

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*.
Vol. I. Page 798.

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-

tended comuners condescended on by Balmanno to be examined *ex officio*, and before answer, not upon the terms of the communing, but if they were comuners in that affair, and who others were present, and where they met, and what evidences they can give of their having been employed as comuners; and, if that be sufficient to clear the Lords, then they declare they will hear Glendoick why they should not be examined on the terms of the communing, and what they shall import to make him liable either *actione quanti minoris* to give a greater price, or receive his money laid out, and quit the bargain; and likewise allowed Glendoick to condescend on such as he knew to be comuners in that affair, to be examined in the same manner with Balmanno's, if he thought fit.

Vol. I. Page 799.

1697. December 10. AIKENHHEAD OF JAW *against* RUSSELL of ELRIG.

The Lords determined in the mutual declarators depending betwixt Aikenhead of Jaw and Russell of Elrig. Jaw acquired the property of a mill from the Earl of Calander, but the aqueduct of the same runs out of Elrig Loch, and through the ground of Elrig on both sides, which lands belonged to the Duke of Hamilton, and were sold to Russell in 1650. Russell erects a new mill on his own lands, a little above Jaw's mill, and makes sluices both on the loch and the mill-lead; whereupon Jaw, *novi operis nuntiatione*, interrupts him, and raises a declarator, that Elrig should demolish his mill, and could not divert the natural course and channel of the water to the prejudice of his more ancient mill, nor make the water flow otherwise than it was wont to do through his aqueduct, whereof he had been in the continual and uninterrupted possession. Elrig opposed his declarator, That it was lawful for him to build a mill upon his own ground, *et uti jure suo*, it not being *in æmulationem vicini*; and that the aqueduct was, *quoad* both sides, on his ground, and he had been in the constant possession thereof; and the drawing the water into his own mill did not prejudge him; and, *esto* it did, it was but *per accidens*, and he was not liable for the damage: and the aqueduct passing through his ground, he might stop it as he pleased.

ANSWERED for Jaw,—That he had prescribed the servitude of the mill-lead by forty years' peaceable possession, which was as sufficient to give him right as Elrig had to the property.

REPLIED,—Any possession he had was precarious, and by tolerance of the heritors of Elrig; in so far as it was agreed betwixt them, that Jaw should have the use of the aqueduct, and for that cause Elrig should have his corns ground multure free.

DUPLIED,—This can only be proven *scripto vel juramento*, against his express infestment, not only in the mill, but its leader. TRIPLIED,—His old infestments bear only, The mill with its pertinents: It is true, his last charter from my Lord Calander, in 1668, bears likewise the aqueduct; but Calander, not being heritor or superior of Elrig, could not give it.

The Lords found it relevant for Elrig to prove, by witnesses, that Jaw grinded his corns multure-free; and that it was understood he had this exemption for allowing Jaw the use of the aqueduct, so as there was a *synallagma*, and the