

No. 41. were claimed from them by the representatives of the mortifier, upon this ground, that the two accepting trustees, who are not a *quorum* of those named, having, for that reason, no power to act, the deed of mortification is void, and the subject must belong to the representatives of the mortifier, in the same manner as if there had been no such mortification.

In answer to this claim, it was observed by the two accepting trustees: *1mo*, That the funds being settled by the mortifier upon certain persons, for the use and behoof of the schoolmasters, this assignation is absolute, and does not depend, more or less, upon the will of the trustees. Therefore, though they had all refused to accept, an action would lie against them at the instance of the schoolmaster of Weem, to denude in favours of other trustees who should be willing to accept. *2do*, In general, with regard to a single act, to perform which a certain number of persons must concur, by the settlement, it may be true, that the act cannot be performed if one be wanting; but in a management which requires a course of time, the nomination of a *quorum*, if the contrary be not expressed, ought to be interpreted a *quorum* of those who accept or survive; for the management cannot stop after it is partly executed. The Lords sustained the deed of mortification; and it was the opinion of the Court, That such a deed must stand, though all the trustees should decline acceptance; in which case, the Court would name administrators.

*Sel. Dec. No. 32. p. 35.*

1756. *March 11.*

ROBERT DALZIELL, Esq. *against* ALEXANDER DALZIELL of Glenae and GEORGE HENDERSON.

No. 42.

An heritable bond being taken in name of certain trustees and their heirs, for behoof of the children of a marriage, and the trust having devolved on an infant, who refused to represent, in an action at the instance of the heir of the marriage, the Lords declared the trust, and ordained the superior to grant char-

By contract of marriage betwixt the late Earl of Carnwath and Mrs. Margaret Vincent, the father and mother of the pursuer, particular sums belonging to the lady were vested in certain trustees and the survivors or survivor of them, and the heirs and assignees of the last survivor, for the uses mentioned in the contract, viz. that they should in part be applied towards purchasing, for the behoof of the children of the marriage, an heritable bond, which had been granted by the Earl to Stewart of Shambelly, for £.2500 Sterling, and the remainder towards paying the Earl's personal debts; who therefore obliged himself, his heirs and successors, to grant heritable bond to the trustees, for behoof of the children of the marriage, for such remainder so laid out.

Stewart of Shambelly's debt was accordingly paid off, and a conveyance of his heritable bond taken to the trustees for the behoof of the children, and the remainder of the sums vested in the trustees was applied in terms of the contract, towards paying off the personal debts of the Earl; but he dying without giving any security, Alexander Dalziell of Glenae, his eldest son by a former marriage, granted his heritable bond for the sums last mentioned; and upon both those heritable bonds the trustees were duly infeft.

The trustees being now all dead, and Henderson of Broadholm, the last survivor, having left an only son, George, an infant, incapable of performing the trust, Robert Dalziell, the only child of the marriage, thus circumstanced, brought a process against Dalziell of Glenae and George Henderson, in order that the subjects contained in the trust-right might be vested in his own person. And the question in this case was, How the feudal-right vested in the trustees by their infestment could be transmitted to Robert Dalziell, as George Henderson did not choose to represent his father, the last surviving trustee, or to make up titles to these subjects, so as to convey them in the ordinary form, lest he should thereby incur a passive title.

Various opinions were offered. Some thought that a charge against George Henderson was necessary; and, upon his renouncing, a decree *cognitionis causa* in common form. Others judged that a simple declarator was sufficient to put in the new name into the infestment, in the same manner as a declarator of redemption is sufficient to vest a wadset, as being but a temporary right. Others, again, not satisfied with this last opinion, and judging a simple declarator not sufficient to convey, though sufficient to extinguish a feudal right, proposed, that where the feudal right held of the King, an order should be granted to Chancery to issue out a precept to infest; or where, as in this case, the holding is of a subject, that letters of horning should be granted, as in apprisings. At last it was suggested, That the Court should declare, that Henderson held only in trust; that that trust was now at an end; and that they should ordain Dalziell of Glenae, the superior, to grant charters with precepts for infesting the pursuer, Robert Dalziell. This method, as the easiest, and least expensive, was unanimously agreed to, and declared to be the rule in all cases of the like nature in time coming. The judgment was expressed in the following terms:

“ The Lords found, That the two debts libelled, and the infestments thereon, were vested in the trustees, for the behoof of the issue of the marriage between the pursuer’s father and mother; and found, that the pursuer was the only issue of the said marriage; and found, that John Henderson, younger, of Broadholm, was the surviving trustee; and that the trust was vested in him descendable to the defender, his only son; and found, that George Henderson, the defender, ought to be denuded of the said trust in favour of the pursuer. And they declared the trust-subject to belong to the pursuer, and decerned accordingly. And in order that the said infestments and other securities may be legally vested in the person of the said pursuer, they decerned and ordained Alexander Dalziell of Glenae, the other defender, superior of the foresaid infestments, to grant to the said pursuer proper charters containing precepts of sasine for infesting the pursuer accordingly.”

Petitioner, *Wight.*

W. S.

*Fac. Coll. No. 203. p. 301.*

No. 42.

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