1742, *February* 24. *and June* 16. 1742.
LORD DRUMORE, SIR JOHN BAIRD, and SIR JAMES DALRYMPLE, *against* MRS. ISABELLA SOMERVIL.

No. 98.
Effect of the failure of a *sine qua non.*

WHERE one had named his spouse, his brother, and several others, tutors and curators to his only child, and appointed the major part of those who should accept, and failing any of them by decease, the major part of the survivors to be a quorum, his said spouse being always one of the quorum, and *sine qua non*, and after her death or incapacity, his brother being always one of the quorum and *sine quo non*; and in case of the death or incapacity of his spouse or brother, declared that the tutory and curatory should not dissolve, but should continue with the other tutors and curators so long as any of them were in life, the Lady refused to accept: The Lords at first "Found the nomination had thereby fallen;" but upon advising petition and answers, one or two of the Lords having altered their opinion, it was by plurality of voices found, "That the nomination did not fall by the Lady's refusal to accept."

The Lords unanimously considered it as clear law, notwithstanding of certain decisions to the contrary, that the failing of the quorum, or of the *sine qua non*, sopites the nomination; and the case would be the same of the failure of one of more tutors or curators named jointly. The reason in all these cases is the same, that the father seems to have put no trust in the rest without the quorum, or without the *sine qua non*, or in any one or more, of tutors named jointly, without the whole. But as that reason did not apply in this case, where the father, upon the failure of both the *sine quibus non*, had declared that the tutory and curatory should not dissolve, but continue with the rest so long as any of them were on life, the majority of the Lords came to be of opinion, that this gave sufficient evidence, that the father intended to trust any of the persons named; and that the omitting to provide for the case of the Lady's not accepting, as he had done for the cases of death or incapacity, had only happened *per incuriam*, and from his having taken it for granted, that she was not to decline accepting. See TUTOR and PUPIL.

Fol. Dic. v. 4. *p.* 297. *Kilkerran, No.* 6. *p.* 585.

1752. *June* 26.
CAMPBELL *against* LORD MONZIE, CAMPBELL of Achalader, and Others, Trustees for Campbell.

No. 99.
Effect of the failure of a *quorum* of Trustees in a mortification.

THE deceased Mr. Archibald Campbell, minister of Weem, executed a deed, in the year 1736, whereby, on the narrative of the schoolmaster of Weem, not being sufficiently provided, and the great use more schools in the parish might be of, he disponed all debts and sums of money that should be resting to him at his death, in favour of Lord Monzie, Sir R. Menzies, Lady Menzies his mother, Mr John Stewart of Birny, and the deceased John Campbell of Achalader, their heirs and

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successors, in their lands and estates, trustees and administrators, in name, and for the use and behoof of the schoolmaster at Weem, and of other five schoolmasters to be settled in the said parish at the five places therein mentioned, and their successors in office in all time coming for ever; and with power to them, or the major part of them, who were declared a quorum, to ask, crave, uplift the debts and sums of money; and after payment of debts and other legacies, to apply and secure the remainder, for the use and behoof of the above schoolmasters, at the rate, and in the proportions therein mentioned.

Some variations were afterwards made upon this settlement with respect to the number of schools, and some new deeds granted on deathbed, which were reduced on that ground by the heir, but which are unnecessary to be particularly recited for the present purpose; which is only to observe, that when the Lord Monzie and the present Achalader in the count aud reckoning which ensued between them and the heir of the mortifier, took credit for the sum of 6000 merks laid out upon the schools in terms of the defunct's settlements excuted in *liege poustie*; the heir objected, that the mortification was now fallen and become void through the failure and repudiation of the majority of the trustees, which was by the deed declared a quorum, and that therefore the Lord Monzie and Achalader, being only two of five, had no power to settle the schools, or execute any part of the defunct's will, but must denude or make payment to the pursuer of the sums contained in their charge.

The objection resolved into two questions, *first*, Whether or not, in the event that has happened, the trust with respect to the schools devolves upon the two trustees who have accepted, notwithstanding the repudiation of the other three? *2dly*, Whether, supposing they should have no power to act, as not being the major part of the nomination, the mortification may not still subsist, and be carried into execution by the direction of the Court?

And upon report, the Lords found "That the deed of mortification in question does not fall nor become void, through the failure or repudiation of the majority of the trustees; and that though there should be only one of them surviving and not renouncing, he may accept, and is entitled to act. And farther found, that the said mortification does not fall even by the failure or renunciation of the whole trustees, but that in that case it is competent to this Court to nominate and appoint such person or persons as they shall think fit, for carrying the said deed into execution."

The decisions on this point, What shall be the effect of a quorum's failing? have not been uniform; but the conclusion would seem to be rational, which we find in Lord Stair, Lib. 1 Tit. 12. § 13. Of Mandate or Commision, that however in the case of contracts or deeds *inter vivos* powers of administration must be taken in the terms they are conceived, *e. g.* in mandates, which being jointly given, can only be jointly executed, because the power failing, returns from the mandatary to the mandant himself; the rule is different as to powers given in contemplation of death, which cannot return; as in the case of tutors or executors

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jointly named; for in such case the defunct is presumed, even where a quorum fails, to prefer all the persons named to any other to whom the power might devolve by course of law. At the same time it is true, that this conclusion seems not to have been relished by the Court in the case determined between the tutors named by Mr Hugh Murray Kynnynmound and Mrs Isabella Somervil his widow, which *vide* June 16. 1742. No. 98. p. 14703. where the contrary doctrine was held as law, that the failing of a quorum of tutors, or of a *sine quo non*, vacates the nomination, for the reason there mentioned; although the nomination, in that case, was sustained upon the special conception of the clause.

But, there was no occasion in the present question to determine any such abstract point, as might comprehend either the case of tutors or executors. The settlement of a defunct's estate does not depend upon the nomination of tutors or executors; for where such nomination fails, the law supplies it by tutors of law and executors of blood; but where a man makes a settlement, such as this in question, by a mortification, and names managers, to whom he gives power to call in his money and apply it in terms of the mortification, this nomination is an essential part of the settlement itself, as without managers the settlement cannot take effect; yet it were absurd to suppose that it should depend on the will and pleasure of the nominees, whether his pious intention should have effect or not.

And on that ground it was, that the Lords here found not only that the nomination would subsist, though there should remain but one of the nominees, but that the management would devolve upon this Court in case they should all fail.

Fol. Dic. v. 4. p. 297. Kilkerran No. 2. p. 518.

1772. *February* 18.

HENRY DAVIDSON *against* SIR HECTOR M'KENZIE and Others.

No. 101.
A single curator may interpose for the evident utility of the minor, although, by the nomination, the right of acting be vested in the majority, who dissent.

IN this case, the pursuer insisting to have a decree of constitution against the minor, in order to lead an adjudication of his estate, upon certain debts affecting the same, in his person, in consequence of the Court having found, that a transaction made with the predecessor, for a sale of part of said estate, and in view whereof these debts were acquired, was not binding upon the defender, the heir of tailzie, and in which he was only opposed by one of four curators, the majority of whom being declared to be a *quorum*, it was urged, That the negative of the rest, who deemed the opposition inexpedient, did bar him from maintaining it singly.

"The Lords found the pursuer entitled to have decree of constitution for the debts libelled on; but that the debtor, Sir Hector, or Alexander M'Kenzie, his curator, may stop such decree, by paying to the pursuer, or consigning in the clerk's hands, the said debts."

Act. *A. Lockhart et Solicitor Dundas.* Alt. *Ilay Campbell et J. Boswell.* Clerk, *Kirkpatrick.*

Fac. Coll. No. 8. p. 13.