

1666. February 14.

ARCHBISHOP of GLASGOW *against* COMMISSARY of GLASGOW.

No 10.

A commissary obliged to reside at the place of the commissariat; must be answerable for deputies appointed by him; and found deposable by the bishop of the diocese if he be not sufficiently qualified to discharge the office.

THE Archbishop of Glasgow pursues a declarator, to hear and see it found and declared, That Commissaries ought to be persons qualified and able to judge according to law; and that if they be not, they might be deprived by the act 1609, empowering the Bishops, then restored, to appoint able and sufficient men Commissaries in all time coming; and by the act of restitution 1661, whereby the like power is granted, excepting Commissaries nominated by the King unless they be insufficient or malversant; and subsumes, that Mr William Fleming is not sufficient nor qualified for that place; and also, that by the injunctions given to Commissaries mentioned in the act 1609, there is no place for deputies, unless it were by special consent of the Bishops; and craves that it may be declared that the said Mr William may not serve by a deputy. The pursuer *insisted* on the first member. It was *alleged* for the defender, That he had his place both from the King and Bishop Fairfowl, confirming the same with a *novodamus*; and therefore, though he might have been questioned before the said ratification and new gift, yet now he cannot be questioned upon insufficiency, but only on malversation, whereof there is no point alleged nor condended on; nor is his insufficiency qualified by any act of in orderly process or injustice committed by him now these five years; and as Bishop Fairfowl, who acknowledged him to be a fit and qualified person by his ratification, could never quarrel him upon insufficiency, neither can this Bishop; *2dly*, The defender has his place with power of deputation; and therefore, having given 8000 merks to the former Bishop for his ratification with power of deputation, he cannot be questioned on his sufficiency, being able *per se aut per deputatum*; and no act alleged of injustice. It was *answered* by the pursuer to the first defence, That albeit this same Bishop had admitted this Commissary, upon hopes of his qualifications, yet if contrary to his expectation, it appears he is not qualified for so eminent a judicature, he may justly quarrel him of insufficiency as well as a minister whom he ordained; *2dly*, Though the same person might not, yet his successor in office might, and is not bound to acknowledge what his predecessor did by mistake or otherwise to the detriment of the See, which were in his option, without a rule, or requiring qualifications, as the naming of Commissaries. To the second, Albeit deputies were allowable, as they are not by the injunctions, yet the principal Commissary, who must regulate and answer for them, must also be qualified, both by the act 1609 and the exception 1661, which enervates both the defender's gifts

THE LORDS found that member of the libel on the qualifications and sufficiency relevant.

1666. February 22.—THE Bishop of Glasgow insisted in his declarator against the Commissary of Glasgow ; and *alleged first*, That by injunctions related to in the act of restitution 1609, it was provided, That all Commissaries should reside at the place where the Commissariot sat, and should not be absent but upon necessity and with leave of the Bishop, under the pain of deposition, and that in case of the absence of the Commissary through sickness or other necessity, or through being declined in these causes, the Bishop should name a depute ; from whence it was *alleged, first*, That the Commissary had already transgressed the injunctions, and deserved deposition for non-residence and for appointing deputes himself not appointed by the Bishop ; yea, for continuing to make use of these deputes, albeit the Bishop did intimate the injunctions to him, and did judicially require the depute not to sit, and took instruments thereupon ; *2dly*, That in time coming it ought to be declared, that the Commissary ought to reside, under the pain of deprivation, and to act by no depute but such as were authorised by the Bishop. It was *alleged* for the defender, Absolvitor from this member of the declarator, because the defender had his office from the King and the late Bishop of Glasgow, with power of deputation ; and as to the injunctions, *first*, They had no authority of law, for albeit the act of Parliament 1609 related to injunctions to be made, yet it did not authorise any persons to make the same, nor is it constant that these are the injunctions that are alleged to be made by the Bishops *in anno* 1610 ; *2dly*, Albeit they had been then so made, they are in desuetude ; because ever since, all Commissaries have enjoyed their place with power of deputation, and exercised the same accordingly ; *3dly*, There is no injunction against the Bishops giving power to the Commissaries to depute ; for albeit the injunctions bear that in such cases he could not give deputation, and therefore the Commissary did not wrong to continue his depute ; and it is most necessary that the Commissary should have a power of deputation, or otherwise their office is elusory, seeing the Bishop may be absent or refuse to depute any person in case of the Commissary's necessary absence, and so both delay justice to the lieges and evacuate the gift. It was *answered* for the pursuer, That *first*, the injunctions were commonly received and known through all the kingdom, and are registered in the Commissary's books of Edinburgh, being the Supreme Commissariot ; and according thereto the LORDS have decided in advocations and reductions ; and albeit they have not been observed, seeing there is no contrary decision, they cannot go in desuetude by mere non-observance ; *2dly*, That the injunctions do import that no deputation can be granted by Commissaries, but only by the Bishops *in casibus expressis*, is clear from the foresaid two injunctions ; for to what effect should the Commissary's residence be required, if he might at his pleasure act by deputes ; and why were these cases expressed, if deputation were competent in all cases ? *3dly*, Albeit the power of deputation granted by Bishop Fairfowl be sufficient during his life, and seclude him from quarrelling the same *personaliter objectione* ; yet that exception is not competent against this

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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.*

No 11.

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

1663. July 21.

Lord RENTON *against* Laird LAMERTON.

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