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. No 202.

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.