

S E C T. IX.

Proof led before Commissioners.

1582. May.

A. against B.

No 191.

Found that
Commission-
ers for taking
evidence
might dele-
gate their
powers.

THERE were certain strangers that pursued certain burgesses of Edinburgh, and other Scotsmen, for the resetting and intromitting with certain goods and gear, which were reft and spuilzied from them by way of piracy. The matter being first intented before the Lords of Session, there was commission granted to certain Judges Commissioners, and the libel admitted to probation, and certain terms of probation used thereintil. The pursuers desired a commission to certain Judges forth of the country, viz. to the Magistrates of Antwerp, to examine certain witnesses in these parts, for proving their libel; which commission being granted by the Judges Commissioners, it was meaned by supplication to the Lords of Session, by the defenders, that the Judges Commissioners had no power to grant the said commission quia de jure delegatus non potuit subdelegare, L. 2. D. De officio ejus cui mandata est jurisdictio. To which was *answered*, That the said Judges Commissioners had not subdelegated the whole cause, but only that part anent the examination and receiving of certain witnesses, which they might do of law; and a Judge-delegate, in doing of this, non videtur committere ea quæ sunt jurisdictionis sed ea tantum quæ sunt nudi ministerii, as if a Judge would give commission to a notary to receive witnesses, and examine them, and write their depositions, de qua re vide Bald. in L. 5. C. De judiciis. To this was *answered*, That the common law meant but of them qui sunt delegati ab universitate causarum possunt res subdelegare; but these exceptions could never be applied to the present case; and, also, the commission being read in presence of the Lords, there was nosuch power given to them contained thereintil, as to give commission to any others to make subdelegation. THE LORDS, after long reasoning, concluded, for the most part, That the commission granted by the Judges Commissioners should stand; for it was thought, by some of the Lords, quod omnia fuerunt illis judicibus delegatis commissa quæ fuerant ad causæ expeditionem, as this examination of witnesses was to the same effect, ego et nonnulli in contraria, &c. that a commission to examine witnesses who were forth of the country should have been given by the Lords of Session qui principalem habebant jurisdictionem. As I believe, the matter was brought back, and heard over again.

Fol. Dic v. 2 p. 191. Colvil, MS p. 327.