

her sister the heretrix, for the 20,000 merks, and for declaring that she had right to the half of Margaret's 10,000 merks, as falling to the heretrix and Mary as the two nearest of kin to Margaret. The defender alleged no process, because the pursuer was not lawfully authorized, but by a tutor dative, whereas there was a tutor of law served within a year after the failing of the tutor nominated, the mother having married, and the tutor nominated having died. *2do*, The division was not valid, because not made before Margaret's death. *3tio*, It was exorbitant, because the defunct's mind was not followed, who provided, that in case there were but one daughter she should have £.12,000; and the matter coming to that case by the death of Margaret in her childhood, the friends should only have determined her share to be £.12,000. The pursuer answered, that the tutor of law not having served within a year after the defunct's death, and not having removed the tutors nominated, in respect the testament, whereby they were nominated, is subscribed by two Ministers as notaries for the defunct, but was not subscribed till he was dead, and however, that could not stop the process, because the tutor of law was willing to concur, or the Lords might authorize by appointing curators *ad hanc litem*: And as to the division, it was valid, albeit Margaret was dead, because both Mary and Margaret surviving the term of payment, did transmit their shares to their executors, and the division being referred to friends who had an arbitrament, the same could not be questioned upon the difference of 18,000 and 20,000 merks, which was *modica* and not enormous.

The Lords sustained the division, and found, that Mary had right to 20,000 merks as her own part, and to the half of Margaret's ten, the other half whereof fell to the heretrix, and preferred the tutor of law, being served within a year after the failure of the tutors nominated by the death of the one and marriage of the other, and found the nomination valid, if the defunct gave warrant to the Ministers to subscribe, though they subscribed after his death.

Stair, v. 2. p. 594.

1678. July 19.

BEATSON *against* BEATSON.

Beatson of Cardon, having in his testament nominated Robert Beatson and others tutors to his bairns of the second marriage, the said Robert did transact the defunct's debts, and appraised his estate; but, by a back-bond declared, "That the children should have the benefit of the compositions, providing, that if they died without children, the benefit should be his own, they always ratifying at majority. David Beatson, heir of the second marriage, raises a reduction on these reasons; *First*, That the defender was his tutor nominate, and did accept, by opening the charter-chest, and taking out writs, by uplifting of the defunct's coal worth £.150 Sterling yearly, and of his land-rent, which acts are either sufficient to instruct accepting to be tutor, or acting as pro-tutor; and in either case all benefit the defender made of the transactions must accresce to the pursuer without limitation.

No. 194.
What infers
acceptance
by a tutor?

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 *absolutor*, 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