

No. 150. The pursuer then insisted against the tutrix for paying so far as she had intruded. It was answered, That she was but called for her interest, to authorise her pupil, but not to pay, neither could she be liable to pay, unless a decree had been first established against the pupil, and then it had been arrested in her hands, and pursued to be made forthcoming.

And yet the Lords found the tutrix, *hoc ordine*, liable.

*Stair, v. 1. p. 317.*

No. 151. 1665. December 5. HILL against MAXWELLS.

It was found justifiable in a tutor to apply heritable bonds to the reparation of the dwelling-house, since the benefit thereof was to accresce to the heir, and not to the executor.

*Stair.*

\* \* This case is No. 2. p. 14355. *vide* SERVICE AND CONFIRMATION.

No. 152.

In singular cases and circumstances, the Lords *ex officio*, and before answer, take the oath of the tutor in causes against the pupil.

1666. January. HAY against OGSTOUN.

Mr. Francis Ogstoun, servitor to the Lord Advocate, having died, and having left a legacy to Mr. John Hay, servitor to one of the Clerks of Session, who lived not long after him, and there being withal an alleged bond, granted by the said Mr. Francis to the said Mr. John, for 1000 merks, which he assigned to John Hay, his son, the said John Hay, with concurrence of John Hay, writer in Edinburgh, his curator, and which curator is also executor to the said Mr. John, pursues Jean Ogstoun, sister and executrix to the said Mr. Francis, for payment; who alleges, That she having but lately come to Edinburgh, after the decease of her brother, and of the said Mr. John Hay, her brother's papers were delivered to her as executrix, by the same pursuer, who is executor to the father, and curator to the son, and that without mention of any bond granted by her brother to the said Mr. John; but, on the contrary, it is unlikely he would have left him a legacy, without mentioning the debt, that it might be known whether the legacy was by and attour the debt, or in satisfaction thereof; and therefore craved, that the said John might *ante omnia* give his oath, whether or not this bond was retired by Mr. Francis in his own name as satisfied, and found amongst Mr. Francis's papers, and what he knows anent the payment thereof, in whole or in part, before Mr. John assigned the same to his son.

Which the Lords found reasonable, notwithstanding it was answered, that his oath could not prejudice the minor, who is assignee; reserving the consideration of what the oath should work at the time of the advising.

*Gilmour, No. 179. p. 129.*