

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.

No 89.

*Replied*; It is a necessary security for all parties having interest, that a confirmation intrinsically null be not sustained; so that it is not *jus tertii*, but *exclusivum juris agentis*. And inferior Commissaries should not be encouraged to continue this informal method after the Commissaries of Edinburgh have laid it aside; for *consuetudo non usque adeo sui valitura memento ut aut rationem vincat aut legem*.

THE LORDS repelled the nullity, and sustained the Children's title.

*Fol. Dic. v. 1. p. 578. Forbes, p. 191.*

1747. December 3.

MORISON against STEWARTS.

No 90.

A minor whose administrator in law was out of the kingdom, was authorised by the Lords to receive money, and employ it on a security approved by them.

JOHN STEWART, grandson and heir to the deceased Lord Roystoun, having right by progress to an heritable bond granted by William Morison of Craigleith, to Sir William Baird of Newbyth, did, with consent of John Stewart elder, his father and administrator in law, convey the same to Mrs Isabel Stewart, widow of George M'Kenzie, younger of Roystoun, in security of L. 100 annuity payable by said John Stewart the heir to her.

William Morison proposing to extinguish the debt, duly premonished the said John and Mrs Isabel Stewarts to receive the money as at Martinmas last; and understanding that the said John Stewart the creditor was under age, and that his father and administrator was out of the kingdom, applied by bill of suspension, craving that he might be authorised by the Lords to consign or to pay up the money on getting a valid renunciation, and that the said John Stewart might be ordained to chuse a curator, who might concur with him in such renunciation.

This bill was passed upon report, and a tutor *ad litem* appointed to John Stewart on his application; and now at discussing, Isabel Stewart admitted the facts stated in the bill, and consented to the raising the money and re-employing the same; and represented that she had procured an heritable bond for that purpose on the estate of Inverighty, in security of the said L. 100 of annuity to Mrs Stewart, and to the said John himself, ready to be delivered upon payment of the money; and concurred with the debtor in praying that the Lords might, in such a manner as they should think proper, interpose their authority, that there might be a valid renunciation.

The point reasoned on the Bench was, In what manner the Court was to interpose in this case, Whether by directly authorising the payment and acceptance of the security offered for the money, or by appointing an *interim* curator who should find caution? Some of the Lords inclined to the last, doubting how the Court could directly authorise, as they knew not the sufficiency of the person who was to grant the new bond; and that if he was insufficient, the Court was caution for the money. Others again doubted, if the Court could at all appoint an *interim* curator even *ad effectum*, as the minor had an administrator;