

No 11. creditors themselves.—The process of ranking was sleeping at the time the petition was given in.—No authority is produced from the creditors whose names are assumed to the petition; and the loose and hurried proceedings before the Lord Ordinary can infer no consent on the part of the other creditors.

The office of a factor, *loco tutoris*, is very different from that of a judicial factor on a sequestrated subject; and, from the nature of it, requires more extensive powers.—But there is no reason for supposing, that even his powers extend to the submitting of claims.—In the case of Brown *contra* Scoular, the decret-arbitral was acquiesced in by the minor and his friends; and the challenge was brought by the party who contracted with the factor; against whom it was pleaded, that he was barred *personali exceptione*.

Besides the defences above-mentioned, the defender founded on some transactions after the decret-arbitral, as implying an homologation of it by the creditors.

The COURT were of opinion, that, under the usual powers of a judicial factor on a subject, that of referring claims is not included: And it was said by several of the Judges, that the Court could not grant such a power on the application and consent of only part of the creditors:—That, even though there were an application from the whole creditors, it was not the province of the Court to grant such a power.

The judgment was, 'finding that the factor had no legal or sufficient powers to enter into the submission on which the decret-arbitral proceeded; and that the same were not sufficiently homologated by the creditors, so as to supply said original defect; therefore reduce,' &c.

Act. *D. Rae, Ch. Hay.*

Alt. *Crosbie.*

Fol. Dic. v. 3. p. 201. Fac. Col. No 30. p. 49.

S E C T. III.

Rules of accounting.—Right to salary.—Malversation.

No 12.

As at what period chargeable with the price of victual sold.

1692. December 15.

BRUCE of Bordy *against* KEIRIE of Gogar.

THE LORDS thought the margining the act by Charles Oliphant unwarrantable, bearing a restriction of Harry Dow's sum of 20,000 merks to 13,000

merks, seeing he should not have given out the act in these terms : And found by Gogar's back-bond, he was a trustee thus far, that he having not paid the full price for the lands, as to any sums of Bordy's he transacted, he could not charge Bordy with any more than what he actually paid, and that the eases behooved to accresce to him ; and therefore, before answer, whether they would loose the act in that point or not, they ordained Keirie to give his oath of calumny, whether he did not compone Dow's debt for 13,000 merks, less or more. See WRIT.

No 12.

1694. June 20.—THE LORDS found Kiery not accountable any farther for the emoluments of the commissariot but conform to the accounts of the factor put in by the Lords, and that the said factor shall only account for actual intromission since 1680, when he was debarred by Bordy, on pretence that Gogar was paid of the sums for which he had a right to the commissariot dues, in corroboration. The question arose, if the instrument taken *contra* Bordy sitting in judgment was probative, his oath of calumny being taken at the bar, and he not positive. The witnesses insert were ordained to be examined. The *second* question was, Whether the Sheriff's fiars were to be the rule, or the prices set by the regality of Dumfermline, within which the lands lay. But the LORDS chused the Sheriff's fiars, in regard the other are more properly made *in modum penæ* between master and tenant, in case of not delivering the victual.

Fol. Dic. v. 1. p. 288. Fountainball, v. 1. p. 532, 620.

1711. June 22.

PATRICK HERIOT, Merchant in Fisher-row, *against* ARCHIBALD KER, Writer in Edinburgh.

IN the count and reckoning at the instance of Patrick Heriot, and the other Creditors of Monkton, against Archibald Ker, late factor to the estate, the LORDS refused to allow any factor-fee to the said Archibald Ker, in respect he had been negligent, and had given up, in his accounts, two articles of rests that had been really paid to him. Albeit it was *alleged* for Mr Ker, That this could be no reason for denying him a salary, because his negligence prejudiced nobody but himself ; he being liable to the creditors for what is lost thereby without any allowance of expenses, which his doing of diligence would have cost them, and perhaps, at the long-run, would not have operated their payment ; so that it is more advantageous to the creditors, that Mr Ker hold count to them for the rents, than that he could instruct ineffectual diligence done by him for recovery thereof ; and, there is no more reason to refuse him a salary, than there is to detain a servant's fee, upon the account of some things lost by him to his master, albeit the servant had made up his master's loss. For the LORDS thought, that Mr Ker, who had been negligent, and put his constituents

No 13.

A factor on a bankrupt estate was allowed no factor-fee, in respect he had been negligent, and had given up, in his accounts, some articles as due, that had been really paid to him.