No 202.
Effect of a transaction in which a tutor had taken an assignation to himself.

1662. *December.* Tutor of Stormont *against* His Pupil.

There being a compt and reckoning pursued betwixt Mr John Murray, tutor of Stormont, and the Viscount his pupil; the tutor charged him with 1000 merks, with the annualrents thereof, whereunto he was assigned by Mr Patrick Murray, his brother's son, and which Mr Patrick was infeft in an annualrent furth of the lands for his security. It was *alleged*, That the tutor could not charge his pupil with that sum; because, by the law *Novel.* 27, it is not lawful to a tutor or curator to take assignations or rights of any thing belonging to his pupil, wherewith he may charge him; and the reason is, because, if this should be allowed, then a tutor or curator finding bonds lying in his pupil's charter chest retired, may collude and take assignations to satisfied bonds from the creditors, and ruin the pupil. Likeas, this assignation was granted without an onerous cause, except 100 merks; and it is not consistent but there might have been a discharge of this debt in his pupil's charter chest before the recovery of the assignation. And farther, this pursuer being also tutor to the defender's father, by contract betwixt them in his majority, the debt owing by the father was then given up to be 9000 merks, whereof this was no part.—Likeas, the pursuer was in *pessima fide* to take assignation; because the debt was payable to Mr Patrick and the heirs of his body, which failing, to return to the house; and in prejudice of the family, he ought not to have taken a right to this debt, whereunto his pupil was to succeed, failing heirs of Mr Patrick's body. It was *answered*; That the civil law doth not bind us: That there is nothing more ordinary, that when tutors and curators advance money of their own for payment of their minor's debts, they take assignations, and thereupon crave payment of what they truly paid therefor: That the assignation grants only the receipt of 100 merks, for which, and for the love and favour Mr Patrick carried to his uncle, he did assign him to this debt; with this condition, That he being then to go out of the country, if he should return, his uncle should be accountable to him, and repone him. So that in effect, it was but a tailzie and provision of the sum to him after Mr Patrick's death: That there was no presumption that the debt was paid, because it was all Mr Patrick's portion, and due by a registered infeftment, which, if it had been paid, it would have been renounced by a registered renunciation: That in the contract betwixt the tutor and his first pupil, there is a clause by which the pupil is obliged in general to relieve the tutor of all debts owing to Mr Patrick and another brother; which obligement to relieve, is equivalent as if this debt and assignation had been reserved: And though the debt was appointed to return, failing the heirs of Mr Patrick's body, that did not take from him the power of disponing. It was *replied*, That the allegeance and several members thereof were opponed; and that by the said contract, the tutor was discharged by his then pupil, without making a particular account, and that he

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thereby got gratis a discharge of the reversion of the lands of Couden, which his pupil probably would not have done, if he had known of the right he had taken to the said debt; and if it had been intended, that the said right should have been reserved entire, the tutor should either have caused insert a particular reservation thereof, or should have taken in his own name a bond from the Laird therefor. It was *answered;* That the reason why the tutor did not mention the assignation in the contract, nor took not the pupil's bond, was, because Mr Patrick being out of the country, might have returned, and in that case, he was to be reponed. It was *duplied*, and offered to be proved, That Mr Patrick was long before dead, and reputed and held to be so in the country.

The Lords found the allegeance relevant, the pupil proving, that Mr Patrick was dead the time of the contract, and reputed to be so by his friends in the country. *Ratio*, Because, if he was alive, and thought to be so, the debt was his own after his return, and the tutors' right thereto, was, in that case, not effectual; but if he was not dead, the Lords thought Mr Patrick should have expressed a reservation of it, or taken security for it; and they thought the general obligement to relieve, was not equivalent to a reservation. Likeas, they conceived, that the tutors' part was not fair, considering the provision to return in favours of his own pupil.

Gilmour, *No* 54. *p*. 38.

1669. *July* 2. Wilson *against* Dawling.

No 203.
An heritable bond being produced by the heir cancelled is to be presumed paid by him, and not by the executor, the heir always making faith.

In a compt and reckoning, the said Mr George Wilson, as heir to one Wilson, his uncle, and Dawling, who had married his uncle's relict, who was executrix, there being a debt given up in the inventory of the testament of 200 merks due by bond to one Shorteous, whereby the free goods were diminished in the total; the minister alleging, that he had paid that debt, and retired the bond, which he produced cancelled; it was *alleged*, That that did not prove payment, unless he had a discharge from the creditor. Whereupon Shorteous was ordained to depone; and being examined, did declare, that the sums of the bond were truly paid to one Milne in her name, who, by her order, delivered up the bond, but that she knew not whether the payment was made by the heir, or the executor. The Lords, in respect that both the executor and Miln were dead, that no more trial could be made in the cause, and the bond being heritable, and in the heir's possession, did sustain his allegeance of payment, he always declaring upon oath, that truly he paid the same with his money.

Fol. Dic. v. 2. *p.* 152. *Gosford, MS. No* 153. *p.* 60.