No. 39.

For the defenders: This interpretation might have some appearance, if the right were given to the whole under this irritancy; but the trust is only in favour of such as the trustees should compound with. There was no intention of paying the whole creditors, or their whole debts; but the trustees were, upon consideration of their several cases, to make the distribution; and none could complain of being paid too little, but behoved to take what was given him.

For the pursuers: The power of compounding was only in the view of there not being sufficient funds to answer all the creditors; but if there were, they were to pay the whole. This appears from their being liable for the residue to the executors of the Duchess, who could not claim it till all were paid. The present pursuit was not by any creditor seeking to establish himself a preference, but by the whole jointly, demanding an account of the trust-subjects.

The Lords found the action was competent.

Act. *H. Home & Lockhart.* Alt. *R. Craigie & Ferguson.* Clerk, *Kirkpatrick.*

D. Falconer, No. 211. p. 291.

1748, *June* 8, & *July* 6. GORDON *against* ANDERSON.

No. 40.
Bills granted to a purchaser, by a trustee, for the purpose of adjudging, not sustained as proof of partial payments against his constituents.

An assignee in trust, in order to adjudge, having, after the sale of the lands, got partial payments from the purchaser, and, because the scheme of division was not then made, granted his bills for the money; in a process against the purchaser, at the instance of the persons for whose use the adjudication was led, the Lords "Found the purchaser could have no allowance of those payments;" although it was evident, from the circumstances of the case, that between the trustee and purchaser these bills were intended as no other than an interim instruction of so much of the price of the lands; and *that* notwithstanding a former decision in the case of the Creditors of Pittedie, where, in the like case, such bills had been sustained as payments to the purchaser.

Kilkerran, No. 3. p. 582.

1752. *December.*

ARCHIBALD CAMPBELL *against* CAMPBELL of Monzie and CAMPBELL of Achalader.

No. 41.
A deed of mortification, for the use of the schoolmaster of a parish, stands good though none of the trustees accept.

Mr. Archibald Campbell, Minister at Weem, made a deed of mortification, in which he settled his funds upon five trustees, and their successors, for the use of the schoolmaster of Weem, and of other schoolmasters to be settled in the parish at the places therein named, the sums to be secured and employed in name and for the use of the schoolmasters; and the major part of the trustees are declared a *quorum*. Two of the trustees only having accepted and intromitted, the sums

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: 1*mo*, 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. 2*do*, 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.