No. 190. had his pension from my Lord when he was major *sciens et prudens*, bearing expressly, for his good service in my Lord's affairs, during my Lord's travels, which takes off all pretence of malversation. And for the other sums they were truly lent to, and given out for my Lord, and were no gratifications, and the charger spent that part of his life with my Lord, which might have fitted him for any other employment at home, which is now lost.

The Lords found, that seeing the accounts were transacted with Mr. John as Governor, he ought to give some account of the manner, and reason of the expenses, reserving to the Lords the manner of charge and discharge, and the effect, how far the charger should be liable beyond his intromission.

Stair, v. 2. p. 585.

1678. *February* 25. ROSE of Garlestone.

No. 191.

A tutor or curator is not in law obliged to lay out the annual-rent of the minor's money upon annualrent, but the rents of lands he must lend out after a year.—See APPENDIX.

Fountainhall.

*** This case is mentioned in No. 8. p. 9986. *voce* PAYMENT.

1678. *July* 26.
PEARSON of Kippenrosse *against* BELSHES of Tofts.

No. 192.

An action against him as tutor to count. He craves £.100 as the yearly aliment. Answered, The annual of their money unliferented was but 100 merks. The Lords found, except in very singular cases they would not suffer the aliment to exceed the annual-rent.

Fountainhall MS.

1678. *January* 18. GRAY *against* The LADY BALLEGERNO.

No. 193.
A Testament naming tutors found valid, the defunct not being able to subscribe, having given warrant to Ministers to subscribe, tho' he died before they fully subscribed.

Umquhile Ballegerno having no sons, provides his estate to his eldest daughter, with the burden of £.20,000 to his other daughters in case he had two or more, and £.12,000 in case of one, payable at the first term after his death; he did also name his wife and some other persons tutors to his bairns. He had two daughters, Mary and Margaret, who survived the first term after his death. This provision was with a power to the father to divide the portions off the £.20,000 and in case he divided not, to two friends after his death, which two friends did divide to Mary the elder 20,000 merks, and to the successors of Margaret, who is dead, 10,000; whereupon there is a pursuit at the instance of Mary against

No. 193.

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 arbitriment, 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.

No. 194.
What infers acceptance by a tutor?

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 apprised 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.