

stance or precedent of it. However, the plurality extended it even to that, which is the highest of all secular crimes, and, by their certificate, declared in these terms.

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1709. *November 16.* SIR WILLIAM MENZIES of GLADSTANES *against* SIR ROBERT DICKSON of INVERESK.

MENZIES *against* Dickson. Sir William Menzies of Gladstanes, and sundry others, having taken a tack of the customs from the Lords of Treasury, in 1691, for five years, they made Sir Robert Dickson of Inveresk their cash-keeper, solicitor, and book-keeper. At the issue of the tack, they craving sundry deductions from their tack-duty, and the Exchequer not inclining to allow them, they were charged with horning; whereupon sundry of the tacksmen absconded, and Sir Robert Dickson went to London to negotiate their common concern; and, after his return, the Lords of Treasury and they having concerted the business, they got some deductions. There having great profit arisen from that tack, upwards of £48,000 sterling, and Sir Robert, the cashier, declining to count for his intromissions, Sir William raises a process of count, reckoning, and payment against him; in which Sir Robert Dickson craving allowance, (besides many other articles of expenses claimed by him,) of £500 sterling expended in his voyage to London, where he applied to King William, and got favourable returns, that were very beneficial to the whole society, and had influence on the deductions afterwards obtained:

ANSWERED,—That, by his commission, he was to act nothing in expending their money, without a warrant from a quorum of the tacksmen; which he cannot pretend he had for his London voyage. Likeas, the gratuities he gave there signified nothing to the advancement of their business; their deliverance came quite another way. And he was so far from being put to borrow or advance money for them, that *intus habebat* much more than would do the turn; but with their money he purchased considerable bargains of lands.

REPLIED,—Though he had no special warrant and commission to repair to London, yet his general employment, as their solicitor and cashier, empowered him sufficiently to do what might tend to the benefit of the society; and it was *utilis negotiorum gestio, et in rem versum* to the tacksmen.

The Lords thought he should have applied for a special warrant and instruction before he went; but if he could yet prove it was *utiliter gestum*, there might be some ground to modify something to him on that account: and therefore allowed him to condescend and instruct what was the services he did the company by going to London, and then they would consider what it might deserve.

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1709. *November 19.* WALTER GIBSON *against* MUNGO COCHRAN.

WALTER Gibson, late Provost of Glasgow, gives in a bill to the Lords, that he had consented to Mungo Cochran's being nominated factor on his estate;

and at his own sight most of the debts were transacted, and considerable eases given, and the rights taken in Mungo's name for Gibson's behoof; and now Mungo was carrying on a sale of his lands, and refused to communicate the cases to him; which necessitated him to raise a declarator of trust against him and Andrew Gibson his brother, who ingered himself into the management. This had so irritated them, that, in September last, they came to him, when attending his shearers in the fields, with a premeditated design to provoke him; and his brother began to give him scurrilous unsufferable language, to stir him up to beat him; and Mungo, to carry on the plot, aggravated the injury to the highest pin, and wondered how he could sit with such opprobrious affronts. But the petitioner says, he smelt the project: that, if he beat any of them, he might, by the 219th Act 1594, lose his action, and, being on his guard, kept up his hands; which disappointment did so transport them with passion, that they fell in the snare they had laid for him; and, pulling his staff out of his hands, his brother Andrew beat him to the ground, and so had incurred the penalty of the foresaid Act of Parliament, and amitted the plea; the one as actor, and the other as art and part, red and counsel.

ANSWERED,—The matter of fact was wholly misrepresented; for they were *versantes in actu licito*, having come along with a messenger to assist him in a poiding; which he deforced, and beat them first. They acknowledged that they took his staff from him, and it was not till he had first insulted and invaded them; and therefore craved a conjunct probation.

The Lords allowed either party to prove who was the first aggressor, and the way and manner of the poiding, and resisting it; and what accession Mungo Cochran had; and if there was any previous design to provoke and ensnare Walter Gibson to incur the penalty of the law; seeing *malitiis et propositis fraudulentis non est indulgendum*.
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1709. November 23. JAMES NASMITH, &C. CREDITORS OF WILLIAM ARCHIBALD, against WILLIAM MARTIN OF HARWOOD.

NASMITH and Martin. Mr William Archibald having disposed the lands of Meggitlands to James Brown, he gives bond for the price, and makes it payable to such particular creditors as Mr William had given him up in a list. James Nasmith, master of horse to the Duke of Queensberry, and some others of Mr William's creditors, finding themselves neglected and past by in that list, they raise a reduction of the said disposition and list, in so far as it was prejudicial to them. And the Lords finding it was a fair sale for an adequate price, as much as any other would have given, and that it was yet in the buyer's hands, they sustained the disposition; but he having retired to the Abbey, and absconded before the sixty days from the date of the list were run out, they, conform to the standard of bankruptcy, settled by the 5th Act 1696, found the application of the price by the list was a partial gratification of the common debtor's, preferring some of his creditors to the rest; and so reduced it as fraudulent, on the Act of Parliament 1621, esteeming it all one as if he had ranked his creditors at his own hand, after he was gone to the Abbey, preferring whom he pleased, and excluding others; and therefore brought in the creditors equally *pari passu* to