

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

the price, at least conform to their arrestments and other diligences affecting the same.

Upon this interlocutor, compeared William Martin of Harwood, ALLEGING,—He was creditor to Mr William Archibald in 2000 merks he had paid as cautioner for him to William Miller, the Quaker, gardener in the Abbey; and, for his relief, he had caused insert his debt in Brown the purchaser's bond for the price, and relied so fully thereon, that he had used no manner of diligence for securing himself. And though that obligation and list, specially applying the price, was reduced, yet he was in a quite different case from the rest of the creditors therein mentioned; and it behoved to stand good as to him, because the right of the lands was wholly conveyed to him; and though it was in trust for Archibald's behoof, and he denuded of it, yet it can never be supposed that he would do it otherwise but with the tacit burden and reservation of his own relief as to his cautionary to Miller. And he being under no back-bond, his denuding of the trust must imply his being relieved of all debts he stood bound in, for the person intruster from whom he had the trust.

ANSWERED for Nasmith and the other creditors,—That if he had expressly burdened his disposition to Archibald with the debt he stood cautioner for him to Miller, he might have had a more favourable plea: but this he does not; his disposition proceeds upon a plain narrative of mere trust, and is simple, pure, and absolute, without the least reservation for his own relief; and is more than a year before Archibald sells the lands to Brown. And if he relied on Brown the purchaser's obligation to pay him, when Mr Archibald was out of a legal capacity to prefer one creditor to another, *sibi imputet* that he did not expressly burden his disposition when he denuded: His being once trustee gives him no manner of preference, unless he had restricted, qualified, and burdened his denuding therewith; and, having made no such stipulation and reserve, he cannot plead any preference on the price, more than any other of Archibald's creditors; and however he might have refused to denude but with the burden of his relief, yet having done it simply, without that reservation, he has none to blame but himself, who did not advert better to his own security, however some remote kind of equity may seem to favour him.

The Lords thought, if the obligation to pay the debts contained in the list given by the purchaser, had been of the same date with Harwood's disposition as trustee, it might have been looked on as *pars contractus*; but finding he had simply denuded of the trust more than a year before the sale, without providing for himself, they refused his bill, and found he had no preference beyond the rest of the creditors.

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1709. November 29. SEMPLE of BELTREES against JAMES STEILL.

SEMPLE of Beltrees elder, being resting some small debts up and down the country, and trusting one James Steill, a notary and writer in Beith, to purchase in his debts; he, taking advantage of his simplicity, buys in about twenty debts, and causes Beltrees renew the bonds. And because he was under a registrate interdiction, he, to shun it, makes them of a date some years prior, and then adjudges for the whole, and charges the superiors to infest him, and pursues for