

deduced, so as to take any place ; for as prescription is the great security for ascertaining our properties, yet interruptions are not so odious and unfavourable but sometimes any evidence or document, *talis qualis*, has been found sufficient to stop the course of prescription. *Vol. II. Page 289.*

1705. November 13. WILLIAM GORDON *against* SIR ANDREW KENNEDY.

[See the prior part of this case, Dictionary, page 7508.]

WILLIAM Gordon, late factor at Campvere, now merchant in Aberdeen, pursues Sir Andrew Kennedy, conservator of the Scots privileges in the Netherlands, for payment of certain sums contained in accepted bills ; and, after some debate, obtains a decret against him ; which Sir Andrew suspends on this reason, That he must have compensation ; because you having pursued a divorce against your wife, and the Dutch having owned her, you employed me to negotiate that business for you, at the Hague and the Loo, wherein I was at great expenses and trouble, which you must refund me. And the conservator being reponed against the first decret, as being then out of the kingdom when it was obtained ; and having referred his reason of suspension to William the charger's oath, he confessed that he applied to him, as judge of the place, to protect him against the injustice of the Dutch, but did not promise him payment, &c.

This oath coming to be advised, it was first ALLEGED for Gordon the charger, —That the reason of suspension being a compensation, and not proponed in the first instance, was not, by the 142d Act of Parliament 1592, receivable *in secunda instantia*, being competent and omitted in the first.

ANSWERED,—The allegiance was very true, if the first instance was subsisting ; but it was extinct, in so far as Sir Andrew was reponed against that first decret, and paid £20 of expenses ; and so, it being turned to a libel, this became truly the first instance.

The Lords, in respect that the first decret was turned to a libel, found the compensation yet receivable.

Then, *2do*, it was ALLEGED for Gordon, That his oath did not prove the compensation, seeing he denied any promise of payment ; his employing him being *ratione officii*, as a judge bound to protect all Scotsmen under his jurisdiction ; and which he was bound to do *gratis*.

ANSWERED,—By an express article and instruction from the royal burghs, as he was obliged to act and negotiate for the Scots merchants, so it is expressly declared it was to be on the employer's expenses. *2do*, This obligation of reimbursing and indemnifying me is implied, *ex natura negotii*, without any express paction. If I employ you, though there be nothing treated anent my repaying you, yet, without a promise, it is due ; and your swearing that you never promised to repay me, does not liberate, because it is presumed and included ; and you depone on a point *in jure* anent your own credulity, which is only your erroneous opinion.

Some of the Lords thought Sir Andrew's grounds of compensation not being so liquid nor instantly verified, that they ought to be reserved to a farther liquidation in a process particularly to that effect : But the plurality inclined to receive them *hoc ordine*, without multiplying pleas ; and so found that employ-

ment imported an obligation to refund expenses ; and ordained Sir Andrew to give in his account of disbursements and expenses in negotiating Mr Gordon's affairs, and how he would instruct the same ; and declared, after hearing objections, they would modify the same.

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1705. *November 16.* SPENCE and TROOP, Agents for the MANUFACTORY of NEWMILLS, *against* JOHN BINNING of DRUMCORSE and ADAM OLIVER.

LORD Tillicoultry reported Spence and Troop, agents for the manufactory of Newmills, against John Binning of Drumcorse, and Adam Oliver, merchant in Jedburgh. Mr Binning having bought thirteen packs of wool from the said Oliver, he causes bring them to Queensferry, with a design (as he affirmed) to transport it to Fife, and sell it there. The doers for the manufactory, finding it lying on the rocks beside the shore of Quensferry, they seized it, and pursue John Binning before the sheriff-depute of Linlithgow for confiscation of the wool. And he founding on a permit, it was OBJECTED,—It bore only eleven packs, whereas he bought thirteen ; which disconformity proved the permit to relate to other wool ; *2do*, It mentioned it was to go to Borrowstounness ; whereas, this was taken unto the Queensferry.

ANSWERED,—The weight was the same, though the eleven packs were, by the carriers, for the ease of their horses, made up in thirteen ; and the touching at Queensferry was not much out of their way.

Then the managers offered to prove, by Binning's oath, that the wool was his own, (though he called it Oliver's,) and that it was laid down with a design to ship it in a fleet then ready to sail to Holland, to be exported ; contrary to the 9th Act of Parliament 1701. And he refusing to depone anent designs and intentions, as nowise relevant, the sheriff held him as confessed, and escheated the wool. Of which decret he raised suspension and reduction, on this reason, That he had not contravened the said Act of Parliament, which only prohibits actual exportation, and, to prevent mistakes and arbitrary seizures, determines the cases wherein only it shall be lawful, viz. where it is found on shipboard and water-borne, or when it is found at land, in cellars or houses, packed up in casks, barrels, or boxes. The law has made these *præsumptiones juris et de jure*, of a designed exportation ; none of which cases can be subsumed here ; but the same Act has sufficiently provided, when it is found within three miles of a sea-port, and you suspect it, you may cause weigh it, and put the owner to find caution that he shall not export it ; which is all that could have been done in this case : and yet this method prescribed by the law was not followed, but a most unwarrantable riotous seizure made, upon weak and frivolous presumptions.

ANSWERED,—That the Act of Parliament discharged exportation, which can never be effectually prevented if it must be first on shipboard ere it can be seized ; for here it was laid on the craigs, where the waves would have washen it away within an hour or two, if it had continued there. And Mr Binning had prevaricated all along and refused his oath ; which is a stronger manner of probation than those expressed in the Act, and more than equipollent acts ; and without this it shall be the easiest thing in the world to frustrate and evacuate the Act, and render it wholly ineffectual.