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

they had served him heir, though the one gives him advertisement to seek restitution *intra annos utiles*, and the other does not; but here he was yet within minority, and he might revoke or seek redress. No. 196.

Fountainhall MS.

1680. *June* 24.

WRIGHT, and JOHN HAMILTON, Her HUSBAND, *against* WILLIAM VEITCH.

No. 197.
It was found that a tutor might use the kain fowls of his pupil's lands.

In a tutor count, the Lords found the kain fowls of the pupil's lands might be used by the tutor as a casualty for his pains, and where they are numerous, then *eo casu* the burden of the administration will be proportionally great; and in buying land, the kains are not estimated, and it is to be presumed the tutor uses them when he is employed in his pupil's affairs; and though it be *officium gratuitum*, yet law deals strictly with them in the matter of diligence, and *gravatus in uno levandus in alio.*

Fountainhall MS.

1680. *July* 2. GIBSON *against* The LORD DUNKELD and THOMSON.

No. 198.
Tutors testamentary were removed as malversant for not making inventory of the pupil's estate.

Mr. Alexander Gibson pursues a declarator against the Lord Dunkeld and Sir James Thomson, that the nomination of them to be tutors to Thomas Gibson his brother, by Sir John Gibson their father, might be annulled, because the defunct's Lady was named tutrix *sine qua non*, and she is dead; 2*do*, At least they ought to be removed as suspected tutors, because they made no inventory of the pupil's estate, conform to the act of Parliament, declaring their tutory null, who did not make eiks to the inventory, so soon as they came to knowledge. It was answered to the *first*, That a *quorum*, or *sine quo non*, when either they accept not, or die, does not vitiate the nomination; but it is ever presumed, that the defunct preferred those he named to all others, whether tutors of law or dative, so that *sine quo non* is only understood, that so long as such persons are in capacity, nothing should be done without them; to the *second*, The statute doth not annul the tutory for not making inventories, but for not making eiks, and cannot be drawn in consequence, being *stricti juris*. It was replied, That though there had been no nullity, yet the statute ordaining inventories to be made, imports an eminent duty of the tutors, the neglect whereof is a malversation and ground of removal, especially seeing the inventories were neither made at first, nor at any time since this process.

The Lords removed these tutors upon not making the inventories, but had no need to determine the other ground of the failing of the tutrix *sine qua non.*

Stair, v. 2. p. 781.