1752. *June* 26.

CAMPBELL *against* Lord MONZIE, CAMPBELL of Achalader, and Others, Trustees named by CAMPBELL.

No 163.
In the case of a mortification falling by the renunciation or death of the whole trustees, it is competent to the Court to appoint trustees.

THE deceased Mr Archibald Campbell, Minister at 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 the Lord Monzie, Sir Robert Menzies, the Lady Menzies, his mother, Mr John Stewart of Binny, and the deceased John Campbell of Achalader, their heirs and successors, in their lands and estates, trustees and administrators, in name and for the use and behoof of the schoolmaster of 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, and 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 death-bed, 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 and 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, executed 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? 2*dly*, 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."

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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 Commission*, that, however, in the case of contracts or deeds *inter vivos*, powers of administration must be taken in the terms they are conceived; as, *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 jointly named; for, in such cases, 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, June 16. 1742, *voce* Solidum et pro Rata; where the contrary doctrine was held as law, that the failing of a quorum of tutors, or of a *sine qua 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. See Solidum et pro Rata.

Fol. Dic. v. 3. *p.* 348. *Kilkerran*, (Solidum et pro Rata.) *No.* 2. *p.* 518.

*** This case is reported in the Faculty Collection.

1752. *July* 26.—The deceased Archibald Campbell, Minister of the Gospel at Weem, by a deed, bearing date in the 1736, mortified certain sums for the

No 163. payment of yearly salaries to three additional schoolmasters, to be established within the said parish, at the places mentioned in the deed. And for carrying this part of his will into execution, he vested the sums in Lord Monzie, John Campbell of Achalader, and three other persons, and their heirs and successors in their lands and estates, as trustees and administrators, for the use and behoof of the said schoolmasters; with power to the said trustees, and their foresaids, or major part of them, who are thereby declared a quorum, to ask, uplift, and receive the debts and sums thereby assigned, and to apply and secure the same, for the purposes of the said mortification.

Lord Monzie and Achalader accepted of this trust, uplifted the defunct's funds, and settled the three schools, in terms of the will.

Thereafter an action of count and reckoning was brought against them by Archibald Campbell, nephew, heir, and executor of the defunct; in which the defenders charged themselves with the defunct's money, intromitted with by them, and took credit for 6000 merks, laid out for behoof of the three schoolmasters, in terms of the defunct's will.

It was *objected* for the pursuer to this article of their discharge, That one of the trustees being dead, and two of them having declared, under their hands, that they are resolved not to accept of the trust; consequently, the defenders, who are not a *quorum* of the five trustees, have no power to settle the schools, but must denude, or make payment to the pursuer of the sums contained in their charge.

Answered for the defenders, *1mo*, The mortification was what the defunct had chiefly in view in his settlement. He named the trustees, in order to carry it into execution, but not to enable them to defeat his will, by declining to accept of the trust.

2dly, It is a general rule in the construction of settlements, to take place after death, that powers of administration, thereby devolved, are interpreted in as extensive a manner as the words can admit of, that so the defunct's will may not perish, or the execution thereof devolve upon others than he himself inclined to trust. Stair, lib. 1. tit. 12. § 13. Many decisions have been given agreeable to this opinion; particularly 14th Feb. 1672, Elies against Scott, *voce* SOLIDUM ET PRO RATA; and 11th Feb. 1676, Turnbull against Rutherford, *voce* MUTUAL CONTRACT; in both which cases, five tutors had been named, and the nomination was found effectual, though only two had acted in the first case, and no more but one in the other. Even where a *quorum* has been named, the failure of the *quorum* has been found, in some cases, not sufficient to sopite the nomination, though it must be owned, the decisions have not been uniform upon this point. Dict. *voce* SOLIDUM ET PRO RATA But, in the present case, there is no occasion to carry the point so far, for the defunct has not limited any precise number to be a *quorum*, but has devolved the whole powers *upon the trustees, and their heirs, and major part of them, who are declared a* quorum. This major part must be applied to such of the trustees as in-

cline to accept and act under the settlement. The condition of acceptance is implied in the ordinary stile of such nominations, and it cannot be a reason for inducing a different construction, that the testator has declared the majority a *quorum*. And so the Lords decided, in a similar case, 15th July, 1680, the Hospital of Largo against the Earl of Wemyss, *voce* SOLIDUM ET PRO RATA.

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But, 3*tio*, Supposing the nomination altogether to have failed, yet this failure cannot have so strong a consequence, as totally to frustrate the will of the defunct. This would be, in other words, to maintain that the defunct intended the settlement of these schools should depend, not upon his own will, but upon the will of the trustees, who, by refusing to act, would have it in their power to take away this sum from the pious use to which it was destinated, and give it to the pursuer. And if the Lords should be of opinion, that the power of the trustees are at an end, they will, no doubt, lay down some proper method for carrying the defunct's will into execution, as they did in a late case of a mortification, left by Mr Gilbert Ramsay to the Corporation of New Aberdeen *.

"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 renouncing, he may accept, and is entitled to act; and further 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 should think fit, for carrying the said deed into execution."

Reporter, *Elchies*. Act. *Geo. Pringle*. Alt. *Ja. Ferguson*. Clerk, *Kirkpatrick*.
M. *Fac. Coll. No.* 32. *p*. 52.

1752. *July* 1.
Sir KENNETH M'KENZIE of Granville *against* JOHN STEWART.

No 164.
Even an act of Parliament cannot authorise the Court to give effect to fraud.

GEORGE, Earl of Cromarty, *anno* 1688, disponed the lands of Roystoun to Sir James M'Kenzie, his third son, and the heirs-male of his body; whom failing, to Sir Kenneth, his second son, and the heirs-male of his body. The disposition, containing strict clauses, prohibitory and irritant, against altering the order of succession, contracting debts, or disposing land, was recorded in the register of tailzies, and afterwards completed by infeftment.

Sir James M'Kenzie, afterwards Lord Roystoun, having no male issue, but one son, and wanting to free himself of the entail, obtained an act of Parliament for selling the lands, upon pretext of certain fictitious debts, which were said to be good against the entail. The act goes upon the narrative of these debts being incumbrances upon the entailed estate; empowers certain trus-

* Examine General List of Names.