

No 173.

Court remitted with instructions to admit the procurator suggested.

procurators, are the Faculty of Advocates; nor can any litigant ever want ample assistance from so numerous and so learned a body.

*Answered* by Collins, It is a jest to pretend that the detail of proceedings in that Court can possibly be conducted, by any other persons but those who have had an opportunity of being habituated to every minute circumstance of its intricate forms of process; a thing which the province of an advocate does not even admit.

THE LORDS did not enter into the questions with regard to the foundation of the immemorial custom pleaded by the Judge-Admiral, nor to the qualifications requisite in a practitioner before his Court. They considered this case as affording an example of a wrong, to which no ordinary remedy could be applied, but for which their supreme jurisdiction authorised them to provide an extraordinary one; in the same manner as in all those more important instances, where any accidental stop having been put to the usual course of administration, in distributing justice, or in regulating police, it is their privilege, by temporary appointments, to supply the deficiency.

Accordingly, the LORDS 'remitted the cause to the Judge-Admiral, with an instruction to admit Mr Sprott, without delay, to act in the cause as procurator for Captain Collins.'

Act. *Crosbie.*Alt. *Blair.*

S.

*Fac. Col. No 39. p. 70.*1788. *January 19.*

MARY COWAN and ANDREW COWAN her Father, Petitioners.

No 174.

In the appointment of a factor *loco tutoris*, where the application was made in name of the mother of the children, and her father, the Lords ordered intimation to be made to the two nearest agnates.

THE husband of Mary Cowan died possessed of property, both heritable and moveable, leaving several infant children by her, but without having made any settlement of his effects, or nomination of tutors or curators to his children. Along with her father, she presented a petition to the Court, stating these circumstances, and adding, that the tutor of law was, by reason of infirmity, incapable of discharging that office; and therefore praying, that she might be appointed *factrix loco tutoris* to the children during her widowity. On advising the petition, it was

*Observed* on the Bench, The granting of factories *loco tutoris*, is in itself a stretch of the powers of the Court, and in every instance ought to be strictly guarded by the established rules. In the present case, as the application is only made in the names of the mother of the children, and of her father, intimation ought to be given under form of instrument to the two nearest agnates, not because their consent is deemed essential, but in order that they may have an opportunity of stating any relevant objection to the proceeding.

THE COURT having unanimously acquiesced in this opinion, the above mentioned intimation was accordingly ordered.

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For the Petitioner, *Dickson*.

S.

*Fol. Dic. v. 3. p. 348. Fac. Col. No 16. p. 28.*

1789. November 20.

JAMES-ANNE MACDOWALL and Others, *against* ARCHIBALD MACDOWALL and Others.

THE grandfather of James Anne-Macdowall executed a deed, conveying his landed property to certain persons, and to one or more of them as trustees, and to their assignees and disponees, excluding their heirs and executors; whom failing, by death or non-acceptance, to his only son James Macdowall, his heirs and assignees.

The purposes of the trust were,—the payment of the granter's debts, which were considerable;—the settlement of a suitable annuity on his son;—the sale of so much of the lands as might be necessary; and the borrowing of money.

And it was declared, 'That after payment and extinction of the debts and obligations owing and prestable by the granter, and after deduction of all necessary charges laid out in the execution of the trust, the trustees, or a quorum of them accepting, or the last survivor of them, should be obliged to denude of the lands, &c. to and in favour of James Macdowall the granter's son, and the heirs whatsoever to be procreated of his body; whom failing, to Elisabeth Macdowall the granter's daughter, and the heirs whatsoever of her body; whom failing, to the heirs named in a separate deed executed by the granter.'

Of the trustees thus named, only two undertook the management; one of these afterwards died, and the other, who was a merchant, having become bankrupt, an action was brought after the death of James Macdowall, the granter's son, who had left one daughter James-Anne Macdowall, for obliging the surviving trustee, on account of his insolvency, to convey the subjects to James-Anne Macdowall, or to any other person to be named trustee by the Court. At this time the trust-estate was very much encumbered, so that the same extensive powers which had been given to the trustees, seemed to be necessary for its management. James-Anne Macdowall was an infant, and her mother had been appointed *factrix loco tutoris* to her, in virtue of the act of sederunt in 1756.

Some of the Judges were of opinion, that bankruptcy, unless attended with circumstances of fraud, did not incapacitate a trustee, although it might au-

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An only surviving trustee having become bankrupt, the court declared the trust at an end, and appointed the trustee to denude in favour of the heir.