Indies, there is a bill given in to the Lords by my Lord Secretary Carmichael, and other creditors of the said Sir George, craving that, till the return of the heir, or certioration to be given him, they would appoint Mr Lauder, the youngest brother, to be factor, for shearing the crop, disposing of the stock on the ground, and uplifting the rents, upon caution, to hold compt to the heir, when he returns, and to the creditors *medio tempore*. THE LORDS demurred, because the estate was not encumbered, nor affected by diligence or adjudications, in which case only, during the ranking of creditors, the Lords used to name factors; yet, the case being extraordinary, they interposed their authority to his being factor only for a year, in which time the apparent heir might return, and only to intromit with what falls to the heir; for as to the bygone rents and stocking, these falling under executry, they might apply to the Commissaries, and get a warrant to dispose on these; for, where law has provided a remedy, we are not to recur to extraordinary methods. In such cases the Lords have varied, sometimes allowing a factor, and at other times refusing, and leaving parties to follow their own way, as they think best, without interposing their authority.

No 177.

Fol. Dic. v. 1. p. 499. Fountainhall, v. 2. p. 103.

1708. *July* 13.

WILLIAM STUART Brother-german to Charles Stuart of Polcalk, Supplicant.

No 178.
A commission to manage the affairs of an heritor who had gone abroad, without leaving a factory, refused to be granted to one who offered caution to accompt for his intromissions to the absent heritor and all others concerned.

WILLIAM STUART having represented to the Lords by petition, that his brother Charles was at Barcelona, without having named a factor to manage his estate in Scotland, whereby his rents might perish in tenants hands, his debtors prove insolvent, and his creditors use diligence against his estate for want of one authorized to take course with them; and therefore craved their Lordships would grant warrant and commission to the petitioner for managing his brother's affairs in his absence, upon finding caution to compt for his intromissions to the said Charles Stuart, and all others concerned. THE LORDS refused the desire of the bill.

Fol. Dic. v. 1. p. 500. Forbes, p. 263.

1758. *January* 10. Supplication of Mr JOHN CRAIGIE, Advocate.

No 179.
The nature and effect of a factory *loco tutoris*.

AN application being made to the Court of Session, in behalf of Henry, Duke of Buccleugh, an infant, craving, that the Lords would name a factor *loco tutoris*, as no person appeared to undertake the management, Mr John Craigie advocate, February, 1756, was named factor, with instructions to follow the rules laid down in the act of sederunt 1730.

No 179.

It appeared afterwards, that the interlocutor appointing Mr Craigie factor, was purposely contrived to screen Mr Craigie by the authority of the Court, in all his proceedings. He was empowered to settle and clear the accounts of his management before this Court annually; and he was empowered to demand the authority of the Court when he employed the pupil's money upon interest, in purchasing land, or in any other negociation. In this form was the interlocutor pronounced, and the factory taken out.

This created applications to the Court for their authority in every particular act of management. Authority at first was given of course. But when these applications came to be frequent, which were always followed with the authority of the Court, as almost a matter of course with little or no examination, some of the Judges took the alarm, and scrupled greatly to interpose the authority of the Court, with so little deliberation, and so little pains taken to enquire into the management. This produced a debate in which the matter was thoroughly canvassed. It was observed, that in granting this factory we were misled by a resemblance of this case to a sequestration. An estate sequestrated is in the hands of the Court, and is managed by naming a factor, who is factor for the Court, and accountable to the Court as a private factor is to his constituent. The case is very different, where we name a factor *loco tutoris*, or a factor to manage for those who are absent. Necessity obliges us to assume that extraordinary power; for otherways individuals might suffer in their fortunes without a remedy. But there is no necessity that we exoner such factors, or direct their management. The Exchequer names tutors, but does not exoner them. They must account to their pupils; and it would be strange that we, acting through necessity merely, should assume more power in naming a factor *loco tutoris*, than the Exchequer pretends to do in naming a real tutor. To assume such power, far from being necessary, would be extremely inexpedient for the lieges, as well as burdensome upon the Court. In exonering factors upon bankrupt estates, we have the means in our own hands of being thoroughly informed; because the creditors are at hand, who are interested that the factor shall give a faithful account. But, in pretending to exoner a factor *loco tutoris*, there is no *altera pars*; and the Court has no means of being informed but by the factor himself. This is a matter not of slight importance; no man hereafter will ever undertake the perilous duty of a tutor, when he can act so much more securely as a factor *loco tutoris*. At that rate, the whole estates of the kingdom belonging to pupils will be brought under the management of the Court of Session, and leave them little time for other business.

It carried, however, by a plurality, that the management should be continued as formerly.

Sel. Dec. No 139. *p.* 195.

*** This case is reported in the Faculty Collection:

Upon the 5th of February 1756, a petition was presented to the Court in name of the Duke of Buccleugh, with the concurrence of the Marquis of

Tweeddale and Countess of Dalkeith, craving, That a factor *loco tutoris* might be appointed for the management of the Duke's estate. No 179.

Upon this application, the Court pronounced the following interlocutor. 'THE LORDS having advised the foregoing petition, they do nominate, autho-'rise, and appoint Mr John Craigie of Kilgraston, advocate, to be factor *loco* 'tutoris to the said Henry Duke of Buccleugh, with power to him to continue 'the plan of management of the infant's estate, in the manner the same has 'been formerly in use to be managed; and particularly with power to the said 'Mr John Craigie, to appoint chamberlains as usual over the several different 'estates, and all other officers necessary for extricating the said management, 'with the usual powers; and to settle and clear the accounts of the said cham-'berlains, or others; and to receive the balance thence arising, or any other 'debts and sums of money belonging to the said Duke; and to lodge the said 'balances, or any other sums belonging to the said Duke, that may from time 'to time be impressed in his hands by the chamberlains, or others, (after de-'duction of such sums as he shall have occasion to lay out on the Duke's ac-'count), in either of the Banks of Edinburgh, at such rate of interest as can 'be agreed on with them, for the Duke's behoof, there to remain until proper 'security shall be found, on which such sums may be laid out by authority of 'this Court; and with power to the said Mr John Craigie to settle and clear 'the accounts of his own management annually before this Court, and, 'in general, to manage the said Duke's affairs in the manner prescribed 'by an act of sederunt dated the 13th day of February 1730, entitled, "Act concerning factors appointed by the Lords on the estates of pupils "not having tutors, and others,' and in the manner above directed, until the 'factory shall be recalled by this Court, or the Duke's affairs brought under 'some other administration, which may supersede the said factory; the said 'Mr John Craigie always before extract, finding sufficient caution to be ac-'countable for the effects of the said Duke, falling under his administration, 'in terms of the said act of sederunt.'

In August 1756, Mr Craigie applied to the Court, desiring their authority to make purchases of the lands of Reynaldburn, and others, and to lend money to the Earl of Hyndford and Reynaldburn. The Court remitted to the Lord Ordinary to examine into the facts, and upon his report authorised these purchases and loans, with a quality expressed in the following words: 'And as to 'the influence the disposing of the monies in the manner proposed and autho-'rised may have on the succession to these sums in case of the Duke's decease, 'the LORDS leave that point to the determination of the law, according as the 'event shall happen.'

Upon the 10th March 1757, the LORD ORDINARY, in obedience to a remit from the Lords, authorised the purchase of the lands of Easter Haychesters and Lairhope, and others, and a loan of money to Mr Drummond of Pitkellony.

Mr Craigie having afterwards applied to the Court for authority to purchase the lands of Howpaslie and Maclair, and also the lands of Kirkhouse, it was

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.