

directed from the Lords, did not bear that he should cause Sir William subscribe. — THE LORDS bid Sir William to be re-examined, and to subscribe his oaths; seeing he being a Scotsman, and the commission granted in his favours, he ought to have known what our law did require; and the LORDS did declare, that as to all commissions that should be directed hereafter, that it should be ordained particularly.

Fol. Dic. v. I. p. 317. Gasford, MS. No. 583. p. 331.

No 5.
tion and seal of a foreign judge, is not sufficient, although it is the custom of that place.

1675. February 5. BURNET against LUTGRUE.

A COMMISSION being directed for taking the oath of a stranger residing in Holland, the report was questioned upon that pretence, that the stranger's deposition was not subscribed, albeit the commission did bear, that he should subscribe the same; and yet it was sustained, because of the custom of Holland, that the judges only subscribe, and the same was subscribed by them; and it was adminiculated with a letter from him, bearing that he had declared before the commissioners, and that he would adhere to what he had declared.

Clerk, Gibson.

Fol. Dic. v. I. p. 317. Dirleton, No. 239. p. 115.

No 6.

1707. March 19.

SIR ALEXANDER CUMING against SIR ANDREW KENNEDY, Conservator.

THE LORDS in July last, decreed a commission to the staple port of Campvere in Zealand, for examining witnesses on either side, either to prove the alleged articles of malversation, or Sir Andrew's grounds of exculpation; and Sir Alexander having reported the commission, but being in low Dutch, the LORDS appointed the preparer of the cause to call for Gilbert Stewart, or any other sworn interpreter, to translate it into Scots; and this having been accordingly done, and the report coming to be advised, it was objected by Sir Andrew Kennedy, 1st, That it was returned nowise executed in terms of the commission, in so far as it named two Scotsmen, condescended on by the other party, to be the judges and commissioners in taking the oaths; and though failing of them, it delegated the Baillou and Schepins (Scabine) of Campvere *in subsidium*, yet he neglected Sir Andrew's nominees, and applied to the magistrates of Zealand, and employed them to examine his witnesses.—*Answered*, Sir Andrew's commissioners having shifted, and then falling sick, he was necessitated to go to the next appointed substitute; and Sir Andrew being debarred *personali exceptione* from quarrelling this, *causam dedit* why Sir Alexander recurred to the

No 7.

A commission was granted by the Court to examine witnesses in Holland. The report was not signed by the witnesses, but only by the examiner and clerk; and, on a paper apart, this was declared to be the custom of the country, and that they were in use only to give out notarial extracts. There was likewise

No 7.
an attestation
of the wit-
nesses, that
the extracts
were accu-
rate. These
found suffi-
cient *fidem*
facere judicii.

substitute ; and thus it was solemnly decided, 13th Jan. 1672, Strachan *contra* Forbes, *voce* SOLIDUM ET PRO RATA ; where a commission executed only by one was sustained, because the person named by the other absented himself, so he could not object his own fault, nor *lucrari ex sua culpa*.—THE LORDS repelled the objection, in respect of the answer. 2do, *Objected*, That Peter Haukirkman, the clerk to the commission, and writer of the depositions, is not sworn.—*Answered*, He being the town of Campvere's secretary, and having taken the oath *de fidei* at his admission, it was not necessary he should mention his taking the oath at every act that concerned his office.—THE LORDS found this answer relevant and sufficient. 3tio, *Objected*, The witnesses were not legally and formally sworn, seeing it did not bear, *as they shall answer to God*.—*Replied*, It had words materially the same, *so help me God*, which is the style in the United Provinces.—THE LORDS also repelled this. The 4th and most material *objection* was, That the report produced is not signed by the witnesses, but only by the Schepins, judges examiners, and the clerk, and so is no more but a double and copy, and makes an essential defect and nullity.—*Answered*, The report is an extract, containing the depositions ingrossed, and is all they give, and is authentic and probative in all these countries. And Voet, *tit. D. de fide instr.* tells, by their customs, 'public instruments, *in eodem loco jubentur perpetuo asservari, prohibita omni eorum translatione ne corrumpantur, intervertantur, seu amittantur* ; and cites *instructiones curiæ Hollandiæ* 1569, and is analogous to *l. 18. c. de testament.* And as writs made abroad, after the custom of the place, are valid and probative, even so reports of commissions are received, conform to the laws and practice of that place where they are executed. See Dirleton's Decisions, 5th February 1675, Burnet, No 6. p. 4433 ; when a commission from Holland, subscribed by the judge, but not by the party deponer, was sustained, in respect of the custom of the place. But Sir Alexander Cuming has more in this case ; for he has a declaration from the magistrates, shewing, that they give no more to any but a notorial extract, and which is also attested by the witnesses examined, who declare they have compared their testimonies *de verbo in verbum*, and find them to agree *in omnibus*, which is equipollent to their signed depositions.—*Replied*, The Lords have never relied upon extracts in foreign commissions ; for in Lord Oxenford's pursuit against Mr John Cockburn a commission executed at Rome, Leghorn, Genoa, &c. was returned with the subscription of the witnesses, as well as of the judge and clerk, (*See APPENDIX*) ; and the Lords found notorial extracts from Hamburg, in the case of Mrs Hay, could not make faith, (*See APPENDIX.*) And the Commissaries of Edinburgh, their commission to Holland, to try about William Gordon's wife's adultery, the witnesses principal depositions were reported and returned, (*See APPENDIX.*)—THE LORDS having balanced the reasons, thought Sir Alexander could not force them to transmit the principal depositions, and they were sufficiently attested by the affidavits produced, so that they might *fidem facere judicii*, and therefore sustained them as probative.

November 19, 1707.—In the debate betwixt Sir Alexander Cumming and Sir Andrew Kennedy, about the Conservator's office, mentioned 19th March 1707, the LORDS going to advise the articles of malversation alleged against Sir Andrew in his office, both *quoad* the relevancy and probation, his lawyers recurred to a new defence, that *quoad* all preceding March 1703 absolutor, because pardoned by the Queen's indemnity at that time proclaimed, bearing a full amnesty, oblivion and abolition of all malversations, misdemeanors and transgressions in public offices whatsoever, preceding that date; and which all judges are commanded to attend and interpret in the most ample sense and form, and discharges all prosecutions, to be made hereafter on any such account; and protested that his recurring to that defence was not from any sense he had of the least guilt or accession to the least malversation he was accused of, whereof he was altogether innocent; seeing whatever the founding on a remission does, (though even in that case many crimes are insert whereof the party is innocent) yet the using the benefit of an indemnity is never reputed the acknowledging any guilt; but he chooses this plain and short method to ease the Lords of that tedious intricate probation. *Answered, 1mo*, The protestation was *contraria facto*, for the law says, *indulgentia quos liberat notat, nec infamiam criminis tollit, sed pænæ tantum gratiam facit, l. 3. C. de generali abolitione*. But, *2do*, Sir Alexander Cumming urged, that this scandalous paper-harness of the indemnity could not secure, for it was in these terms: 'Pardons and indemnifies all prior malversations, in so far as the same may infer any pain or punishment against the transgressor;' that is to say, it frees and liberates him from all fines or corporal punishments which might have been inflicted on him before such an indemnity, but it can never be a screen to protect him in his office, wherein he has so palpably malversed; for that is to give him a further occasion *amplius grassandi*, and emboldens him to continue in his former tract of oppressions; and no man will say, that such an indemnity will discharge and liberate a ward-vassal from recognition, liferent-escheat, non-entry, and other feudal delinquencies incurred before the same. *3tio*, Whatever might be pretended with respect to offices within the kingdom, yet this extends not to the Conservatorship, which depends upon a treaty with a foreign state, which did at first complain. *4to*, These malversations were tabled before the Queen prior to her indemnity; and since it, she has bestowed the office by a commission to Sir Alexander Cumming, narrating expressly his malverses, which evidently proved, the Queen never designed to indemnify what is laid to Sir Andrew's charge; and Crompton, Lombard, and Dalton, famous English lawyers, observe, where a complaint is commenced before the pardon, it is not included therein, unless it be specially and *nominatim* remitted; and so Clarus and Perezus, that *prodest ad pænâ corporalem aver-tendam, sed non quoad damnum partum et interesse*; and Farinacius says, *delinquerii in publico officio, ipso jure privantur illo officio sine medio sententiæ declarationæ, et nunquam rursus gerit illud officium in quo ante decoxit*. And though Sir An-

No 7.

drew Kennedy had it during lifetime *ad vitam aut culpam*, yet that is only *quandiu se bene gesserit*, and all liferent offices have a tacit condition implied in them by law, viz. so long as they duly and lawfully administer and execute the same. Hence Sir Edward Coke, in his Institutions of the law of England, instances; in one having a gift of parkership, or keeping of cattle during life, if he either do not attend well, or let the deer be killed; or the trees cut down, he may be turned out, and another put in his place; And with him agree Plowden, Dyer, and Fincham, in their reports. And to come to our own customs, it has been so decided with us, 4th February 1664, the Town of Edinburgh against Sir William Thomson, their clerk, *voce PUBLIC OFFICER*; 19th Feb. 1680, the Lord Register against Sir William Primrose, *IBIDEM*; and 11th July 1672, in the case of Nimmo, *voce JURISDICTION*, deprived for non-residence, though he had a depute. *Replied* for Sir Andrew Kennedy; That indemnities were the great securities of the people, and not to be nibbled or crumbled away by nice distinctions, seeing many greater faults than his are unquestionably pardoned and sopped thereby. All nations repute such amnesties sacred, and like fundamental laws and corner stones, *nec movendum, nec tangendum*; and to allege that the clause adjected in so far as concerns pain or punishment does limit it, and only indemnify criminal processes, but not as to other punishments, is to disquiet the minds of the people, and make them believe they are not yet secure; and if he may be deprived of his liferent-office, notwithstanding of that indemnity, then he has no benefit at all; for, without it, the most that could have been concluded against him was the loss of his office; and will any man, soberly considering, think that this is no punishment, that not only stains his fame, honour, and reputation, but also deprives him of his livelihood, and liferent property. And if all lawyers count *suspensio ab officio* a punishment, then *deprivatio et depositio* must be much more so. And it alters not the case, that the States of Campvere and Zealand are concerned; for they, by their letters, have declared, they pass from any complaints against him; and though it be in a foreign country, yet it is a Scotch colony, and ruled by our laws. And as for Farinacius his opinion, the greatest part of the doctors differed from him, and required a declaratory sentence of a judge, applying the law to the particular delinquency and malversation, before the place could vacate and irritate. It was proposed by Sir Alexander Cumming's lawyers, that the Lords would take a view of the malversations libelled in the 23 articles, to have been committed by him since the indemnity in March 1703, that the conjunction of all may be under the Lords consideration at once; but the indemnity being an abstract point of law, the LORDS thought it best to decide that first, but prejudice of advising the subsequent malversations, and how far these preceding the indemnity can influence or aggravate the posterior continuation of them. Some thought the indemnity behoved to have some effect in this case, and that at least it would cut off all articles of malversation prior thereto founded on mere

omissions of duty, but as to the positive misdemeanors and commissions contrary to clear law and the staple contract, they did not think these included in the indemnity, such as taking dues for ships landing at Rotterdam, and deserting the staple port of Campvere, or causing them pay for Irish goods, without punishing them for colouring them under Scotch merchants names, &c. The vote being stated, Sustain the indemnity to cut off all preceding malversations, or repel it; five sustained, and five repelled, and one was *non liquet*, and two were absent out of the house; and so it came to the President's vote, who sustained the indemnity, whereby Sir Andrew Kennedy gained it.

December 9. 1707.—The debate about the Conservator's place betwixt the two competitors, Sir Andrew Kennedy and Sir Alexander Cumming, mentioned 19th November last, was decided, and the malversations being restricted to these committed after the indemnity, dated in March 1703; and Sir Alexander insisting on two particulars drawn out from many others, viz. Sir Andrew's communicating the Scots staple port privileges to the Irish, Dutch, and other nations, and taking his duties for the same; *Item*, his non-residence, his not marking the factor's books, his not holding of courts, &c, the LORDS fixed upon the first article, and, by a plurality of seven *contra* five, found his taking dues from those others, knowing them not to be Scots goods, was relevant to infer the loss and tinsel of his liferent office; and then the probation being read, they found his exacting these dues, and knowing them to be Irish, sufficiently proven by the testimonies of the witnesses; and therefore deprived him, and declared in favour of Sir Alexander Cumming his gift and commission to that place from the Queen. Some *alleged* this was like Jezebel and Ahab, Arise, kill, and possess, to take a gift of a man's liferent office, and to backpeer the tract of his bygone life; and if this were allowed, there be few in public offices but they may be over-reached; for in many things we offend all, and, as the Poet expresses it, *Iliacos inter muros peccatur, et extra*, and the most innocent, if strictly scanned, are not able to justify all their steps of omission or commission; and that Sir Andrew had exacted nothing but what his predecessors in office had done before him; and Sir Alexander Cumming had already done worse. On the other hand, when malversations are so patly made out, it were to encourage him *amplius grassari*, and perpetrate all extortion and oppression, to continue them still in office; and though *non sufficit accusasse* to conclude a man guilty, yet if *negasse sufficerit, nullus unquam esset nocens*; and the States of Holland and Zealand will admire what rule of justice we proceed by, if they shall hear we have assoilzied him, when they so perfectly know his mal-administration.

January 16. 1708.—In the case mentioned, 9th December 1707, between the two Conservators, there having been a new hearing allowed them on separate

No 7.

points, the whole came to be re-advised and determined this day.—It was *alleged* for Sir Andrew Kennedy, That his taking conservator dues for goods from Ireland, can never be such a malversation as to forfeit his place, seeing it is plain his predecessors in that office had frequently done it ; which he finding to be the practice at his entry, the continuing of such a custom can never be reputed such a breach as to irritate his gift ; *2do*, This being laid before the royal burghs, they neither censured it, nor gave him any injunctions about it ; so there being no law from them who were most concerned to notice and restrain it, there can be no transgression. Then he *objected* these two nullities against Sir Alexander Cumming's gift, *1mo*, That it was surreptitious and obreptitious, containing a plain falsity, that a report of the royal burghs was laid before the Queen, complaining of the said Sir Andrew, whereas, there is no vestige that any such thing was done, it neither being recorded in the books of the convention of burghs, nor in the secretary's office at London ; and so the Queen was imposed upon by a false narrative, which, by the common law, annuls all rescripts of princes so impetrated ; *2do*, It is also null, because in the principal signature, which is the warrant of Sir Alexander's gift and commission, there are some lines and clauses scored and delete ; and though in the margin it bears to have been done by my Lord Chancellor's order, and is so marked by Sir Alexander Ogilvie of Forglen, then keeper of the Great Seal, yet he could make no such alterations without acquainting the Queen ; for though the Exchequer may limit and restrict the Queen's gifts, they passing with her consent, yet the Chancellor alone has no such power ; for that were to make him master of the subjects rights.—*Answered*, That *esto* the former Conservators had exacted any such dues, which is denied, yet this evil custom is so far from being an excuse or cloak to Sir Andrew's guilt, that it rather aggravates the same ; that being set up as a beacon for him to avoid the rocks his predecessors split upon ; and whatever errors in some circumstantial points may do to extenuate, yet the very fundamentals of trust being thereby subverted, (that instead of a Conservator, he turns a betrayer of Scots liberties,) they can never defend ; this being *consuetudo irrationabilis et morum corruptela, seu labe* ; and how would it be hissed out of doors, if a waiter or customhouse-officer, taking money to let goods pass without paying custom, should seek to shroud himself under that defence, that others before him did the like ; and so of a Colonel making false musters by putting men in his pocket, or a Governor in foreign places conniving at strangers carrying away the trade of tobacco, sugar, spices, &c. ; yea more than so, a searcher at Sandwich was deprived of his office he had for life, because he was absent for two or three days, when ships went out and in without being searched, as Judge Crooks in his Reports observes ; and even so, if a jailor neglect to lock his prison, and by that *crassa negligentia* some malefactors escape. To the *second*, it was *answered*, *1mo*, The commissioners of the royal burghs had no power to censure, but to report ; so their silence imports nothing. But, *2do*, *Esto* they had connived, it could never excuse Sir Andrew Kennedy ; for this is

actio popularis, the whole lieges are prejudged, so the burghs could never dispense with it; and yet, on the contrary, by their act in 1699, they had discharged it. And as to the nullities objected to Sir Alexander's gift, it was *answered* to the *first*, This was to give the lie to the Secretary of State, who presented that gift to her Majesty; and yet that report was truly sent, though not recorded; for there be many other passages of which Sir Andrew Kennedy cannot contest the verity, and yet they are neglected to be recorded; and as to the *second*, The deleting that clause quarrelled was to Sir Andrew's advantage; for it cassed, annulled, and rescinded his gift, which my Lord Chancellor, by advice of the Queen's lawyers, caused delete, as of an extraordinary nature, and *quoad* all writs passing the Great Seal *per saltum* he has been in constant use to do; the name of his office being, according to Spelman, in his *Glossarium Latino-barbarum*, derived *a cancellando*, though others take it to come *a cancellis*, and his sitting within the chancel; and hence the Chancery. The *first* question started was, Whether the Lords should begin with Sir Andrew's malversations, or with his objections against Sir Alexander Cumming's title; for which it was *urged*, That if Sir Alexander's gift was found null, then he had no more interest to quarrel Sir Andrew's right.—*Answered*, That *esto* the Lords should find Sir Alexander's gift null, yet the process would go on in the Queen's Advocate's name, who was expressly ordered by her Majesty to insist; and though he cannot pursue alone in improbations to force production, without a private party's interest, yet here was a public minister, and one of the Queen's servants, pursued for malversing, and so there was a clear difference.—THE LORDS thought they had all along, by consent of both parties, proceeded to cognosce the malversations first, and had already pronounced interlocutors thereon, so they began there. On which Sir Alexander Kennedy gave in a declinature against my Lord Forglen, he who scored the said clause in Coulter's gift, and so was concerned to maintain his own deed. It was argued among the Lords, that what he did was *ratione officii*, and by the Chancellor's order, and so could never decline him; being less than if one should object against a Lord of Session, you cannot vote in such a cause; for, before your advancement to the Bench, you was an advocate in it, and received money; which was never sustained.—THE LORDS repelled the declinature. Then the vote was stated, If Sir Andrew Kennedy's taking Conservator dues for staple goods coming from Ireland, and so communicating the Scots privileges to strangers, was relevant to infer deprivation of his liferent office; and by a plurality it was found sufficient.

The next thing the Lords proceeded in was the probation; against which it was *objected*, That however the witnesses deponed as to his taking such dues, yet there were not two concurring witnesses upon one fact, and so they were *singulares testes*.—*Answered*, That in murder, and such like crimes, there must be a concurrence of witnesses, both as to time, place, person, and manner; but *in*

No 7.

crimini generico, which was reiterable, the deponing on several facts was sufficient; they being all of one kind and species; and so it is sustained in adultery, and other such crimes; and here it was clearly proven, that, since the indemnity in March 1703, he had received such dues from strangers. This being put to the vote, the LORDS found the said malversation proven, and so ordained the decret to be extracted; reducing Sir Andrew Kennedy's right, and preferring Sir Alexander Cumming's gift. Much was founded in the debate on the staple contract betwixt the royal burghs and the town of Campvere and States of Zealand, which see recorded at length by Mr William Black, advocate, in his Treatise on the privileges of the royal burghs of Scotland.

December 9. 1708.—Sir Alexander Cumming having got a decret, *supra* 16th January 1708, *contra* Sir Andrew Kennedy, finding he had lost his office of Conservatorship through malversations; and his son, John Vere Kennedy, founding on his gift as conjunct with his father; it was *alleged*, That it was terminated and expired, because it expressly bore, that after his father's decease he was only to bruik and enjoy the office *durante bene placito*, though his father had it *ad vitam vel culpam quamdiu se bene gesserit*, and the Queen had now, by a second gift and commission to Sir Alexander, ratifying the former, declared her pleasure, and revoked John Vere's gift. *Answered*, That the son's commission stood good during the father's natural life, and was irrevocable till then; and deprivation was no equivalent any more than a natural incapacity in the father by sickness, or furiosity, would have been; and by the divine law, sons are not to be punished for their father's delinquencies, nor their teeth to be set on edge, because their father eated sour grapes. *Replied*, That criminal incapacities, arising from faults, differed from natural and innocent ones; and in the eye and construction of the law *mors civilis* by deprivation for malversations was equiparate to a natural death, *L. 17. D. ad § C. Trebell.* and *Robertus Rer. Judicat. lib. 4. C. 16.* shews the parliament of Paris found *mortem civilem eosdem sortiri effectus cum naturali*. But Sir George Mackenzie, in the beginning of his printed pleadings, shews the supreme senate of Burgundy found a civil death did not purify that condition. THE LORDS being equally divided, by some being *non liquet*, it came to my Lord President's vote, whether the sentence of deprivation against the father, did vacate and terminate the son's right, at least made it to be during pleasure, or if it stood till his father's natural death? THE PRESIDENT forebore to give his vote this day, till he saw if those who voted *non liquet* would clear themselves, and till he tried if the parties would agree; but these failing, he found deprivation equivalent to natural death, and so that the son's gift was at an end, or at the Queen's disposal at least.

February 5. 1709.—In the process between Kennedy and Cumming, the two Conservators, mentioned 9th December 1708, the LORDS decided the two remaining points. The first was a reason of reduction of Sir Alexander's gift,

because the warrant under the King's hand is vitiate, razed, and delete in a whole clause, by ocular inspection, which could not be done by the Chancellor alone, but either by the King's special command, or the Lords of Exchequer, as a judicatory proper for expunging exorbitant clauses. *Answered, 1mo,* The Chancellor cannot be denied a discretionary power in revising such gifts. *2do,* The scoring of this clause was in favours of Sir Andrew Kennedy, being a clause revoking, recalling, and annulling his gift, whereby the Queen judged the cause antecedently, and so he had the benefit of the razing it out. *3tio,* The Queen could only quarrel it, which her Majesty has been so far from doing, that she has given Sir Alexander a ratification of her first gift with a *novodamus*. THE LORDS repelled the reason of reduction, and did not find it a nullity. The next point was, if John Vere Kennedy's gift, in conjunction with his father, be now terminated by his father's deprivation upon malversation. THE LORDS found *supra*, 9th December 1708, that the father's deprivation was in law equivalent to his natural death; but the most could be inferred from that was, John's gift came thereby to be *durante beneplacito*, and so he continued in office, ay till the Queen declared her pleasure by revoking it. *Answered,* The Queen has done that upon the matter, by the new gift and ratification in favours of Sir Alexander Cuming, which is a material revocation of John's gift, and puts it to an end. *Replied,* This new gift is in August last, and the Lords interlocutor, finding John Vere's gift reduced to the state of a *durante beneplacito*, was not till December thereafter, so it can have no retrospect, and was the disposing of an office before it became vacant, contrary to the claim of right. *Duplied,* John's place became vacant by the interlocutor depriving his father, which was before the Queen's second gift; and the interlocutor in December last was only declaring and applying it.—THE LORDS found John's right terminated and void by the Queen's second gift to Sir Alexander, and so declared in his favours, and sustained his gift. There remained yet another point in this cause to be decided, viz. Sir Alexander's intrusion upon Sir Andrew Kennedy's possession of the bygone emoluments, fees, and profits of the place, in regard the Lords by their decret had continued Sir Andrew in possession of the Conservatorship during the dependence.—THE LORDS discharged the extracting of the decret till that point was determined; and Sir Alexander being now chosen a member of the British Parliament for Aberdeenshire, in place of my Lord Haddo, found incapable as a Peer's apparent heir, it was suggested he would use his privilege, and so refuse to answer and debate the intrusion. He offered a renunciation under his hand of that privilege; but it was answered, they could not dispense with it, for the English act of Parliament expressly discharges all Judges to sustain process against them, whether they claim it or not; but the Lords did not dip upon these privileges. See INDEMNITY.

Fol. Dic. v. 1. p. 307. Fountainball, v. 2. p. 362, 393, 401, 419, 470, & 488.

* * * Forbes reports the same case :

No 7.

IN the process at the instance of Sir Alexander Cuming against Sir Andrew Kennedy, about the office of Conservator of the Scottish Privileges in the United Provinces, the LORDS, by an act, before answer, having allowed a conjunct probation to the parties, viz. To Sir Alexander for proving the malversations charged upon Sir Andrew, and to Sir Andrew for proving his exculpation ; a commission was directed to two persons named by Sir Alexander, and other two named by Sir Andrew, and in case of their absence, or not acceptance, to one or more of the Magistrates of Campvere. Sir Alexander extracted an act, and, upon the failure of the commissioners named, applied to two Schepins of Campvere, before whom he examined his witnesses ; and brought home a report, containing an extract under the secretary's hand, of the principal depositions. Sir Andrew Kennedy *objected* against this report, that the commission was directed with this quality, that the depositions signed by the witnesses, judge, and clerk, should be transmitted ; whereas nothing is produced but the clerk's notorial attestation of depositions pretended to be taken before the Magistrates of Campvere.

Answered for Sir Alexander ; It is the custom of the place to keep all original depositions, affidavits, &c. signed by the deponent, judge, and clerk, in the Stadt-house, and to give out only extracts under the clerk's hands ; as is clear from the affidavit and declarations of the clerk of the town, and of a public Magistrate, and from the testimony of Voet. in his late Practical Commentary, *ad tit. ff. De Fide Instrumentorum*. Besides, that it is upon the matter acknowledged by a decision observed by Dirleton, February 5. 1675, Burnet *contra* Lutgrue, No 6. p. 4433. And, for confirming the verity of the extract produced, there is a declaration of the whole Magistrates of the city, signed by the secretary, and the town-seal appended, and a collationed copy signed by the witnesses, the pensionary, secretary, and two public notaries.

Replied for Sir Andrew ; He who accepts of a commission must prosecute the same in the terms thereof, otherwise he acts not by authority thereof, and the granter of the commission cannot regard his report. As to the decision Burnet *contra* Lutgrue, the LORDS there demurred upon the informality of the report, as not duly subscribed. Nor had they sustained it, but that it was subscribed by the Judge, and homologated by an express letter under Lutgrue's hand. Sir Alexander's affidavit and declaration are nothing to the purpose, since the question here is not about the custom of the place, but the manner of executing the Lords commissions ; and no foreign Judge can be supposed so uncivil as to neglect the same, if required to do it. The testimony of Voet, *De Fide Instrumentorum*, doth as little towards confirming the legality of the report, as if Sir Alexander had said, *Baculus stat in Angulo, ergo, &c.* 2do, That this is not the method of reporting commissions sent abroad, may be cleared from several

instances ; as a commission in the case of the Viscount of Oxenford and Mr John Cockburn was executed and reported by returning the subscriptions of deponents, judges, and clerk from Rome, Leghorn, &c. In the case of one Hay, the Lords did not sustain notorial extracts from the Senate of Hamburg as probative here, though they made faith with them there about the year 1682. A commission from the commissaries of Edinburgh, in the case of William Gordon and his wife, to John Steenlack burgomaster of Rotterdam, and others, 1698, for proving the libel of adultery against her, was duly executed and reported by the subscriptions of the deponent, judges, and clerk, *anno* 1704. A commission, in the case of Van Rixel, merchant in Harlem, and David Cleland, merchant in Edinburgh, to Jacob Van Cralingen and John Drummond, merchants in Amsterdam, was duly executed and reported by the subscriptions of parties, judge, and clerk, together with the seal of the city of Amsterdam.

Duplied for Sir Alexander ; The instances adduced by Sir Andrew, of commissions otherwise reported than Sir Alexander's, are not to the purpose ; for these commissions were all directed to private merchants, and not to the Magistrates of the place : Nor is there any instance of a commission reported from Campvere, where Sir Alexander's commission was executed ; and the custom of other cities is no rule to them.

THE LORDS repelled the objection, and sustained the report.

Forbes, p. 152.

No 7.

S E C T. III.

Extracts.

1627. *March* 2. LAMINGTON *against* KINCAID.

EXTRACT of a bond made in Bourdeaux, subscribed only by the Tabellion, which bears, that a party subscribed a bond insert in his register, is sustained by the Lords to furnish action, because it was known to the Lords that it was the custom of that part to make the bond after that form ;—and because the bond bore damage and interest, the LORDS modified and restricted the interest and damage to the annualrent of 10 for each hundred, so long as the principal sum was unpaid.

Fol. Dic. v. 1. p. 317. Auchinleck, MS. p. 15.

No 8.