perjurium dolosum can never be profitable to the delinquent, *ne lucretur ex suo dolo.*

When this case came to be argued among the Lords, some observed that crimes can be pursued either *ad civilem vel criminalem effectum.* Falsehood is competent, *in prima instantia,* either before the Session or the Justice-court. Deforcement of messengers can be pursued, either criminally, to infer escheat of moveables, or civilly, to pay the debt in the caption. And, where parties are come to that boldness, to venture on perjury, either *in damno vitando,* or *lucro captando,* it is time to load them with more penalties to deter them. Others reasoned, on the contrary, that, after an oath deferred, to subject them to damages was to shake a fundamental principle in law; that after an oath there can be no more inquiry as to civil effects; and were to wreathe a snare to catch innocent people: for how oft have we heard parties threatened that there was writ under their hand contradicting their oath, and kept up to inveigle, when the writ may be false. And Stair, *book* 4, *tit.* 44, is very positive, that, after an oath deferred, no more is to be inquired but *an juratum sit.* And that there is no remeid but by the criminal action; for reference is a contract and stipulation to stand to the oath, and no appeal can be sustained against sentences proceeding on voluntary deferred oaths.

Some thought the oath could not preclude damages, being but an oath of calumny on the matter; but, being read, it was found a peremptory positive *negative,* and could not be reconciled with the commission. It was argued by some, there were presumptions enough to prove the subscription to be his. Others said they were very pregnant, yet could not amount to a full probation. Therefore the Lords continued him under caution, and adjourned the advising till November; to see if his son could be apprehended; and to give the pursuer an opportunity to pannel him criminally in the mean time.

Vol. II. Page 760.

1706, 1708, *and* 1712. Sir Andrew Kennedy of Closeburn *against* Sir Alexander Cuming of Culter, Advocate.

1706. *January* 3.—Sir Andrew being made conservator of the Scottish privileges in the Netherlands, by a gift from King William in 1689; some years after, there were several complaints exhibited against him by the States of Zealand and magistrates of Campvere, both to King William and Queen Anne, and to the royal boroughs; and they having named a committee for trying the matter, there is a report thereof transmitted to the Queen; which being considered by her, she grants a new gift and commission of the said office of resident and conservator, in favour of Sir Alexander Cuming, bearing, that, after trial and cognition of Sir Andrew Kennedy's malversations in his said office, she had laid him aside, and conferred the same on Sir Alexander Cuming. Sir Andrew, being informed of this gift, raises a reduction and declarator before the Lords of Session: and, in September last, applying to the Parliament, he got a remit from them to the Session, summarily to discuss both the point of right and possession: and which action being called, Sir Andrew did, *primo loco,* insist to have his possession declared; and that the Lords might find Sir Alexander had unwarrantably intruded into

the possession, by going over to Holland, and getting himself admitted by the States-General, and acknowledged as conservator on the Queen's gift; and that he may be discharged to disturb Sir Andrew's possession, till his commission be reduced.

ALLEGED for Sir Alexander Cuming,—That Sir Andrew's right to that office is already reduced and annulled, and so can neither afford him right nor possession; in so far as the Queen (who is the only competent judge in such cases,) has taken cognition of the cause, and finally determined therein, by recalling Sir Andrew's gift, and installing Sir Alexander in the office, as vaking in her hands by the other's deprivation; and that, in such extraordinary cognitions, the Queen may proceed *summarie et de plano*. And it was no novelty; for both Mr Nathaniel, Edward, and Harry Wilkie, were so removed from the same office of conservator by letters from the King. And the Town of Edinburgh turned out Sir William Thomson, their clerk, although he had a gift *ad vitam*. And though the Queen cannot regularly recal liferent offices exerced within the kingdom, yet this office of conservator is of a quite different nature, being a foreign trust; and as she may change her envoys and residents sent abroad, so may she the conservator, though she did it not till after probation led of his gross and scandalous malversations. And it is not to be expected the Dutch would complain of him to any other but the Queen, from whom they derive their right; and Sir Alexander having obtained her Majesty's gift of the office, he cannot be blamed for making use of it, and putting himself in possession, it neither being *clam, vi, vel precario*. And Sir Andrew's executing his declarator could lay no embargo on him, as if *lite pendente nihil sit innovandum;* for, there being a *litis pendentia* before the Queen, now determined by a sentence, he ought not to innovate the matter by raising this declarator, but ought to have applied to her Majesty for redress, who, by the 82d Act 1503, is made judge of the conservator's delinquencies; and so this being *res judicata*, which is *exceptio impeditiva litis ingressus*, the Lords could neither enter to cognosce the point of right nor possession.

ANSWERED for Sir Andrew Kennedy,—That he opponed his liferent-gift; which could not be taken from him in such a manner, seeing the claim of right condemns the turning of judges' gifts *ad vitam* into gifts *durante beneplacito;* and discharging any gifts of forfeiture, before sentence, finding the crime. That the Kings and Queens of Scotland had a twofold will and capacity; the one legal, when they order and command in and by the laws; the other personal, when they pass gifts and writs by intervention of the secretary's office; and there parties are heard against them if they prejudge their private rights, and that without any reflection on her Majesty. And for this end were the seals invented, to be a check and curb on such surreptitious gifts; and therefore our Acts of Parliament declare, that the Lords of Session, nor other judges, are not to regard any private writings or charges directed to them from the King, which ofttimes are impetrated by misrepresentations, importunity, or solicitation. Yea, in the Roman empire, which was an absolute tyranny, their emperors are so just, that they enjoin, where rescripts are procured from them, *contra jus vel utilitatem publicam*, that they be not regarded, *sed ea ab omnibus judicibus refutari præcipimus*: and such has been the benignity and gentleness of our government, that our princes never took upon them to judge the validity of gifts, but left the same entire to the cognizance of her judicatures and the

course of law. And the turning out of Harry Wilkie, &c. was no precedent, for it was done by virtue of the cumulative jurisdiction, given the King by the Act of Parliament 1681, and now rescinded by the 28th Act 1690. Neither makes it any specialty that the conservator is a foreign judge and in another country; for still he is a Scots judge, and exerces his power over a colony and corporation of Scotsmen, though living abroad: and must judge them by the Scots law. And when Sir Walter Raleigh was accused of malversations done abroad, by the Spanish ambassador, Gondamore, King James did not assume the cognition, but remitted him to be judged by a formal process in the King's-bench; and when the Danish envoy at London prevailed with King Charles II. to write to the Lords of Session, to send up the process to him about the prize called the *Patience* and *Palmtree*, because it dipped upon his treaties of commerce with foreign princes,—the Lords did remonstrate that the same was not agreeable to law; whereupon it was passed from and dropt. The Act of James IV. imports nothing; for, besides that it is before the erection of the College of Justice, and that *non constat* if the conservator's office was then *ad vitam*, the disjunctive of answering to the King or his Council, though in disjunctive terms, yet (as in many other cases) must be understood as a copulative; and, however, it concerns not this case, but only, if he come not yearly himself, that he send a procurator; but nowise determines before whom he must be tried, in case of malversations. And the Scots privileges in the Netherlands are very ancient, being first granted by the Dukes of Burgundy, before the Kings of Spain came to be lords of that country: and they are erected into a corporation by the 96th Act, 1579, and the conservators are accountable to the royal boroughs, and have their fees and emoluments from the Scots merchants trading to those parts; and so the conservator ought only to be judged in Scotland, and is not in the case of other residents, who are only sent, during pleasure, on some particular emergent of state, and may be discharged and recalled when the Queen pleases, and are never constituted during life, nor vested with a power of deputation, as the conservator is. So it is evident Sir Alexander Cuming's gift has been impetrated by subreption or obreption, *celata veritate, vel expresso mendacio*, though her Majesty had a judicative capacity in such cases, as she has not; there being no ultimate decision or final determination in the case, much less any thing that can make a *res judicata* to exclude the Lords from cognoscing it anew. And, for the possession, Sir Alexander could not invade it till he had legally declared his right; and we have borrowed the *interdicta possessoria* from the Roman law, whereof this is one, *uti possidetis, ita possideatis*, especially when his entry was *authore prætore;* and, even though a party's right were not good, law maintains him in it till he be orderly removed.

Replied, for Sir Alexander Cuming,—That he acknowledged this difference betwixt other residents and the conservator,—that the Queen may recal others *indicta causa*, without giving any reason; but the depriving of a conservator must be on a trial, inquiry, and probation; all which was done here: and to revise such sentences were to set up a power superior to the Queen's prerogative, who certainly, *quoad munera et honores* flowing from herself as the fountain of honour, may proceed summarily. And to what end got he a gift and commission, if he might not perfect it by taking possession? which can never be called vicious nor unwarrantable. And, if Sir Andrew insists on the interdict *pro recuperanda possessione amissa*, he may; but cannot now quarrel Sir Alex-

ander's legally attained possession with consent of the Queen, the States of Holland, the royal boroughs, and all parties concerned.

Some proposed (for shunning that nice point of the Queen's competency to judge this cause) to take in the point of right first; but the bench inclined rather to give their sentiments on what had been debated: and, by a plurality of seven against five, (there being one *non liquet*,) found Sir Alexander Cuming's manner of obtaining the possession unwarrantable, being after Sir Andrew Kennedy's declarator; and therefore he could neither invert nor disturb his possession, till the point of right on the validity of their gifts and his malversations were cognosced.

On the 28th February 1706, an appeal was given in by Sir Alexander Cuming, against this interlocutor. *Vol. II. Page* 307.

[See the intermediate parts of this Report, pointed out in the Index to the Decisions.]

1708. *February* 24.—The Lords having ordained Sir Alexander Cuming's decreet of reduction of Sir Andrew Kennedy's right to the conservator's office to be extracted, Sir Andrew thereon appealed to the British Parliament. John Vere Kennedy, his son, as conjunct with his father, claiming his right, and Sir Alexander Cuming alleging, he was never owned nor acknowledged as such, neither by the royal boroughs nor the Estates of Zealand; the Lords reserved his right and possession as accords. *Vol. II. Page* 436.

[For the intermediate parts of this Report, see Index.]

1712. *July* 26.—It is remarked *supra*, 25th June 1712, that Sir Andrew Kennedy had obtained Sir Alexander Cuming's decreet reversed by the House of Peers, and an order to the Lords of Session to tax his expenses. And both parties being heard thereon, my Lord Justice-Clerk offered to report Sir Alexander's objections against the accounts of expenses, some of them total and exclusive of the whole, others partial as to their exorbitances. And Sir Andrew Kennedy having given in the decreet of the House of Peers, to instruct his claim, it was observed by the Ordinary, that, in the end of them, there were noted down some remarks and observes made by Sir Andrew himself, bearing, that the Duke of Argyle, when commissioner in 1705, impetrated from the Queen a gift of his conservatory-office to Sir Alexander Cumming, his great favourite, and that he had influenced sundry of the Lords of the Session to own Sir Alexander; and then he sets down the names of Lords who voted for him, and who against him, and adds sundry reflections against the President, &c. And, thir memorials being read, the Lords thought them so scandalous and injurious that they could not pass them over without some mark of censure: so, Sir Andrew being called in, and interrogated if he owned them, acknowledged he had, for his own private use and memory, set down these observations, but had never shown them, and had produced the book without remembering these notes; which, if he had done, he would have cancelled and torn them out; but confessed he had given information thereof to his English counsel and lawyers, but not to his Scots procurators. The Lords read the Acts of Parliament against murmuring and defaming of Judges, *viz.* Act 68th, 1537, and Act 104th

1540, where the wrongous slanderers of Judges are to be punished by infamy, and other arbitrary punishments, and may be committed to prison; but, withal, having considered Sir Andrew's age and infirmity, with the lowness of his fortune, not able to abide a fine, resolved to mitigate the rigour of the law, and only sentenced [him] to crave the Lords' pardon on his knees, and to lie in prison some days for an example; and ordained the Clerk to keep the book, in regard it touched my Lord Argyle, Seafield, and others, who, if they pleased to sue him on *scandalum magnatum*, the book might be forthcoming to them. So the Lords cognosced only the injury done to the bench; whereas, if it had stopped there, they would have ordered him to have torn it out with his own hand, or ordained it to be burned by the common hangman; but, seeing it concerned others, they left it entire.

This being over, the defences and objections against his account of expenses were reported; and, 1*mo*, Sir Alexander Cumming ALLEGED,—The decree of the Peers was, that the Lords of Session should direct the expenses according to the course of the said court: but, so it is, the rule before the Session is, wherever there is *probabilis causa litigandi*, there no expenses are due. Now, he had more than a probable ground, for he prevailed before the Session, and Sir Andrew succumbs; and, though that be now *ex post facto* reversed, yet no law in the Christian world makes the winner pay the tyner's expenses. It is *victus victori qui tenetur in expensas*. See Sir George Mackenzie's Observes on the 43d Act, 1587, determining the pain of malicious pleaers.

ANSWERED,—The rule of expenses is, who prevails in the supreme judicatory, and the final ultimate resort, and not who gained the cause in the court whence the appeal is made. The Peers knew Sir Andrew had succumbed before the Session, and yet ordain him to get his costs; for they found neither a just nor a probable cause on Sir Alexander Cuming's part, his gift being impetrated from the Queen by obreption and surprise, against the claim of right securing liferent-offices, and on a false narrative of Sir Andrew's malverses; and the warrant vitiated and scored; and was found to be a null right by the Peers; who, on all these grounds, have ordered expenses to be modified.

2*do*, ALLEGED,—He can never be reputed a calumnious plear; for he had the Queen's special warrant to her advocate to concur with him, for her special interest; which must excuse *à calumniâ*. ANSWERED,—The Queen's concourse was only a matter of course, and to satisfy our forms; and the special warrant was got by the same method the gift was.

3*tio*, OBJECTED,—The accounts must be separated; for all those articles relating to John Vere Kennedy, his son's process, have nothing to do with Sir Andrew's declarator. ANSWERED,—John, being conjunct with his father in the gift, and called as a defender, was necessarily concerned to defend the gift as his own, and so his expenses must come *in computo* as well as his father's.

4*to*, ALLEGED,—Sir Andrew cannot state his personal expenses, wared out at London in discussing his appeal, because the remit is only to consider his expenses in the pursuits in Scotland. ANSWERED,—The costs in discussing the appeal are nothing but a continuation and currency of the former expenses he had been put to; and are equally necessary with the preceding.

5*to*, OBJECTED,—That his extravagant account, extending to £2000 or £3000 sterling, is not, in the terms of the Peers' remit, to tax conform to the course used by the Lords, who, for the greatest contumacy or calumny, never exceed

£20 or £30 sterling; and seldom go that length. ANSWERED,—All modifications are *in arbitrio judicis*, with a due regard always to the party's damages.

6*to*, OBJECTED,—That his fees to lawyers and their number is contrary to the regulations, 1695, restricting to three advocates, and determining the salaries, in which his contravention subjects him to the penalty of £1000 Scots *toties quoties*. ANSWERED,—If I exceeded, you did much more; seeing it is offered to be proven you had 13 advocates, and their honoraries were beyond the statute: so, you being *in pari casu*, the transgressions must mutually compense.

7*mo*, OBJECTED,—He states in his account the expense of keeping two families, one at Campvere, the staple port, and another at Edinburgh; as also his borrowing money upon interest, to carry on the plea, whereas law regards no extrinsic losses, but what are intrinsic, arising from the nature of the thing. ANSWERED,—These articles are *damna* arising from your fault and obstinacy, and enter the cause as much as my other depursements do; and therefore crave the Lords may, in compliance with the Peers' order, proceed to modify and tax his expenses, and so prevent the ruin of his family.

The Lords, after advising thir objections, modified only £100 sterling, in lieu of all expenses. *Vol. II. Page* 761.

[See Robertson's Appealed Cases, page 24.]

1712. *July* 30.—Sir Andrew Kennedy gave in an appeal to the British Parliament for remeid of law, against Sir Alexander Cuming, for repelling the articles of his account of expenses, and modifying only £100 sterling.

Vol. II. Page 763.

1711 *and* 1712. GEORGE MAXWELL, *alias* NAPER of KILMAHEW, *against* PETER NAPER, Merchant in Glasgow.

1711. *February* 21.—PETER Naper, merchant in Glasgow, being creditor to George Maxwell, *alias* Naper of Kilmahew, in upwards of £34,000 Scots; and having incarcerated him; after he had lain three months, they agree that Kilmahew should dispone to him certain lands irredeemably, in satisfaction of his debt; but that Peter, out of respect to his chief, shall give a letter of reversion, to repone him to his own land, if, within three years, he shall redeem from him, with his own proper money, without borrowing it from others; and that the favour shall be merely personal to himself, secluding his heirs and assignees. Within the three years Kilmahew procures the money, premonishes and uses an order of redemption, requiring Peter to denude; who refuses, because not in the terms of the reversion, seeing he offered to prove by his oath it was not his own money, but borrowed from the bank; which made Peter raise a declarator of expiration of the reversion, and that the lands were become irredeemable.

Against which pursuit it was ALLEGED for Kilmahew,—That the bargain was extorted from him by plain concussion and fear; seeing he was let out the one day and the papers presented to him the next, with this certification, that if he refused to sign he would be re-incarcerated; and the whip of a caption being kept over his head, it was *justus metus, qui in constantissimum virum cadere po-*