

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-

naces or threats towards him, nor yet that ever the cancelled discharge, now produced, was Mr Roderick's delivered evident; so that the qualifications of concussion, however relevantly libelled, were not proven.

The Lords found what was proven not sufficient to infer reduction of Mr Roderick's rights upon the head of concussion; but thought it reasonable he should communicate to John Binning the eases he got from his creditors; and ordained him to count for the same, at the sight of two of the Lords.

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1696. *February 26.*—In the cause mentioned 13th current, pursued by Boid of Trochrig, and John Binning, against Mr Rory M'Kenzie, for reducing his rights on concussion; Mr Rory being assoilyied, the question now arose anent his communicating the eases and compositions he got from John Binning's creditors, which he was willing to do; but the *cardo controversiæ* lay in this,—Who should prove the eases; whether Mr Rory or John Binning? Mr Rory opposed his dispositions and assignations, bearing, he had paid sums equivalent, and other onerous causes; and so this narrative was probative, unless redargued by his oath that he paid less. Mr Binning opposed the 16th Act of Parliament 1695, where parties are only to have action against forfeited persons for the sums they paid, and no farther; *ergo*, they must instruct what they paid; and to make the restored parties burdened with such a difficult probation, is to deprive them totally of the benefit of the eases.

The Lords considered the Act of Parliament, and found it did not expressly determine what should be the *modus probandi* in such cases; and that it were hard to examine debtors on what they got, or other persons present at the payment, or to put a party to prove what he paid. *2do.* The Lords found the narrative of Mr Rory's disposition, bearing his payment of 2800 merks, and other onerous causes, was sufficient, unless they would convell and redargue the same by his oath; in which case they would allow the receivers of the price, or other witnesses, to be confronted with him for refreshing his memory.

The pursuers were so displeas'd with this interlocutor, as prejudicial to all forfeited persons, that they were threatening to protest for remeid of law to the Lords of Parliament; and cited several contrary decisions, in the pursuits against Grierson of Lag, Lieutenant-general Douglas, and others;—but these were in the case of fines, or compositions paid for forfeitures. The Session rose without any such appeal given in.

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1693, 1694, and 1696. SIR ARCHIBALD MURRAY of BLACKBARONY *against* SIR GEORGE CAMPBELL of CESNOCK.

1693. *February 8.*—The Lords found the Act of Parliament in 1690, anent retouring annualrents in non-entries, to be declaratory, and to draw back to years prior to the Act wherein the infestment of annualrent was in non-entry, if the action of declarator was posterior to the said Act; as here, not only the declarator, but the very gift, were after the date of the Act. Some doubted what the meaning of this pursuit was; whether he would have exacted the full annualrent for the non-entry, because then *valebit seipsum*; and also have exacted it over again by the obligation of the heritable bond: But others conjectured that his design was, that Cesnock being one of the forfeited persons