

Britain in affirmance of the former decree or sentence as to the prolongation of the said leases be reversed, so far as the same relates to the prolongation of the said leases, except only as to the first nineteen years of the six 19 years.

For Appellant, *Jo. Pringle.*
 For Respondents, *Sam. Dodd.*

Sir Andrew Kennedy, Baronet, - - *Appellant;*
 Sir Alexander Cuming, Baronet, - - *Respondent.*

Case 8.
 Fountain-
 hall, 3d Jan.
 1706.
 19 March,
 19 Nov.
 9 Dec. 1707.
 16 Jan.
 24 Feb.
 9 Dec. 1708.
 5 Feb. 1709.
 Forbes,
 3 Jan. 1706.
 18 March,
 19 Nov.
 1707. 16
 Jan. 1708.

19th April 1711.

Public Officer.—The office of conservator, held by a grant under the great seal to a father and his son jointly, being upon complaint of the father's malversations granted to a third person, without previous sentence; this new grant was void.

Certain malversations alleged against the conservator not relevant to infer deprivation.

Proof.—The malversations of a conservator being found proved *per singulares testes*, the judgment is reversed.

Act of indemnity.—Malversation thereby remitted.

Expences of the court below given to *an appellant*.

Proceedings on the mode of ascertaining the amount of these expences.

THE office of Conservator of the Scots Privileges in the Netherlands is very antient; it was held by grant under the great seal of Scotland: to it several powers and faculties were committed in relation to trade, treaties with foreign states, and other matters that concerned the government and public peace.

By many ancient treaties, and by a contract made between the royal burghs of Scotland, with the approbation of his Majesty King William, on the one part, and the states of Zealand and town of Campvere on the other part, in 1699, and by an act of the parliament of Scotland, Campvere was appointed the port where all staple goods, such as linens, woollens, hides, butter, oil, tallow, pork, beef, salmon, lead ore, &c. of the manufacture, growth, and produce of Scotland were to be landed. By this contract the Scots had many privileges and advantages.

For the better maintaining these privileges, and that the conservator might have more ready access to the states and their senates abroad, he was vested with the character of a public minister, as resident for the whole provinces; and had jurisdiction over Scotsmen both civil and criminal. By several acts of parliament he was obliged to keep courts, and administer justice according to the laws of Scotland, and those who sued before any other judicature were punishable: where differences arose between the Scots and Dutch, the conservator was to appoint arbitrators; and if they made no determination, he was to sit and judge with Dutch magistrates.

1503, c. 81.
 1579, c. 96.

Their Majesties King William and Queen Mary, in 1689, granted a commission under the great seal of Scotland to the appellant to be conservator of the Scots privileges in the Netherlands, and their Majesties' resident for the affairs of Scotland within the seventeen United Provinces for and during his life. In 1697, a new grant was obtained of the said office from King William, also under the great seal of Scotland, to the appellant, Sir Andrew, and his son John Vere Kennedy jointly during Sir Andrew's life, and after his death to John Vere Kennedy for and during his Majesty's pleasure.

The office of conservator was administered for some time under these grants, by the appellant (a) : complaints, soon after, began to be made by the states of Zealand and the magistrates of Campvere to King William, and to the royal burghs, and afterwards to Queen Anne, of a non-observance of the staple contract. The parties in this appeal are not agreed with regard to the grounds of such complaints; the respondent states, that they were occasioned by the appellant and his son having neglected and abused their trusts; whereas the appellant mentions, that the original memorials from the states of Zealand and the magistrates of Campvere did not criminate or charge him; but that afterwards, at the instigation of one Isaac Denheldt, burgo-master of Campvere, his personal enemy, letters were written to the convention of royal burghs, complaining of his administration.

In 1702, the convention of royal burghs gave commission to two persons to go to Campvere, and to investigate these complaints. The parties, likewise, are not agreed with regard to the proceedings of these commissioners. The appellant states, that after their arrival Denheldt gave in several complaints against him, which being laid before the royal burghs, they were all after a strict examination found groundless; and the royal burghs never did pass any sentence or censure upon the appellant: the respondent, on the contrary, mentions, that the commissioners having made their report to their principals, it appeared that the appellant and his son had been guilty of very great misdemeanors; that this report being ratified by a new committee of the burghs, an abstract thereof was made, and the report laid before her then Majesty.

On the 7th of April 1705, her Majesty executed a warrant for a new grant of the said office to be made in favour of the respondent Sir Alexander Cuming, proceeding upon a recital, that *after trial and cognition of Sir Andrew Kennedy's and his son's malversations in their said office, they had forfeited the same*; and her Majesty thereby ordained her advocate and solicitors to prosecute all actions necessary for annulling the former grant, and for making that in favour of the respondent effectual. A commission in consequence thereof passed the seal, and the respondent entered upon his

(a) It does not with certainty appear whether the appellant's son took any part of the administration: the respondent states that the appellant and his son did not take the oaths upon their joint grant of the office, and though the son is charged generally in some parts of the respondent's case with misdemeanors, no particular instances are stated.

office, and was received as her Majesty's minister by the States General of the town of Campvere.

The appellant thereupon commenced an action of reduction and declarator before the Court of Session against the respondent, for reduction of the commission granted to the latter, and to have his own right under the former commission declared. In this action he insisted that the grant to the respondent proceeded upon misrepresentation of matters of fact; that the Queen's warrant was rased in essential places, and that it was contrary to the claim of right, ratified by act of parliament 1703, c. 3., which declares all forfeitures before sentence to be against law. The Court found "that Sir Alexander Cuming could not warrantably obtain possession of the said office by virtue of his commission until Sir Andrew Kennedy's action of reduction and declarator were determined, or that Sir Alexander had obtained a decret declaring his right thereto."

A counter-action was afterwards brought in name of the respondent and the officers of state for affirming the grant of the office to him; and to have it declared, that the appellant by malversations in his office had incurred a forfeiture of the same. Various articles of misdemeanor were insisted upon by the respondent; but, as these form no part of the question at issue by the present appeal, they are not here detailed. A proof was taken both in Scotland and in the Netherlands, and many witnesses were examined; parties were afterwards heard upon the proof, and a new matter of dispute arose in the cause, namely, an act of indemnity, made in 1703, and ratified by parliament, bearing to be a full amnesty of all transgressions in public offices, and a bar to all prosecutions for such transgressions preceding that date. Parties are not agreed with regard to the manner in which this matter of the indemnity arose in the cause. The appellant states, that it was taken notice of by the Court, without having been pleaded by him; whereas the respondent mentions that *it was so pleaded* by the appellant, as appeared from several places of the decree, though he would now *untruly* suggest the contrary.

Parties were heard by order of the Court on this point of the indemnity; and the respondent contended, that the act did not extend to pardon offences in ministers abroad committed against foreign states, who in this case were prosecutors, and ought not to be debarred of their right, by the law of nations, of being freed from a minister, whom they had complained of in their letters and memorials as *negligent, factious, seditious, turbulent, and vexatious*. And though the said act might excuse the appellant from being punished, it could not be extended to restore him to an office which he had forfeited, nor repose him to that reputation which was necessary for the public service abroad. "Indulgentia, patres conscripti, quos liberat, notat; nec infamiam criminis tollit, sed poenae gratiam facit. L. 9. Cod. T. 43. de generali abolitione." The Court sustained the defence founded on the indemnity as to all malversations of omission or commission committed by the
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appellant

appellant preceding the date thereof. And so far the judgment of the Court is not appealed from.

The cause being thus narrowed, the respondent insisted that the appellant had been guilty of misdemeanors since the date of the indemnity; and the cause being heard, the Court on the 9th of December 1707 pronounced the following interlocutor: "Having considered the state of the process, and having advised the debate, with the depositions of the witnesses, and writs produced, find it proved that the appellant did, since the act of indemnity, receive conservator dues for staple goods belonging to Dutch and Irishmen coming directly from Ireland to the staple port of Campvere, and that he was in the knowledge thereof, which they find to be a malversation in his office of conservator relevant to infer deprivation; and therefore reduce the gift in the appellant's favour, and discern and declare the respondent's right to the said office by virtue of his commission." The appellant reclaimed, and the cause being re-heard, the Court adhered to their former interlocutor.

Entered
20 February
1710-11.

The appeal was brought from "a decree made by the Lords of Council and Session the 9th December 1707."

Heads of the Appellant's Argument.

The respondent's commission is contrary to law, and granted upon a misrepresentation made to her Majesty, and on that account the respondent had no title to sue the appellant for any misdemeanors, though he had been really guilty thereof, as in fact he was not. And further the warrant for the respondent's commission, after it had passed her Majesty's royal hand, was razed in two very material places; the first, where her Majesty does actually recal the commission granted to the respondent, and his son, three lines are razed out; the other, where her Majesty orders the great seal to be appended, the word *thereunto* is razed out, and the words *and pass per saltum* are put in.—By this last alteration the respondent prevented the commission from being laid before the Privy Council, as was usual, having no reason to believe the Privy Council would agree to the passing a commission against law; especially since the warrant had been razed after her Majesty had signed it.

The facts alleged to have been committed by the appellant were according to usual and former practice in the office, and not sufficient to infer a forfeiture; and even these facts were not proved against him by two unexceptionable witnesses. For by the law of Scotland no proof is sustained, unless upon the oath or testimony of two lawful witnesses to one and the same fact; but the two witnesses, Hamilton and Douglas, upon whose evidence only this decree is founded, depone to things entirely different. And even this evidence does not amount to a proof of the misdemeanor laid to the appellant's charge, viz. *That he was in the knowledge thereof.*

Heads

Heads of the Respondent's Argument.

The clause delete in the warrant was thought superfluous, and scored out by the chancellor in favour of the appellant, that he might not be precluded from justifying himself if he was innocent. There was no objection upon this pretended nullity, until after the decree was pronounced, and it could not then be received: nor would it have availed the appellant at any time, he being prosecuted at the queen's suit.—As the respondent's grant under the great seal was sufficient; so he has a new commission, ratifying and confirming the former in every article, and conferring the office *de novo*.—And as to the pretended addition of the words *per saltum* in the warrant, the same is false, as may appear by the warrant itself, and secretary's docket.

The malversations, subsequent to the indemnity, on which the Court pronounced judgment, were, That contrary to the 3d and 13th articles of the Staple Contract, made in the appellant's own time, and an express order of the burghs *anno* 1699, and his own signed instructions, he had betrayed his trust, by allowing the importation of Irish goods belonging to Dutchmen, &c., and permitting the same (for a gratification to himself) to be entered at the staple port as Scots goods, and thereby to enjoy the immunity of customs, &c. to the great loss of the trade, manufactures, and native produce of his nation. And those were proved by ten concurrent witnesses (a). There have been grants of the same and other offices upon misdemeanors of persons having them for life, without any previous sentence, or so much as an inquisition of such misdemeanors or proofs thereof from record as there were in this case. And the appellant being a foreign minister, and as such having injured foreign states, there was no need of a formal sentence, before issuing out the grant, the proofs of his misdemeanors upon record being sufficient. And the prosecutors were not bound to wait relief from the decree of ordinary judicatures, but had immediate recourse to the fountain of justice, her Majesty being in some measure answerable for his behaviour, and so of herself capable to grant redress, which was necessary for preserving the public peace, and preventing reprisals, embargoes, and arrests, &c. which are the common remedies where justice is denied or delayed to sovereign states.

After hearing counsel, *it is ordered and adjudged, that the decree of the Lords of Council and Session in Scotland, complained of in the appeal of Sir Andrew Kennedy, be reversed: and it is declared and adjudged, that the said commission granted by her Majesty to Sir Alexander Cuming is void, and that the said commission granted to Sir Andrew Kennedy and John Vere Kennedy is still subsisting in full force: And it is further ordered, that the Lords of Council and Session do direct the expences in these suits to be taxed according to the course of their Court, and paid to Sir Andrew Kennedy by Sir Alexander Cuming: and that*

Judgment,
19 April
1711.

(a) From Fountainhall, 16th Jan. 1708, it appears that the witnesses on the point appealed from were *singulares testes*, notwithstanding this general allegation of the respondent.

Sir Andrew Kennedy be quieted in the enjoyment of the said office; and as to the mesne profits of the said office the said Sir Andrew Kennedy is left at liberty to pursue such remedy as he shall be advised to take for the same.

For Appellant, *John Pratt.* *P King.*
For Respondent, *Edward Northey.* *Robert Raymond.*

After discussing the Appeal.
Fountain-hall, 25 July 1711.
25 June, 26 July 1712.
Forbes, 21 July, 9 Nov. 1711.
26 June, 30 July 1712.
Journal, 2 June 1712.
17 June and 7 July 1714.

Proceedings with regard to the Expences of the Court below, awarded to the Appellant.

ON the 2d of June 1712, a petition of Sir Andrew Kennedy was presented to the House, shewing, “ That the House, the 19th of April 1711, upon hearing an appeal brought by the petitioner against a decree made by the Lords of Council and Session in Scotland on the behalf of Sir Alexander Cuming, did reverse the said decree, and order the Lords of Session to direct the expences in the suits mentioned in the said order to be taxed according to the course of their court, and to be paid to the petitioner by the said Sir Alexander; and that on the 4th of July last the petitioner did apply to the said Lords of Session in order to have the said expences taxed, but they had delayed the doing thereof.”—And the petition prayed, “ that the House would be pleased to tax the said expences, or order the Lords of Session forthwith to tax the same.”—Upon this petition an order was made, “ that the Lords of Council and Session should forthwith tax the said expences, and direct the same to be paid to the petitioner pursuant to the order and judgment of the House.”

On the 17th of June 1714, a petition of Sir Andrew Kennedy and John Vere Kennedy his son, conservators of the Scots privileges in the Netherlands, was presented to the House and read; reciting the judgment of the 19th of April 1711, and complaining of the contempt of the said judgment, and praying, “ That directions might be given for satisfying the petitioners for their great and extraordinary damages sustained thereby; and that the said judgment might be made effectual, so that the petitioner might have the costs paid him which the Lords of Session had decreed, in such manner as to the House should seem meet.” This petition was referred to a committee to examine the allegations thereof, and report their opinion thereupon to the House.

On the 7th July thereafter the committee made their report, “ That the committee had considered the said petition, and examined the allegations thereof, and heard the parties in relation thereunto; and it appearing that Sir Alexander Cuming had not made payment of the costs, which pursuant to the said order or judgment of the House were taxed by the Lords of Session at the sum of 100*l.* sterling; and notwithstanding the said Sir Alexander did pretend to be entitled to a debt owing by Sir Andrew, for which he pleaded compensation; as also that the creditors of Sir Andrew had attached this sum in his hands;”

“ never”

“ nevertheless, neither of the said allegations were made good by
 “ the said Sir Alexander: and in respect the said costs ought to have
 “ been immediately paid, the committee were therefore of opi-
 “ nion, that the said sum of 100*l.* ought to be forthwith paid to
 “ the said Sir Andrew, and which ought to be declared no way
 “ subject to or affectable by any pretence of compensation or at-
 “ tachment:—and it having further appeared to the committee
 “ that Sir Andrew Kennedy and John Vere Kennedy his son had
 “ not the full enjoyment and possession of their office of conser-
 “ vator as directed by the order of the House, notwithstanding
 “ her Majesty’s letter to the States General on behalf of the said
 “ Sir Andrew and his son; and that Sir Andrew in endeavour-
 “ ing to obtain possession of his said office having been put to
 “ very great trouble and expence, occasioned chiefly by a poste-
 “ rior commission granted to Sir Alexander Cuming under the
 “ great seal for the said office (which had been presented to the
 “ States of Zealand and magistrates of Campvere); it was there-
 “ fore the opinion of the committee, that the House should be
 “ moved, that an humble address should be presented to her Ma-
 “ jesty, that her Majesty would be graciously pleased to grant a
 “ new posterior commission of the aforesaid office of conservator
 “ to the said Sir Andrew Kennedy and John Vere Kennedy, that
 “ thereby the said order of the House might be rendered effectual
 “ to them.”

This report was agreed to by the House, and orders accordingly made in terms thereof.

In the Dictionary of Decisions, vol. II. voce Presumption, p. 153. a judgment of the Court of Session sustaining the gift in favour of the respondent, though some words were added to its warrant, and others scored out, is given as a subsisting decision; but as this gift was totally reduced by the House of Lords, the judgment is not now an existing precedent.

It appears from Fountainhall (26th July 1712), that Sir Andrew Kennedy stated to the Court of Session, that the ground of the judgment of the House of Lords was, “ that they found neither
 “ a just nor a probable cause on Sir Alexander Cuming’s part,
 “ his gift being impetrate from the queen by obreption and sur-
 “ prise against the claim of right securing liferent offices, and
 “ on a false narrative of Sir Andrew’s malversations; and the
 “ warrant vitiate and scored and found to be a null right; who
 “ on all these grounds had modified expences.”