

## DIVISION V.

## Decennial Prescription of Tutory Accounts.

1736. *January 20.* THOMAS MERCER *against* ANNA IRVINE.

## No 193.

A tutrix nominated, found entitled to the benefit of the decennial prescription, though she did not regularly establish the office in her person, or make up inventories conform to law.

THE deceased James Mercer, by a deed *anno* 1690, did nominate several persons, together with Anna Irvine his spouse, to be tutors and curators to his children, two of whom to be a quorum, whereof Anna Irvine to be *sine qua non*. After his death, the widow entered on the administration of her son the said Thomas Mercer's affairs, and continued to act for him from 1702 to 1717, when he was of age; and, from that period, he acquiesced in her management until the 1735, when he insisted in a process of compt and reckoning against her.

For Anna Irvine it was *pleaded*; That the action was cut off by the decennial prescription, introduced by the act 1696; which was a more favourable defence in this case, considering the pursuer was so well satisfied with her conduct, that, upon his majority, he gave his sisters an additional provision, upon a narrative, that she had greatly improven his estate in his nonage; besides, by delaying to bring this process so long, most of the persons are now dead who could have cleared her administration, particularly Provost Allardice, who had concurred with her therein.

*Answered*; That the defender had entered upon the management of his affairs without accepting the office, or making up inventories, as the act 1672 direct; therefore she was not entitled to the benefit of the act 1696; seeing it is not the nomination of a tutor, but the following the direction of the law that gives a right to exercise the office; of consequence she behoved to be considered as a protutor, who, by the act of sederunt 10th June 1665, is liable during the long prescription; so that the act 1696 cannot protect her, as it respects only tutors, &c. who have a legal title, and not such who have acted without any lawful warrant; which doctrine ought to hold with greater force here, as she never notified the deed to any of the other persons named, although it was registered in the 1716; when she, alongst with Provost Allardice, another of the tutors, consented to the pursuer's discharging a tack. But, considering that she had acted for fourteen years preceding, without the knowledge or concurrence of the rest, her acting could not be ascribed to the nomination, which required two at least to be a quorum.

*2dly*, This single act cannot be deemed the deed of a tutor or curator; because she did not legally establish the office in her person. And, with regard

to the narrative of the bond of provision to his sisters, it is answered, that, at the time when it was granted, he imagined his mother had acted beneficially for him ; but, upon enquiring more particularly into the state of his affairs, he finds she is greatly in his debt.

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*Replied* for Anna Irvine ; That, as she was named one of the tutors, &c. her actings must be presumed to have been in consequence thereof, in order to give her the benefit of the prescription ; so that she is not now bound to instruct her conduct was regular in every respect ; and indeed, if the statute were only to protect tutors where their behaviour were unexceptionable, it would be altogether useless. *2dly*, It is by no means a clear point, what is the quorum required by the nomination ; but, supposing two to be necessary, it did not vacate tutory, though only one of them accepted, as was found No 23. p. 9162. But *3tio*, Granting this also were doubtful, yet as she was not quarrelled during her administration, but allowed to act until the pursuer's majority, her conduct could not now be impugned ; of course she is entitled to every privilege competent to a tutor ; just as in the case of an illegal magistracy, who are allowed to continue unquarrelled in the exercise of their office until it expire, after which, as no reduction lies against them, so their administration is considered as if it had been legal. Besides, supposing the prescription was only pleadable by those to whose right there lay no objection, yet, after it is run, the presumption is, that they acted agreeable to the powers given them, especially as after that period, the law does not oblige them to preserve the vouchers of their accounts, the prescription being equal to a discharge. As to her omitting to make up inventories, it is of no importance, because the act 1672, which ordains it, adjects certain penalties to the contravention of the statute, such as being liable for omissions, losing expenses, &c., but still they remain tutors ; their deeds are valid, and of consequence they have right to plead the benefit of the decennial prescription.

The pursuer *duplicated* ; The design of the act 1696 was to induce tutors, &c. (by relaxing the rigour of the common law) to enter upon a legal administration of the affairs of orphans, and to prevent their falling into the hands of those who engage themselves into the management of their effects, without following the directions of the law with regard to giving up inventories ; therefore the defender ought not to have the benefit of the statute, as her conduct was altogether irregular ; for, notwithstanding she had the custody of the defunct's writings, there is no evidence she ever made the nomination known to, or acted in concert with any of the persons named, at least during the tutory. So that her acting in that period cannot be presumed to have been in virtue of the deed, as thereby two were necessary in order to constitute a quorum ; for it appoints the said Anna Irvine *sine qua non*, and then adds, and ' one of the foresaid persons being always a sufficient quorum.' Which, as the words are copulative, made it necessary, in order to constitute a quorum, that she and one of the other persons named should concur, so that she could not alone

No 193. lawfully assume the management, or ascribe it to the nomination, in opposition to the express terms thereof. As to the decision quoted, it is single, and contrary to all principles, that a power entrusted with two should be carried into execution by one; besides, it seems to be founded on this, that the tutors nominate had refused to accept, which cannot apply to the present question, seeing here the defender is charged with secreting the nomination; nor can a single act, wherein she concurred with Provost Allardice during the curatory, found any presumption, that from the beginning she behaved in the same manner; neither is the argument drawn from the acts and deeds of an illegal magistracy to the purpose, as that is founded on reasons of public utility, and the inconveniencies that might follow a contrary doctrine.

*Lastly*, It is begging the question to say, that the objections to her management are not competent after the prescription is run, as the point in dispute is, whether or not she is entitled to the benefit of the prescription at all?

THE LORDS sustained the defence upon the act of Parliament 1696.

*C. Home, No 8. p. 24.*

## DIVISION VI.

### *Præscriptio decennalis et triennialis.*

1612. December 7. EARL HOME *against* LORD BUGGLEUCH.

No 194. FOUND, That 30 years possession *in ecclesiasticis* ought to be a sufficient title in place of the old custom, which required ten years before the Reformation.

*Fol. Dic. v. 2. p. 114. Kerse.*

\* \* \* This case is No 42. p. 7972., *vace* KIRK PATRIMONY.

No 195. 1622. July 24. EARL of WIGTON *against* GRAY and DRUMHEAD.

THE LORDS repelled an exception of triennial and dicennial possession, being proponed *contra verum patronum*, in respect of the express words of the rule of the chancellory, whilk bear *dummodo ad beneficium, per eos ad quos presentatio pertinuit, presentati fuerunt*.

*Fol. Dic. v. 2. p. 114. Kerse, MS. fol. 9.*