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 decreet of depredation for 8000 merks Scots his clan robbed in 1685. His reasons of reduction and suspension were, 1*mo*. 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 spuilyies their men should commit. 2*do*. 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 decreet, and repelled the reasons; especially seeing the decreet bore a proclamation was issued forth, commanding them all to their own homes, seeing Argyle's forces were dissipated, and this depredation 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 infeft 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,*

may not be a good and sufficient right to defend him now, the nullities not being objected within the years of prescription. The Lords ordained the case to be heard in their own presence. *Vol. I. Page* 737.

1696. *November* 27. GORDON of SEATON and ROLLAND of DISBLAIR *against* SIR GEORGE SKEEN, and THOMAS Forbes of ROBSLAW.

CROCERIG reported Gordon of Seaton, and Rolland of Disblair, against Sir George Skeen, and Mr Thomas Forbes of Robslaw, in an action of mails and duties on a disposition. Robslaw repeated a reduction and declarator of trust, and insisted on sundry qualifications to enforce the same.

The Lords thought there was no reason, on the pretence of a declarator, to stop the action of mails and duties; and therefore decerned in that: and having advised the several articles of trust, though they seemed pregnant, yet, in regard the parties here were all alive, therefore they refused to take any trial or expiscation by witnesses, but only allowed them in this case to prove the trust *scripto vel juramento.* *Vol. I. Page* 738.

1696. *July* 2, *and Nov.* 27. ALEXANDER ROSS *against* ANDREW BALFOUR.

July 2.---ARBRUCHELL reported Alexander Ross, son to Kilravock, against Mr Andrew Balfour, Writer to the Signet; being a competition between two assignees upon their respective intimations. Alexander Ross contended his was first intimated to the debtor, by his paying a year's annualrent to the cedent, whose liferent of the sum was reserved in the body of the assignation; and the cedent's discharge to the debtor made express mention of this assignation; which was equivalent to an intimation.

ANSWERED by Mr Balfour.—Though my assignation be posterior, yet it was first legally intimated by way of instrument; and the discharge aforesaid cannot amount to a legal intimation; yea, private knowledge has not been sustained as sufficient;—Dury, *ult. November* 1622, *Murray; 15th June* 1624, *Adamson; March* 14, 1626, *Wishaw. 2do.* This assignation is *inter conjunctas personas, viz.* an aunt and a nephew; and so is very suspect.

REPLIED,—Though *cessio nominis* does not, *in rigore juris,* denude the cedent of the *actio directa ossibus ejus inhærens;* yet if the debtor be any way certiorated of the assignee's right, that is sufficient to put him *in mala fide;—l. 3. C. de Novat. l. ult. D. de Transact.*

The Lords, before answer, allowed the Ordinary to try if the first assignation was a delivered evident, or retained by the cedent; though she had an interest to do so, in respect it bore a reservation of her liferent; but being among so near relations, this was not so much regarded: as also to try if the second assignation was onerous or gratuitous; for if it was not onerous, then it was a contravention of the warrandice by which the cedent stood debtor to the first assignee; as was found, 15*th July* 1675, *Alexander* against *Lundies.*

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November 27.---ARBRUCHEL reported again the competition between Mr An-