

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 Kynnymound 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.

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. Haly Campbell et J. Boswell. Clerk, Kirkpatrick.*

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

No. 100.

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.