

1772. *January 31.*KOEHLER, and His CURATOR *ad litem*, against PAUL NEIDRICK.

AN action was sued by George Frederick Koehler, son to the deceased George Frederick Koehler, and William Henry, his attorney, (by virtue of a letter of attorney signed by him, according thereto, a minor of 15 years, with consent of Isaac Hawley of Portsmouth, his uncle,) concluding against Neidrick, as executor appointed by Koehler senior, for payment of the half of the defunct's personal estate, bequeathed by his will to the pursuer. The Lord Ordinary, in respect of the pursuer's being minor, appointed William Henry (the attorney) curator *ad litem*, and afterwards passed an interim decree for a balance confessed by the defender.

In a suspension of this decree, which came to be discussed by the Lord Ordinary to the original action, the charger having produced an appointment, by the Chancellor of England, of Isaac Hawley to be his guardian, the Lord Ordinary "found the letters orderly proceeded; but found, that the said Isaac Hawley, the charger's uncle and guardian, must concur with him in granting the discharge to the suspender for the sum charged for." And, upon a representation for the suspender, stating it to be the law of Scotland, that no person was obliged to pay a debt to a minor, unless that minor was legally authorised by tutors and curators to receive the money; and that the appointment, produced, of the charger's uncle to be his guardian, did not, from its nature, sufficiently authorise him to receive the money charged for, but seemed rather to resemble the nomination of a curator *ad litem*. The Lord Ordinary found, "That, by the law of Scotland, a payment made to a minor not having curators, is a valid and effectual payment; and that the authority of the English guardian, in this case, is required by the interlocutor, only for the further security of the minor, that the money may not be squandered by him, for which reason it was not opposed by the pursuer; therefore, refused the desire of the representation, and adhered to the former interlocutor." And, afterwards, "found the charger entitled to the expenses incurred by him in the suspension, and also the expense of extracting the decree."

Pleaded by Neidrick, in a reclaiming petition; That payment of any considerable sum of money made to a minor, though not having curators legally authorised to act for him, is not, by the law of this country, such a valid payment as can effectually liberate the debtor who makes that payment at the hands of the minor; and that, as well in the nature of the thing, as according to the principles both of the civil law, and that of this country.

In the nature of the thing, it is a duty incumbent upon every debtor, either when he makes offer of a voluntary payment to a minor-creditor, or is called upon by that creditor to do so, to take care that the money so paid by him be not embezzled by coming directly into the minor's own hands; and that, if he

No 92.
Payment made to a minor, not having curators, valid and effectual by the law of Scotland.

No 92. neglects this duty, he is answerable to the minor, unless he shall be able to make it appear, that the money was profitably applied for his use.

Again, that the principles of the civil law were favourable to his plea, appeared from the following texts, l. 2. C. Si tut. vel cur. interven.; l. 1. C. Si advers. solut.; l. 25. C. De administrat. tut. § 3. Institut. Quib. alien. licet vel non; l. 7. § 2. De minor.—And, as to the practice of this country, there occurred no reason to the suspender, why the principles of the civil law, which seem to be solidly founded in common reason, should be held to be departed from; as the law of this country has, in many particulars, adopted the principles of that law, especially in the matter of tutors and curators; and he has never been informed of a decision of this court, whereby it was found, that a debtor was in safety to pay to a minor without consent of his tutors or curators, or that he could be compelled so to do; on the contrary, it is supposed by a decision, Watt against Panton, No 88. p. 8971. that a debtor was not bound to pay to a minor not having curators.

Answered; Two points are clearly established in the law of Scotland; *imo*, That no minor whatever, who has no curators imposed upon him by his father, can be compelled to accept of any; since every minor, who has sufficient confidence in his own abilities in this particular, is entitled to take upon himself the full management, and free administration of his own affairs, subject to as little controul as if he were a major; *2da*, That no person whatever can be compelled, on any account, to act either as a tutor or curator to another. And, by the practice of this country, numberless minors do every day manage their own affairs, without the aid or interposition of curators, as fully and freely, in all respects, as if they were majors; either because they do not choose to elect curators to themselves, or that the persons who have been appointed curators to them decline to accept the office. In a trading country, such as this, not only many minors, but the whole subjects, would be put in a most disagreeable situation, were the suspender's doctrine to be held as the law of Scotland. But he has not been able to point out a single authority from our law books, nor one precedent from decisions, tending to support it. The decision cited rather serves to refute it; and is, indeed, when examined, a precedent in point for the charger. His reliance, then, is on a few quotations from the civil law, the subtillies whereof we have not adopted; neither are they applicable to the present case. On the other hand, the judgment of the Lord Ordinary is agreeable to the language of all the writers on the law of Scotland, such as Stair, Bankton, &c.; and Erskine's words are precisely in point, tit. Minors, &c. § 6. and 18.

'THE LORDS adhered, and found the petitioner liable in the expense of the answers.'

Act. W. M^r Kenzie.

Alt. D. Graeme.

Clerk, Ross.

Fol. Dic. v. 4. p. 5. Fac. Col. No 2. p. 2.