No 179.

observed on the Bench, That it seemed to be improper, that the Court should interpose its authority in this manner to every step of administration in the case of a factor *loco tutoris*; that the act of sederunt 13th of February 1730, had given sufficient powers, and these ought not to be extended; that the Court interposed in such cases merely from necessity, to prevent the waste and destruction of minor's effects, or others, who were absent or incapable; but if the Court were to proceed in the manner now proposed, it might come in time to appropriate to itself the same sort of powers and authorities which were exercised by the Court of Chancery in England, and would soon have the care and direction of a great part of the estates in the kingdom; which was not the plan of its original institution, and might be attended with many bad consequences; in particular, it would certainly put an end to the administration of minors' estates by tutors; since all persons would certainly chuse to act under the authority of the Court, rather than upon their own opinion and risk; That the Court had no proper means of examining into facts, nor the same checks which were provided by the Court of Chancery, by means of their inferior officers, to prevent frauds and abuses; that the disposing of the Duke of Buccleugh's money in this case, upon lands or heritable bonds, might alter the course of succession to the rents of the Duke's estate, in case he should die in the mean time; and therefore that the Court ought to recal and alter the terms of the former nomination of Mr Craigie, and allow the matter to be carried on upon the footing of the act of sederunt 1730.

On the other hand it was *observed*, That agreeable to the terms of the nomination of Mr Craigie, the savings of the Duke's estate had been lodged in the Bank of Scotland, and that it must continue there till the further orders of the Court; that the Court cannot therefore avoid going on with what it has begun; that the application of the money, in the manner proposed, would not alter the the course of succession; for that it must be understood as done without prejudice of the executors; and a clause to this purpose was added in the first interlocutor, 'authorising Mr Craigie to make purchases, and lend money.'

'The Lords, by a majority of votes, remitted to an Ordinary to inquire into 'the facts set forth in Mr Craigie's petition, relating to the purchase of Howpas-'lie, Maclair, and Kirkhouse; and afterwards, upon a report from the Lord Ordi-'nary, authorised Mr Craigie to make these purchases.—*See* Tutor & Pupil.

Act. *J. Craigie.*

Fac. Col. No 83. p. 146.

1787. *March* 8. William Macilwraith *against* Robert Ramsay.

No 180.
A factor appointed by Court of Session, in vir-

In 1779, Ramsay was appointed factor by the Court of Session on an estate sequestrated in terms of the act 1772. He neither lodged his accounts, nor made the dividends agreeably to the directions of the law.

No 180.
tue of the bankrupt act 1772, c. 72. found liable in the penalties, after the statute itself had been allowed to expire.

In 1784, after the above mentioned statute had been allowed to expire, Macilwraith, a creditor of the person whose effects had been sequestrated, complained, in a summary manner, of these proceedings, to the Court; insisting not only for redress of the wrong that had been committed, but also for an infliction of the statutory penalties.

A doubt having arisen, how far these penalties could now be sued for, the complainer

Pleaded; The parity of distribution directed by the act 1772 was indeed the creature of positive law; but the authority of the Court of Session to name factors, and to take cognisance of their proceedings in a summary way, is an inherent part of their jurisdiction. A power of punishing the factors appointed by them, by imposing adequate pecuniary fines, is of the same nature. Every judge must in this manner be enabled to enforce obedience to his lawful commands. Indeed any difficulty that could arise seems to be removed in the present case, by the posterior act in 1782, which provides, that the rights of creditors under 'the preceding bankrupt-statute shall remain entire.'

Answered; The power of imposing discretionary fines on the servants or officers of Court, according to the demerits of the offender, and that of pronouncing a decreet for a penalty prescribed by a particular law, without any regard to the alleviating circumstances of the case, are in their nature totally different from each other. The one is implied in the constitution of every court; the other, resulting only from positive enactment, must of course cease along with the law from which it originated. In the Court of Exchequer, accordingly, where, from the great fluctuation of the statutes relating to the revenue, this question might have been often agitated, no example can be given in which action was sustained for penalties incurred during the subsistence of a law which has been repealed, or which, being of a limited endurance, has been allowed to expire. And it is of no importance, that by a particular clause in the act of the 23d of his present Majesty, the rights acquired by creditors under the enactment of 1772 have been preserved. Without this provision, every one would have been at liberty, after the expiration of the first statute, to attach the sequestrated effects of his debtor, as if no such proceedings had been held. But a penalty not insisted for during the continuance of the act 1772 cannot be thought to fall under this exception. It might, with equal propriety, be maintained, that, in consequence of a bankruptcy occuring before the act was allowed to expire, creditors might now apply for a sequestration; or that, if a petition had been preferred for that purpose on the day the statute ceased to be in force, it would have been competent afterwards to proceed to the nomination of a factor, with the statutory powers.

No 180. By one interlocutor, the Lords dismissed the complaint as incompetent. But after advising a reclaiming petition for the complainer, with answers in behalf of Robert Ramsay, they altered that judgment, and

'Found the respondent liable in a penalty of L. 15 Sterling.'

Reporter, *Lord Henderland.* Act. *Geo. Fergusson.* Alt. *Dean of Faculty.* Clerk, *Home.* *C.*

Fac. Col. No 329. *p.* 504.

SECT. IX.

Interference of the Court of Session in the modification of Prisoners' aliment, and in the modification of the Fiars.

1710. *December* 28. John Glaswell *against* John Durham.

No 181.
Where Magistrates allow a greater aliment than is reasonable, the Lords are competent to modify it.

John Durham, merchant in Montrose, being debtor to Mr John Glaswell, merchant in London, in L. 53 Sterling by bond; he grants a factory to Harry Hawthorn, merchant in Edinburgh, to prosecute Durham for the said debt. Hawthorn raises caption, and imprisons him in the tolbooth of Forfar, who, after some weeks, applies to the Magistrates on the 32d act 1696, craving he may be either alimented by his creditor incarcerator, or set at liberty in terms of that law. Whereupon the Magistrates take his oath, that he was not able to maintain himself, and modified sixpence *per diem*; but order him to intimate the same to his creditor, which he does by way of instrument to Hawthorn, the factor; and upon the return of this, he requires the Magistrates to set him at liberty, seeing no obedience was given, nor aliment paid him. But the Magistrates demurred, seeing no intimation was made to the creditor. This forces him to apply to the Lords by bill, that they may ordain the Magistrates to liberate him, seeing he had done all the law required, and yet they refused to set him at liberty. *Answered* for the creditor, That intimation to the factor was not sufficient, seeing his trade lay mostly in England, and so they would know better than the factor the fraudulent conveyances of his effects. *Replied*, This would put an intolerable hardship upon the poor prisoner where his creditor lived in another kingdom; for, 1*mo*, He behoved to take out letters of supplement to cite him, whereas he had not bread to put in his mouth; 2*do*, It would oblige him to wait 60 days ere he could be relieved; whereas strangers in such cases should design a domicil, at which they may be cited. The Lords thought the factor, who had power to put him in, had likewise power to