

make payment of the sums therein contained. But this the trustees have refused to do, upon pretence that, as the bequest in the will depends on a variety of contingencies, they are not in safety to make payment. Wherefore the present application was made, hoping that, in the special circumstances of this case, and when the trustees named by James Wotherspoon stand removed by the interlocutor upon the petition and complaint, the Court will not suffer the settlement to be evacuated through the fault of the trustees, but will interpose *ex nobili officio*, and name a new trustee or trustees upon the joint suggestion of all persons having interest. And they cited the case of Lord Monzie and others, No 163. p. 7440. as analogous to the present. At the same time, in case there should be any difficulty upon this head, an alternative prayer was thrown in, to appoint a factor upon the subjects.

The petitioners were ordered to print the trust-right for the consideration of the Court, and to subjoin their reasons for having a trustee rather than a factor. And, as it appeared from the deed itself, that the trustees were thereby appointed executors, and vested with discretionary powers, the doubt as to this Court having a power to name trustees with similar powers, became the greater, though there appeared no objection to their taking this estate under their care, and appointing a factor to manage it. Accordingly,

'THE COURT appointed a factor, with the usual powers; and also, with power to bring an action for denuding the trustees, in case that should be thought advisable.'

For Petitioners, *Geo. Fergusson.*

Fol. Dic. v. 3. p. 349. Fac. Col. No 207. p. 153.

1781. February 20.

CAPTAIN DAVID COLLINS, *against* The JUDGE of the High Court of Admiralty.

A COMPETITION with respect to a Dutch prize-vessel, which had arisen between Captain Collins of his Majesty's navy and three other parties, came before the High Court of Admiralty. But one of the three ordinary procurators belonging to that court being retained by each of the last mentioned parties, no one remained to conduct the suit in behalf of Collins. He, therefore, presented a petition to the Judge, praying that William Sprott, solicitor before the inferior courts of Edinburgh, might be permitted to act on this occasion as his procurator. His petition, however, being refused, he then applied to the Court of Session by bill of advocation; in opposition to which the Judge-Admiral,

Pleaded; According to immemorial consuetude, the only persons-entitled to practise in the Admiralty Court, beside the limited number of three ordinary

No 172.

No 173.
There having been only three procurators in the High Court of Admiralty; in a case in which four parties were concerned, the Judge-Admiral refused to admit an interim procurator; but the Admiral's judgment having been advocated, the

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.