

1697. December 31.

WAIT against PANTON.

No 88.

A BOND of borrowed money being taken payable to a tutor for his pupil's behoof, and after the years of pupillarity, the minor having charged for the same with concurrence of his *quondam* tutor, the debtor suspended upon this reason, That the minor not having chosen curators, there was none authorised to give him a valid discharge, and cited the authority of L. 7. § 2. D. De Minoribus. ' Si minor convenat debitorem, adhibere debet curatores, ut iis solvatur pecunia, alias non compellitur solvere.' THE LORDS found, the money being payable to the *quondam* tutor, that the interposition of his authority was sufficient warrant for the debtor to pay.

*Fol. Dic. v. i. p. 578. Fount.*

\* \* \* This case is No 12. p. 3356, *voce* DEBTOR and CREDITOR.

1707. July 23.

ALEXANDER ALISON, Writer to the Signet, against The CHILDREN of WILLIAM TRENT of Pitcullo.

IN a competition of the Creditors of the Laird of Forret, the Children of the deceased William Trent of Pitcullo, having founded on an assignation granted by the common debtor of his Lady's jointure to their father, established in their person by confirmation before the Commissary of St Andrews; Alexander Alison *objected*, That no respect could be had to their title, because it bears them who are pupils to be surrogated in the confirmed testament to the Procurator-fiscal, without being authorised by tutors for that effect, which is contrary to the act 26th, Parl. 1690; *quod jure prohibente fit, est ipso jure nullum.*

*Answered*; It is *jus tertii* to Mr Alison to make such an objection; the act of Parliament being chiefly designed to prevent vexation occasioned to the lieges by charges of horning at the Fiscal's instance. And here the Fiscal was not decerned after a charge given to the nearest of kin; but only the Commissary continues the old style of confirmation, ' Decerning the Fiscal to the behoof of the Children.' Now, seeing these are actually confirmed, what doth it matter whether they are said to be surrogated to the Fiscal or not? Yea, the Commissaries of Edinburgh always used that old style, except within these two or three years, and it is still used in all inferior Commissariots; *2do*, It is not competent to any person to allege against a pupil the want of tutors, except in a process only; for in other things *potest conditionem suam meliorem facere*, without the authority of tutors; nor again, does the act of Parliament require precisely tutors and curators to concur in the confirmation, but only enumerates the persons who may be confirmed, excluding others.

No 89.

A confirmed testament wherein the nearest of kin, who were pupils, were surrogated to the procurator-fiscal, without being authorised by tutors for that effect, sustained notwithstanding of the enactment in the act, 26th Parl. 1690.