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. No 163.

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.

No 164. tees to concur with Lord Roystoun to sell the land; to apply the price for payment of these debts; and to lay out the residue upon purchase of lands, to be entailed as the lands of Roystoun were.

After the death of Lord Roystoun and his son, the Representatives of Sir Kenneth M'Kenzie, substitutes in the entail, brought an action of count and reckoning against John Stewart, grandson and heir of line to the Lord Roystoun, and against the trustees named in the act of Parliament, to give an account of charge and discharge, in order to ascertain the residue of the price, and to apply the same, in terms of the act of Parliament. The *defence* was, That the price was more than exhausted by the debts named in the act. *Answered*, These debts are fictitious. The defenders, in the reply, did not pretend to justify these debts, or Lord Roystoun for stating them as true debts; but betook themselves to this argument, that the Court of Session had no authority to question or canvass the truth of these debts, after the Parliament has declared that they are to be stated for exhausting the price. *Duplied*, However the words may run, it was no part of the intention of the act to rear up fictitious debts; or, which comes to the same, to allow Lord Roystoun to pocket up the price of the entailed estate, instead of communicating the benefit to the heirs of entail, in lieu of their interest in the lands. It is enough that the purchaser of the estate is secured by this act of Parliament, which has thereby all the effect that was intended. And if the act cannot bear another construction, it belongs to Judges to apply to statutes the same rule they apply to contracts, which is to govern their judgments by the sense and meaning, where the words happen to differ. In fact, they apply this rule every day to public laws, and *a fortiori* they ought to do the same to private acts, if there be a difference.

" The Lords found, that the debts objected to must, upon the authority of the act of Parliament, be stated to exhaust the price; and that this Court cannot admit any objection to them, after the price is appointed by the act to be applied for payment of these very debts."

With regard to this point, it would be no stretch to bar every substitute who concurred in the application to Parliament, from quarrelling debts which they vouch to be just and true, provided they were acquainted with the nature of these debts. But what if the discovery was made after obtaining the act of Parliament? We may suppose by a discharge found in Lord Roystoun's charter chest after his death: Would there be no remedy in this case? I cannot discover any form of application to Parliament. If so, it must be competent before the Court of Session; for every legal wrong must have a legal remedy. And, for this very reason, I think the judgment wrong; for, in fact, the fictitiousness of these debts was not discovered till after Lord Roystoun's death.

This cause was appealed by Sir Kenneth; and the opinion I ventured to give above is fully justified, by the judgment of the House of Peers, by which

the interlocutor of the Court of Session was reversed; and it was adjudged, that the appellant is not barred, by the act of Parliament, from objecting and proving the debts to be fictitious, or that they could not affect the estate of Roystoun. The Lord Chancellor, in delivering his opinion, expressed a good deal of indignation at the fraudulent means of obtaining the act; and said, that he never would have consented to such private acts, had he ever entertained a notion that they could be used to cover fraud. No 164.

Sel. Dec. No. 11. *p.* 12.

1755. *February* 12.

MR NEIL CAMPBELL and Others, Creditors of LORD RUTHVEN, Petitioners. No 165. An estate strictly entailed being sequestrated by the Court of Session, their Lordships ordered leases thereof for nineteen years to be made, the heir of entail offering no objections.

THE lands of Ruthven, entailed under prohibitive, irritant, and resolutive claues, were sequestrated for the behoof of the Creditors of Lord Ruthven.

The Creditors represented, That the tacks on this estate had expired; that the entail did not prohibit the granting of tacks, and that the rents could not be raised, unless tacks were granted to endure for 19 years: They therefore prayed, That the factor might be authorised to grant tacks of the endurance aforesaid.

No objection was offered for the heirs of entail.

'THE LORDS granted the desire of the petition; and ordained, That the tacks should be set at the sight of the Sheriff-depute or his substitutes, and that the said Sheriff, or his substitutes, should sign witness to the tack so set.'

Petitioner, *J. Craigie.*

D. *Fac. Col. No* 135. *p.* 202.

1755. *June* 17.

LORRAIN Petitioner.

No 166. The Court appointed an interim Commissary.

THIS day there was a petition presented to the Lords by James Lorrain, Commissary-clerk of Lauder, craving the Lords would appoint an interim Commissary for Lauder, whereof the tenor, with the deliverance thereon, follows:

To the Right Honourable the Lords of Council and Session, the Petition of James Lorrain, Commissary-clerk of Lauder;

Humbly Sheweth,

THAT, in April last, the office of Commissary-principal of the commissariot of Lauder became vacant by the decease of Sir James Home of Blackadder,