

No 166.

Baronet : That no commission from the Crown for exercising of that office has yet been obtained : That at the decease of Sir James Home the last Commissary, there were several actions and causes depending before the court, edicts raised, in order to confirm several persons executors, and several other consistorial matters not finished ; and as these cannot be proceeded in without a Commissary be appointed, and, if delayed longer, may prejudice or hurt the parties concerned ;—May it therefore please your Lordships to appoint an interim Commissary in place of Sir James Home deceased, until a commission for a new Commissary shall be obtained from the Crown, or till further orders from your Lordships ; and to grant to such interim Commissary to be named by your Lordships, the usual powers. According to Justice, &c. (*Signed*)

JAMES LORRAIN.

*Edinburgh, 18th June 1755.*

THE LORDS having heard this petition, they authorise and appoint James Purvis, writer to the signet, formerly Commissary-depute of the commissariat of Lauder, to execute the office of Commissary of Lauder, with power to him to hold courts from time to time, in the ordinary form, to issue forth edicts, and other writs usual, to confirm testaments, to hear and decide in all causes consistorial and competent to the said office and jurisdiction thereof, and to nominate and appoint deputies, in case of his necessary absence, and all members of court, (clerks excepted,) and generally, to do all and sundry other things pertaining to the said office and jurisdiction, as freely, in all respects, as any Commissary of the said commissariat has done ; and that ay and until his Majesty shall appoint a Commissary for the said commissariat, or till further orders from this Court : And allow this warrant to be extracted, without abiding the course of the minute-book. (*Sic subscribitur*)

ROB. CRAIGIE, *J. P. D.*

*Acts of Sederunt, p. 486.*

No 167.

The Lords found a trust lapsed by the non-acceptance of the trustees ; and, as the deed conferred a discretionary power, the Lords refused to exercise themselves. that power

1758. *January 22.*

SIR ALEXANDER DICK of Prestonfield *against* Mrs FERGUSON and her Children.

DAME JANET DICK, Lady Prestonfield, executed, December 1751, a settlement of considerable funds to Sir John Cunningham her eldest son, and Anne Cunningham her eldest daughter, and the survivor, as trustees for the ends and purposes following ; *1mo*, The trustees are appointed to add and join together the subjects disposed, so as to make up a total of L. 6000 Sterling, to be lent out upon land or other sufficient security ; *2do*, They are appointed to apply and bestow the yearly interest toward the education and support of such of the

granter's descendants as should happen to be in want, or stand in need thereof; and that at the discretion of the trustees; *3tio*, Failing descendants, the capital is to return to her nearest heirs. This deed being whimsical and irrational, the trustees refused to accept. A process for reducing the settlement was brought by the heir at law, in which were called all the descendants in being of Dame Janet Dick. None of them made opposition but Mrs Fergusson for herself and children. Several grounds of reduction were insisted on, chiefly the non-acceptance of the trustees. And it was *urged*, That the present event is a *casus incogitatus*, for which there is no provision made in the settlement. The deed is at an end by the common law; for it supposes the acceptance of the trustees, and there are no means prescribed to carry it on independent of them. The matter then resolves into this, Whether this Court, as a court of equity, ought to supply the defect? The answer to this question is obvious. Seeing the settlement has fallen at common law, and that the subjects contained in the settlement belong to the nearest heirs, it never can be equitable to deprive them of their right; especially to support a whimsical intention in favour of remote descendants, who possibly may never be in want, and never have occasion for the money.

*2do*, The defender has no proper interest to oppose this reduction. The settlement leaves the distribution entirely upon the discretion of the trustees; and, therefore, suppose the trustees had accepted, no descendant of Dame Janet Dick could have a claim in law for any sum out of the trust-subject. If so, they cannot, by the repudiation of the trustees, qualify any loss or lesion that can be regarded in a court of justice.

'THE LORDS found the deed ineffectual by the non-acceptance of the trustees.' See TRUST.

*Fol. Dic. v. 3. p. 349. Sel. Dec. No 143. p. 199.*

1761. July 25.

WILLIAM WALKER, Town-clerk of Inverkeithing, Supplicant.

THE election of Magistrates for the burgh of Inverkeithing made at Michaelmas 1760, being set aside by a sentence of the Court of Session for bribery and corruption, an application was made to the Court by the town-clerk of the burgh, setting forth, That by the want of Magistrates, those interested in burghage tenements were deprived of the ordinary means to complete their titles, or to alien; and therefore praying a warrant and commission to David Rankine and James Young, who were Bailies for the year preceding Michaelmas 1760, to execute the office of Bailies as far as concerns the receiving resignations and the giving infestments held burghage, until Bailies be regularly established; and

No 168.

It is a privilege of the Court of Session, where an election of Magistrates is voided, to name persons to supply the want of the office bearers.