

APPENDIX.

PART I.

DILIGENCE.

1776. November 14.

AGNES WATSON, and JAMES TAYLOR, her Husband, *against* AGNE MATHIE,
and JAMES WEIR, her Husband.

AFTER the death of James Watson, merchant in Greenock, in 1750, his children, Agnes the pursuer, Andrew, and James, both since dead, made choice of Robert Rae, James M'Neil, and Gabriel Mathie, the defenders' father, as their curators, who did accordingly act in that capacity for 5 years, until James the youngest became of age, but without making up any curatorial inventories. After the curatory expired, an action was brought against the curators to account for their intrusions. With regard to Robert Rae, it appeared, that he had the management of some mercantile concerns, in which the late Mr. Watson had been his partner, and that after the curatory commenced, he had received different payments to account of these concerns. While the action depended against the curators, Mr. Rae died, and his heirs having been in bankrupt circumstances; when the decree was pronounced, the other curators were found liable *singuli in solidum* either for omissions or intrusions. It was insisted, that the defender, as representing her father, must be liable for those sums which had come into Mr. Rae's hands after the curatory commenced. Against this, the defender pleaded.

That these sums had been paid to Mr. Rae *privato nomine*, as manager of the mercantile adventure, and not as curator; that when the money had been so placed in his hands, his circumstances were good, and, indeed his credit till the time of his death, which happened many years after the curatory expired, was not questioned, insomuch, that his succession was taken up by his heirs after his death; consequently the pursuer might have got security of this debt from Rae; it would therefore be extremely hard to punish the representatives of the other curators on account of that neglect. The curators had every reason to consider the money as perfectly secure; and it is enough, as Mr. Erskine has said, if curators leave the money of the minors

No. 1.

Co-curators were not found obliged to recover from one of their number funds which had come into his hands *privato nomine*, as he had continued solvent, until the expiry of the curatory.

No. 1. in responsal hands. Ersk. B. 1. Tit. 7. § 24, and 25. Lord Bankton has also said, if the debtors of the pupil are in the same condition upon expiration of the office as they were when it began, the tutor is not to be charged with these debts, whether they be good or bad. Vol. I. p. 171. § 37. Besides, in the present case the eldest of the minors was *majoremnitate proximu*, being 19 years of age when the curatory commenced, and was therefore well able to look after his own affairs. The worst consequences would arise from a decision in the pursuer's favour, as many heirs might be ruined after the death of their predecessor on account of his having undertaken the gratuitous and even pious office of tutor or curator, and consequently no persons would be found to accept of an office attended with so great danger.

Answered: It is not disputed that the sums in question came into the hands of Mr. Rae after the curatory commenced; yet although that money arose from transactions during Mr. Watson's life, of which Rae had the management, he became the debtor of the children, and never had been the debtor of the father on that account; consequently, as that debt did not commence until after the curatory, Mr. Rae must be considered as holding their money from that period as curator for them. Had any other person received that money, and paid it afterward to Rae, he and the rest of the curators *in solidum* would have certainly been liable for such intromission. Where then is the distinction, although Mr. Rae himself received the money as acting partner during the curatory? But whether the money was vested in him *curatorio*, or *privato nomine*, it certainly was the duty of the curators to have those debts which depended only upon open and loose accounts, constituted by bond or bill bearing interest; the omission of which was of itself sufficient to render them liable to the minors. The tutor or curator is liable to that degree of diligence which a good *pater familias* ought to observe; and it has been understood to be their duty to get all debts arising from open accompts liquidated and paid up as soon as possible. There has been no *mora* or neglect on the part of the pursuers, as the action commenced immediately after the curatory expired, which continued still in dependence.—The Lord Ordinary found “the pursuers’ claim to subject the defender for the debts due by the deceased Mr. Robert Rae, not well founded, in respect that these were private debts due by Rae *proprio nomine*, not as curator; and also in respect the pursuer does not offer to prove that Rae at the expiry of the curatory was insolvent.”

Upon a reclaiming petition, however, the Court altered that interlocutor. The defender then presented a petition against this judgment, and the Court, having appointed it to be answered, and the procedure before the inferior Court to be printed, returned to the Lord Ordinary's interlocutor, and refused a petition on the part of the pursuer reclaiming against that judgment.

Lord Ordinary, *Auchinleck*. Act. *Wight et Craig*. Alt. *Ilay Campbell et Mat. Ross*.
W. W.