No 10. Archbishop; *4thly*, The injunctions being sent up to the King, his Majesty has signed and approved the same, which therefore revived them; and for the inconveniency upon the Bishop's absence or refusal, it is not to be supposed but that the Bishop's concern in the Commissariots would provide remedy in such cases. The defender *answered*, That acts of Parliament were not drawn *ad pares casus et consequentias*, much less their injunctions; and though they were now revived, yet that cannot be drawn back to the power of deputation granted before; neither can this Bishop be in better condition than his predecessor, or quarrel his predecessor's deed, which he had power to do. The defender did also resume the defence as to sufficiency and trial, that seeing he had power of deputation he was not liable to trial, nor to reside if his depute were sufficient.

THE LORDS found, That albeit the power of deputation should absolutely stand, yet the principal Commissary behoved to be sufficient and ordinarily resident, seeing his sufficiency was both requisite by the act of restitution 1609, and by exception in the act of restitution 1661; and that he ought to direct and over-rule his deputes, for whom he was answerable, and therefore was obliged to reside; that albeit he did not constantly sit, yet he might advise with his deputes in important cases, and the lieges might have access to him to complain in case of the depute's malversation; and as to the power of deputation itself and the injunctions,

THE LORDS found, That the defender was *in bona fide* to enjoy these privileges till it was declared, notwithstanding he was required to the contrary; but as to the future, they found that he ought to reside and make use of no deputes without the consent of the Archbishop; but whether that should be only *pro re nata*, or by a warrant for such persons, not only upon necessary occasions mentioned in the injunctions, but also in others, that the deputes might ordinarily sit and advise with the Commissaries in cases of importance, the LORDS were of different judgments, and recommended to the Bishop in common, to consider what was fit in that case; but declared only according to the injunctions without interpreting how far the deputation should reach.

Fol. Dic. v. 2. *p.* 292. *Stair, v.* 1. *p.* 355 & 363.

1663. *July* 21. Lord RENTON *against* Laird LAMERTON.

No 11.

Where goods have been seized *manu militari* in times of intestine war, who liable?

THE Lord Renton, Justice Clerk, having pursued Lamerton as representing his father, for the pursuer's rents and goods intromitted with by the defender's father *in anno* 1641, the defender *excepted* upon the act of pacification *in anno* 1641, and upon the act of indemnity *in anno* 1661, and produced his father's commission by which he meddled; so that having done by public authority for the time, in relation to the war and differences of the time, he was secured by

No 11.

both these acts. The pursuer *answered*, That the act of pacification and that whole Parliament was rescinded, and the act of indemnity had an express exception of all that meddled with public monies of fines, forfeitures, or sequestrated estates, and had applied the same to their own use, and had not duly counted therefor; and the pursuer insisted for what the defender's father had applied to his own use, or had not duly counted for. The defender *duplied*, That his father had duly counted for his whole intromission, and had made faith to the Committee of Estates; particularly, that he had truly given up his charge without omission, and thereupon was discharged. The pursuer *answered*, That he had instructed much more intromission, and was content to allow the particulars in the count produced, and craved the superplus, which he had now proved by witnesses adduced before answer; and as for the oath, it could only be understood as an oath of credulity, like that of executors confirming testaments, which doth not exclude probation of super-intromission; and there being two counts produced, the charge of the last count is the rest of the former count, and the oath relates only to the last count.

THE LORDS repelled the defence upon the act of pacification, which they found was only unrescinded, in so far as it is contained in the late act of indemnity; and repelled the defence upon the act of indemnity, in respect of the exception; and found that the father had not counted duly for his whole intromission, and that his oath extended only to the last count; and having considered the testimonies of the witnesses, they made a difference betwixt what umquhile Lamerton applied to his own use, and what corns and cattle were carried away by soldiers by his direction to the army, that he might be free of the latter and liable for the former.

1668. *July* 28.—This day the Lord Renton's process against Lamerton, mentioned the 21st instant, was advised; by the probation it appeared that the corns in the girnels of Haymouth, and the cattle in the Mains of Renton and horses were taken away by Lamerton with a troop or troopers; and that the corns were carried to Dunse, the army being thereabout at that time; whereupon the question arose, whether or not Lamerton were liable for these, which by the probation did not appear to be applied to his use, but to the use of the army.

THE LORDS assoilzied him therefrom, as they had done in several cases formerly upon the act of indemnity, whereby whatsoever was acted in the troubles by warrant of any authority in being, was totally discharged; and the LORDS did thereupon find, That the actors were not obliged to produce, or show a warrant, but that it was enough the deeds were done *manu militari*, unless the contrary were proved by the actor's own oath, that what was meddled with was not employed to entertainment of soldiers, or any other public use, but to their own private use.

Stair, v. 1. p. 556. & 559.