

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 Baillie Cuningham might be put to find caution to secure against them; but this was laid aside.

*Vol. I. Page 702.*