. A remit was made to the Accountant in Bankruptcy to inquire into the condition of the estate, and he reported that he was unable to state whether or not the heritable property, if exposed for sale, would realise enough to pay off the bonds in full. The moveable estate was hypothecated in security of other debts. The petitioners returned to America before the application was disposed of, having granted a factory and commission. *Held* that the matter was entirely within the discretion of the Court; that the creditors were entitled to have their interests protected; and that there had been no change of circumstances which would justify the recal of an appointment competently made. Petition *refused.*

*Process—Petition for Recal of Factory—*20 *and* 21 *Vict. cap.* 56, *sec.* 4—*Competent in Outer House.*

Held (by Lord Trayner, Ordinary) that the appointment of a factor under the 164th section of the Bankruptcy (Scotland) Act 1856 can competently be recalled in the Outer House.

John Masterton, civil engineer, Edinburgh, died there on the 9th October 1886, intestate, leaving a widow but no family.

Upon the 18th October 1886 a petition was presented, under section 164 of the Bankruptcy (Scotland) Act 1856, by certain heritable creditors, with the consent and concurrence of the widow, Mrs Jane Field or Masterton, praying for the appointment of a judicial factor upon the estate of the deceased, which consisted, so far as the petitioners were aware, of the following:—£1000 of Anglo-American Telegraph Stock, £500 Great Eastern Railway Ordinary Stock, ten shares in the North British and Mercantile Insurance Company, certain heritable subjects in Bonnington Road, Bangor Road, and Breadalbane Street, Leith, an interest (amount unknown to the petitioners) in the Craiglockhart Estate Company, and in heritable property belonging to a building syndicate in Dundee.

The nearest-of-kin of the deceased were his two brothers, James Masterton and William Masterton, both resident in Philadelphia, United States of America.

Upon 6th November 1886 the Lord Ordinary appointed Mr Ebenezer Erskine Scott judicial factor upon the said estate.

Upon 2nd December 1886 a petition was presented by the said William Masterton and others, praying for the recal of Mr Scott's appointment as factor foresaid.

The petitioner William Masterton averred that as soon as he heard of his brother's death he authorised a mandatory to act for him in relation to his deceased brother's estate, and that upon 19th November 1886 he was appointed executor-dative *qua* next-of-kin of the said John Masterton. He also alleged that he had returned to this country and was ready to perform his duties as executor; that the petitioners were the whole parties (except the widow of the deceased) who were entitled to succeed to his estate; that after de-

ducting the heritable debts of the petitioners there was a free margin of from £3000 to £4000, with a free yearly income of from £250 to £300; that as there were no pressing claims on the estate the appointment of a judicial factor was no longer necessary, and its continuance occasioned the estate unnecessary expense.

Answers to the petition were lodged by the Rev. John Erskine and others, the heritable creditors and petitioners in the petition under which the factor was appointed. They objected to the recal on the grounds that the factor had been duly and competently appointed, and that it was not until he had entered upon the duties of his office that proceedings were commenced by the petitioner William Masterton in the Commissary Court of Edinburgh. The respondents further objected to the legal diligence which they had competently used being superseded, especially as there was no proposal to pay their debt. They denied the valuations submitted by the petitioners, and alleged that the properties taken at fifteen years' purchase of their present rental would hardly meet the debts of the heritable creditors, while in addition the property was burdened with the widow's terce. They stated that the moveable property was to a large extent hypothecated to the Clydesdale Bank, and that debts had been intimated to the extent of £500. The respondents further averred that the estate was practically insolvent.

By interlocutor of 25th January 1887 the Lord Ordinary recalled Mr Scott's appointment as judicial factor on John Masterton's estate.

"*Opinion.*—It is objected by the respondents that the present application is incompetent before me, and should have been presented in the Inner House as the only Court competent to deal with the recal of a factory. The Act 20 and 21 Vict. cap. 56, provides (sec. 4) that 'all summary petitions and applications to the Lords of Council and Session, which are not incident to actions and causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just,' and in particular all petitions and applications of the kind described in the Act. For some time the practice of the Court to some extent proceeded upon a construction of that Act which limited the power of the Junior Lord Ordinary to deal with the cases falling within those specially enumerated in the Act. But a broader construction has since been adopted, as an illustration of which reference may be made to the case of *Tweedie*, 24 S.L.R. 155. As a summary petition not incident to an action or cause presently depending in Court, I think I can competently deal with the present application, and therefore I repel the objection stated.

"On the merits of the application I entertain no difficulty. The petition for the appointment of a factor set forth, *inter alia*, that Mr Masterton died intestate, that there was no one interested in his estate then resident in Scotland to manage or administer that estate, and that certain rents had to be uplifted and disbursements made, or otherwise the estate might suffer injury. In this state of circumstances it was obviously for the advantage of all concerned that a factor should be appointed, and such an appointment was accordingly made. Since then the circumstances have materially changed. The heir-at-law and the executor of Mr Masterton have both come to this country, and are now ready to undertake the duty of administering and managing the estate for behoof of all concerned. The continuance of the factory is therefore no longer necessary, nor is it expedient to burden the estate with the expenses of a factory which is unnecessary. The respondents' claims on the estate of Mr Masterton can suffer no damage by the recal of the factory. So far as these claims affect directly the heritable estate they cannot suffer, because the heritable estate will remain subject to these claims just the same whether there is a factor or not. If the respondents wish to call up their debt they can do so; that remedy is always in their own hands. As regards the moveable estate and the claims upon it the executor will have to account for all the estate he can recover, and will besides, on confirmation, be required to find caution for his intromissions.

"I therefore recal the appointment of factor, an appointment which I would probably not have made had Mr Masterton's executor been in this country, and willing to administer at the date when the petition for appointment was presented.

"I shall allow the expenses of both parties to be paid out of the estate."

The Rev. John Erskine and others reclaimed against this interlocutor.

On 26th February 1887 William Masterton and others presented a note to the First Division submitting a statement and giving their view of the estate of the deceased. They alleged that there was free moveable estate to the extent of £1763, and free heritage to the value of £1734, together amounting to £3497, and that to say that the estate was practically insolvent was entirely inaccurate and misleading.

By interlocutor of 2d March 1887 the First Division remitted to the Accountant in Bankruptcy to inquire into the condition of the intestate estate, and to report.

In his report dated 16th March 1887 the Accountant estimated the value of the moveable estate of the deceased at £1045. He set down the book debts at something less than £500, and he expressed an opinion, after a careful examination of the heritable estate, that he was not in a position to say whether, if exposed for sale, it would realise enough to pay off the bonds in full.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 164, provides—"It shall be competent to one or more creditors of parties deceased to the amount of one hundred pounds . . . in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate . . . to apply by summary petition to either Division of the Court for the appointment of a judicial factor, and . . . the Court may appoint such factor, subject to such conditions as to caution, and such other conditions, as the Court may provide by Act of Sederunt."

Argued for the reclaimers—The appointment of a judicial factor under section 164 of the Bankruptcy Act was what in the circumstances the reclaimers were entitled to; the estate was in a critical condition, and it being uncertain whether it was insolvent or not, it was for the interests of

all concerned that it should be managed by a neutral party. The reclaimers had shown the Court sufficient in the report of the Accountant to warrant the continuance of Mr Scott's appointment—*Alexander*, July 15, 1862, 24 D. 1334.

Replied for the respondents—The question of the appointment of a judicial factor in circumstances like the present was one entirely for the discretion of the Court. The original application was made on the ground of emergency, but as those who *ex lege* were entitled to act had now appeared, and were anxious to administer the estate, the interlocutor of the Lord Ordinary recalling the factory should be adhered to—*Macfarlane and Others*, March 6, 1857, 19 D. 656. The estate would be more economically worked by the respondents than by a judicial factor.

The objection to the competency of presenting the petition to the Junior Lord Ordinary was renewed in the Inner House, but was not insisted in.

At advising—

Lord President—There can be no doubt that the original appointment of a judicial factor upon this estate was a most proper one, as there appears to have been no one to manage it, and from what we have heard an administrator was quite necessary.

The petitioners are heritable creditors who have a deep interest in this estate, both as regards the heritage and the moveables, because they say it is more than doubtful whether the heritage will be sufficient to meet the heritable debts, and the Accountant in Bankruptcy has reported that after careful examination he cannot express any decided opinion upon the matter. That, then, being the state of the facts, there can be no doubt that this estate is in a somewhat critical position.

The circumstances under which the recal of this factory was made by the Lord Ordinary were, that the heir-at-law and executor of Mr Masterton had both come to this country and were ready to administer the estate for the good of all concerned. If the facts as we now know them had been as stated by the Lord Ordinary, and if the heir and executor had come to this country *animo remanendi*, then a great deal might be said against the re-appointment of a judicial factor. The parties mentioned no doubt arrived in this country, but their object in coming apparently was merely to appoint a factor or agent to manage this estate instead of the judicial factor appointed by the Court. They then went back to America, and it is not suggested that they propose to return in order to take any active part in the management of this estate, and that being the state of matters it is quite a different thing from the heir and executor undertaking the management for the good of all concerned.

The appointment was made under sec. 164 of the Bankruptcy Act of 1856, and it is to be observed that under the provisions of that section it is not imperative upon the Court to make such an appointment as that made under the original petition, nor, on the other hand, is it necessary that the estate should be insolvent in order to justify the appointment. The matter is left entirely in the discretion of the Court, and accordingly what we have now to determine is whether a judicial factor having been duly appointed to administer this estate his appointment is now to be recalled, or in other words, is there any change of circumstances since this appointment was made to warrant us in recalling it?

I think we should be exercising our discretion very badly if we yielded to this application for recal. It appears to me most desirable that this estate should remain in the hands of an officer of Court who will be responsible to the Court for its proper management. If the estates were capable of being as easily managed as the representatives of the deceased would have us to believe they are, then there could be no great difficulty in paying off the debts of the heritable creditors; while if the security over the estate was as good as we are told it is, there could be no difficulty in obtaining the money on loan necessary to free the estate. I think that the creditors in the present case are entitled to have their interests protected, and I am for continuing the appointment of the judicial factor with a view to the protection of the interests of all concerned.

Lord Mure—I am entirely of the same opinion. I assume that the moveable estate is sufficient to meet the demands of all but the heritable creditors, but we see that the heritable estate as regards its revenue is yearly diminishing, and if it were realised at present it is more than doubtful if it would meet in full the claims of the heritable creditors. In these circumstances I think the judicial management under which the estate at present is should continue.

Lord Shand—There can be no doubt that this appointment when it was first made was a proper one both for the estate and under the 164th section of the statute, but the petitioners might have succeeded in their present application if they could have shown us that a decided surplus existed sufficient to have satisfactorily met the demands of the heritable creditors. Instead of that the estate is shown to be in a very doubtful state of solvency, and it is very uncertain whether the heritage if exposed at present for sale would realise the valuation which has been put upon it. As for the moveable estate, it is already hypothecated and must be set aside in dealing with the present application. Had the Lord Ordinary known all that we now know, I think he would have had no hesitation in continuing the factor's appointment, for at the best the security of the heritable creditors is somewhat doubtful. In that state of matters I concur in the course proposed by your Lordship, and think that the factor's appointment should be continued.

Lord Adam—I concur with your Lordship in thinking that the appointment of a judicial factor in circumstances like the present is a matter entirely for the discretion of the Court, and I only desire to say that if this had been an application for the original appointment I should have felt no difficulty in granting it, and therefore I consider it an *a fortiori* case for continuing the appointment.

The Court recalled the interlocutor of the Lord Ordinary and refused the petition.

Counsel for Rev. J. Erskine and Others—John Burnet—G. W. Burnet. Agent—Knight Watson, S.S.C.

Counsel for Masterton and Others—J. C. Thomson—Salvesen. Agents—Fodd, Simpson, & Marwick, W.S.