

1696. *February 25.* SIR WILLIAM BRUCE *against* PATRICK TULLOCH.

IN the competition for the lands of Cocker mains, betwixt Sir William Bruce of Kinross and Patrick Tulloch; Sir William offering to prove, that Tulloch's apprising was satisfied and paid within the legal by his intromissions:—ALLEGED,—The only title by which he could propone that allegiance, was Mitchell's comprising, which you acquired while you was my trustee; in so far as the only right then standing in your person was my apprising, and by virtue thereof you compelled him to agree; so that you having now denuded of the trust, and retrocessed me, you cannot make use of John Mitchell's apprising of Shaw of Lethingie's lands, to exclude me, contrary to the trust.

The Lords thought it hard that Sir William should obtrude that right; but, in respect he offered to prove he had paid out more sums than the lands were truly worth, they found that relevant to prefer him. *Vol. I. Page 714.*

1696. *January and February.* JAMES DALLAS, Younger of St Martin's, *against* HUGH CUNINGHAM.

1696. *January 17.*—THIS was a charge on a clause of a disposition to warrant and purge all real incumbrances which should be detected by searching the registers, and be given in to him in list betwixt and a precise day. The reasons of suspension were, *1mo.* This was but of the nature of a general charge, and so can have no other effect but that of a citation or libel; and so the cautioner in the suspension must be free.

ANSWERED,—This was more than a charge on a common clause of warrandice, being limited to purge, conform to a condescence, within a day; and the Lords, though they would not engross the list of incumbrances in the bill of horning, yet they reserved it to the discussing of the suspension. But it being ALLEGED,—That the charge, conform to that list, was unwarrantable, because some of the incumbrances he gave up therein were purged, and the extinctions thereof delivered to himself; the Lords ordained that matter of fact to be tried; and, if it was so, found the charge would be thereby rendered unwarrantable, and so the cautioner in the suspension would be free.

The *second* reason was, his obligation only tied him to purge real incumbrances; which inhibitions were not, seeing they were only prohibitory diligences, and not perfected by infestment, which is requisite to the constitution of a real right; besides, they were only inhibitions served upon depending processes, which could not be purged till they were liquidated and purified by a sentence finding what was due.

The Lords found inhibitions fell under the term of real incumbrances, seeing they affected lands; but, in regard they were only upon dependences, and so not capable of a present implement by purging, they allowed the suspender to the 1st of August 1697, to clear and disburden the lands of them, either by obtaining a decreet of certification against their grounds and warrants in a reduction and improbation, or by otherwise taking them out of the way. Some urged Bailie Cuningham might be put to find caution to secure against them; but this was laid aside.

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1696. *February 26.*—At reporting of the debate between Mr James Dallas and Hugh Cuningham, mentioned 17th January last, as to that single point, Whether hornings whereon denunciations had followed, were such incumbrances as ought to be purged by Bailie Cuningham, so as to make the charge given to him by St Martins warrantable and subsist; that if the major part of the incumbrances given in by him in a list be yet unpurged, then the cautioner in the suspension to remain bound; otherwise to be liberated if the plurality in the condescence was purged: It was ALLEGED,—Hornings were not real incumbrances, and had no present existence of distress, no gift as yet being taken thereon. ANSWERED,—They might be gifted; and then a donatar would pursue for mails and duties, and molest the buyers during the rebel's lifetime.

The Lords found they were such incumbrances as might be made real to affect the lands, and ought to come *in computo* with the rest.

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1694 and 1696. ROBERT BOYD of TROCHRIG and JOHN BINNING, late of DALVENAN against RORY M'KENZIE.

1694. *July 17.*—ROBERT Boyd of Trochrig, and John Binning, late of Dalvenan, against Mr Rory M'Kenzie, advocate, for reducing a disposition given by him to the said Mr Rory, as extorted by concussion; the qualifications whereof were, that he took a discharge from him of all his rights he had on Dalvenan in 1684, when Mr Rory was advocate-depute at the western circuit; and Trochrig was one of them who were in prison.

The Lords did not find these qualifications relevant, but allowed Trochrig, before answer, to prove the said discharge was a delivered evident to Mr Rory, being wrote by his man, and was given up by him a year after when Trochrig gave him the disposition, by the witnesses and the commoners present; though others thought his disposition bearing *onerous causes*, it could not be otherwise convelled or redargued but by his oath; yet the tract of the affair gave some umbrage and suspicion, and all did hang on the taking the first discharge; therefore the Lords took trial of the matter of fact before answer.

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1696. *February 13.*—The Lords advised the process of concussion, pursued by Robert Boyd and John Binning, against Mr Roderick M'Kenzie, (mentioned 17th July 1694,) that being sent, in 1684, to a western circuit, as advocate-depute, and Trochrig being there pannelled and imprisoned as accessory to Bothwell-bridge, he procured from him the rights he had on the lands of Dalvenan; though the disposition was subsequent, it was then treated on; and concussion being *metus injectus a magistratu aliove in potestate constituto, pecuniæ vel alterius rei extorquendæ gratia, et quilibet levis terror* is sufficient from one in power; (yet the law requires it should be *metus qui cadere potest in constantem virum*;) though it should be only *trepidatio et vexatio mentis*; as Stair instances in the French dragooning of the Protestants, in his Institutions, book 4. *tit. 40.* and *Matthæus de Criminibus, tit. de Concussione*, and *Donellus, lib. 15. chap. 40.*

ANSWERED,—Light presumptions must not take away men's rights on suspicion; and the bargain was concluded long after Mr Roderick was out of that capacity of advocate-depute; and it was neither proven that he used any me-