No. 194. The defender answered, That he could not be liable as tutor, because he was content to give his oath, that he knew not that he was nominate; neither as pro-tutor, because he had access to the charter-chest amongst many other friends of the defunct, and kept a key at their desire, and the defender's eldest brother another; and as for the intromission with the coal and rent, most of it was after the comprising; and as to what was before, he was then in his father's family, who had an infeftment of the land and coal ay and while he was satisfied of £.1000, by which, having begun his intromission, though he had continued the same for some time after that sum, he could not therefore be concluded as *gerens pro tutore.*

The Lords found it relevant to be proved, that the defender knew the nomination when he did the foresaid acts, to infer his acceptance of the tutory; but if it were not proved, they found the acts not relevant to infer *gestionem pro tutore.*

Stair, v. 2. p. 637.

1678. *December* 6. BEATSON *against* BEATSON.

No. 195.
Uplifting the profits of a going coal found a sufficient qualification of acceptance where the person had been named tutor, but not to render him pro-tutor, if not named tutor.

Beatson of Pugilt pursues Beatson of Kilrie for count and payment, as tutor, or pro-tutor to him, because he being nominate as one of more tutors, did intromit with the charter-chest, and with the profit of a coal-heugh, of considerable value, which was all the pupil had un-liferented, and did transact with the defunct's creditors, and apprised the pupil's estate, and by several missives, declared that he acted all for the good of the brother's children. The defender alleged *absolvitor*, because it is not, nor cannot be instructed that he knew of a nomination, nor did he make use of any of the defunct's writs, but did only concur with the other friends to preserve them; and for his intromission with the coal, it was at his brother's desire, for satisfaction of a sum affecting the same; and for his letters, he is willing to make them good, by applying all his transactions to the pupil.

The Lords found the defender liable as tutor, if it be proved that he knew of the nomination, and continued to intromit with the coals long after it was free of all burden, as being an act of administration; but if it be not proved that he knew of the tutory, found him liable by intromission with the coals, not as pro-tutor, but as *negotiorum gestor*; neither by his transactions or letters, but ordained him in respect thereof to apply the benefit to the pupil, but found him not liable upon keeping the defunct's writs, he not making use thereof.

Stair, v. 2. p. 654.

1679. *November* 15. FRASER *against* The LORD LOVAT.

No. 196.

The Lords found this to be a passive title on a pupil, that his tutors had intromitted with rents of lands and set tacks, which the Lords found to bind him as if