

1773. July 16. AGNES WATSON *against* MARY RAE.

Mary Rae being sued in an action of count and reckoning, as representing her father, who had been one of the pursuer's curators chosen by herself, the defender objected to certain articles of the charge, founding upon a declaration in the act of curatory, that the curators should not be liable for omissions, but only for their actual intromissions; and the question came to be, Whether this quality adjoined to the nomination was effectual?

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Minors may not elect curators with a quality that they shall not be liable for omissions.

The Lord Ordinary repelled the objection, in respect the curators were not named by the father, but chosen by the minors, who could not exempt from omissions.

Pleaded in a reclaiming bill: The defender does admit it to be a fair and just inference from the act 1696, that the father could not, prior to that act, nor can yet, in any case not falling under that act, exempt tutors and curators from omissions; but it does not appear that the conclusion is necessary to the case of curators chosen by minors themselves. There is a great difference between persons acting as administrators in the affairs of others, and persons acting in their own affairs. A limitation in the powers of the former cannot justly infer a limitation as to those of the latter. Minors are allowed, by law, the election of their own curators, and it is certain may err as essentially in the choice of improper persons as in any one article. Nay, the law has left them at liberty, if they choose, to act without curators at all; and that being the case, there does not appear any good reason why they should not be allowed also to choose curators with this qualification. It might, in some cases, be attended with prejudice to them, as well as the other powers left with them by law; but it is certain, that cases might be figured, in which it would be extremely hurtful to them to want that power. Many persons, however disposed and determined to act with perfect integrity and fidelity to the minors, might decline to accept the office of curator, if they were to be liable for omissions. Indeed, the present case seems to afford an example.

The defender does not find it laid down by any lawyer, that minors may not elect curators with this condition; and the only decision that appears upon this point takes it for granted that they have such power.—It appears from the case of Liberton, No. 150. p. 16327. that a party having nominated tutors to his child, with this quality, that they should not be liable for omissions, and they being thereafter chosen curators by the minor himself, but without any such quality, though they alleged that the quality in the father's nomination should be still understood repeated, the Lords found these tutors not bound to account for omissions, but only for actual intromissions, in the terms of the father's nomination, though it was before the law was made giving parents that privilege; but their Lordships found them liable for omissions as curators; for in that capacity they had no dispensation. Forbes, the reporter, indeed says, that the curators were actually

No. 298. chosen with this qualification ; but this seems to have been a mistake : No such thing is said by Fountainhall ; and the judgment of the Court expressly says, that they had no such dispensation.

It is established, that all acts by minors without curators are valid. It does not appear why this act of choosing curators should be an exception from the general rule, more especially, as in it the minor is by law provided with the advice and assistance of his nearest relations. In the present case, too, some of the minors were very near major. In fine, the curators, in this case, could not, contrary to the express terms of the act of curatory, be charged for more than what they actually received.

Answered : Before the act 1696, all tutors and curators, by whatever person named, were liable not only for intromissions, but for omissions : And the act made an exception from this rule only in the case where the tutors and curators were nominated by a father to administer any estate descending from the father himself. From the words of this act it appears, that tutors and curators are put upon the same footing ; that it is the father only, whether in the nomination of tutors or in the nomination of curators, that has the power of declaring that the tutors and curators shall be liable only for intromissions, and not for omissions ; and ; therefore, it clearly follows, that, in the nomination of curators by any other person, this clause, that curators shall not be liable for omissions, cannot be attended with any effect.

The defender, in alleging that it is not laid down by any lawyer, that minors may not elect curators with the above condition, is mistaken.—See Bankton, B. 1. Tit. 7. § 38. ; and Erskine, B. 1. Tit. 7. § 27. These two authors, as indeed appears from the words of the act itself, consider it as applying equally to tutors and and curators ; and no exception is made in the case of curators named by minors.

With regard to the decision cited by the defender, Mr. Forbes expressly takes notice, that the curators were chosen by the minors, with the quality that they should only be liable for intromissions ; and that, in that case, the Lords found, that the tutors were liable only, in terms of the father's nomination, for their actual intromissions, and not for omissions ; but that, as the same persons were curators, not by the nomination of the father, but by the minor's election, they were liable, *qua* curators, for omissions as well as intromissions. Lord Fountainhall, indeed, does not say so expressly, that the tutors were chosen with this quality ; but still it cannot be inferred from the case, as stated by him, that he meant to say, that this quality was not repeated in the nomination of the curators.

“ The Court adhered to the Lord Ordinary's interlocutor.”

Act. *W. Craig.*

Alt. *Ad. Rolland.*

Clerk, *Campbell.*

Fac. Coll. No. 82. p. 207.