

1697. November 30. MACDOUAL of FREUGH *against* The MARQUIS of DOUGLAS.

FREUGH, being a creditor to the late Viscount of Dundee, on the account of a composition paid to him for his forfeiture; and the Marquis, being now donatar to the said Viscount's forfeiture, he opposed Freugh's process against the tenants;---ALLEGING, By the 24th Act, 1696, the donatar to forfeited persons may pursue the creditors before the Lords, and set off as much land to them as effeirs to their respective sums; and which he was willing to do. ANSWERED for Freugh,—The Act of Parliament bore this farther clause, That it should be but prejudice to the creditors, their rights, diligences, and possessions, till the said allocation were made. REPLIED,—Freugh was but *in attinenda possessione*, and so not in the case of that *salvo*. DUPLIED,—Though he had not obtained the natural possession, yet he had a decreet of pointing the ground, which was a civil possession, and sufficient in law; and that the Marquis's summons for allocation was but new raised, and ought not to be *incidenter* taken in; for, though the forfeited parties had summary process, yet the donatar had no such privilege.

The Lords preferred Freugh *medio tempore*, and refused to take in the Marquis's process summarily; but referred him to go on with his allocation *via ordinaria*.  
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1697. December 3. AUCHINLECK of BALMANNO *against* SIR THOMAS MURRAY of GLENDOICK.

IN the process, Auchinleck of Balmanno against Sir Thomas Murray of Glendoick, it was ALLEGED,—There was a communing betwixt the late Lord Glendoick and Balmanno, where there was a greater price condescended upon for the land; and that there could not be *locus penitentiae* here, seeing *res* was not *integra*; because, on the faith of that communing, Glendoick got up the charterchest, which made *rei interventus* to complete the bargain; and Glendoick's own notes, extracted out of his holograph book, acknowledge a communing; and therefore Balmanno craved the comuners he should condescend on might be examined on the terms.

ANSWERED,—Imperfect comunings signify nothing; for I seeing you could not make me a right, I transacted with the apprisers, and acquired in the preferable rights, and possess by those; and you cannot examine comuners to take away my right.

The question arose, Whether they could be admitted till it were first proven, *scripto vel juramento* of Glendoick, that they were comuners, else all writ might be subverted; and to allow them to swear themselves to be comuners was a singular unparalleled practice; no more than a man can swear himself to a witness by his *causa scientiae*, or can be admitted to depone anent the terms of deposition till it be first proven he was depository.

The Lords, for shunning the dangers of the preparative, ordained the pre-