

1696. *November 26.* CAMPBELL of BARBRECK *against* STUART, Tutor of Appine.

HALCRAIG reported Campbell of Barbreck against Stuart, Tutor of Appine, being a charge on a decret of deprecation for 8000 merks Scots his clan robbed in 1685. His reasons of reduction and suspension were, *1mo.* That he could not be answerable for these men, though his dependers and dwelling on his ground; because the Marquis of Athole being then constituted the king's lieutenant in Argyle, he called out the Highlanders; which freed the chieftains and heads of the clans from their obligation of what spuilys their men should commit. *2do.* It was in the time of war, when the country was broken, when it was impossible for them to restrain their men.

ANSWERED,—Though the Marquis of Athole commanded in chief, yet the Highlanders came forth under their respective clans, and particularly Appine's men followed the Tutor, (the laird being then minor,) so this could no way exoner them. To the *second*, What is plundered in the time of war falls under restitution, as well as what is taken away in time of peace, unless they be able to subsume and prove it was brought to the camp, and consumed for the use of the army, and so spent in the public service; otherwise it is presumed they have been converted to their own private use, and so must refund.

The Lords sustained the decret, and repelled the reasons; especially seeing the decret bore a proclamation was issued forth, commanding them all to their own homes, seeing Argyle's forces were dissipated, and this deprecation was committed after. Yet see Stair, *25th June 1664*, Farquharson *against Gairdner*; and *15th February 1666*, Gordon *against Gordon*; where the Lords would not presume acting without order and commission to loose an act of indemnity.

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1696. *November 27.* HERRIES of BRAIKOCH *against* The EARL of NITHSDALE.

PHILIPHAUGH reported Herries of Braikoch against the Earl of Nithsdale, being a pursuit on the warrandice of a charter, granted by one of the Earl of Nithsdale's predecessors to the pursuer's grandfather, of thir lands, in 1592: upon the precept of seasine therein contained, he infest himself by virtue of the Act of Parliament, 1693, allowing such to complete on serving heir, for preventing the expenses of pursuing an implement.

ALLEGED,---He could not be liable in warrandice, because prescribed, nothing having followed on it for double prescription.

ANSWERED,---They possessed, by virtue of that charter, for many years, till the pursuer's mother, in his minority, was turned out; and, since that dispossession, the prescription has been interrupted.

The Lords found sundry nice questions would arise, as, if possessing by a charter alone, without a seasine, would produce and infer prescription, for we say *nulla sasina nulla terra*; and if the old transumpt of a seasine be produced in his grandfather's person, wanting the words of the attest, *vidi, scivi, et audivi*,