No 22. bygones, *error communis* may so far excuse such an error. THE LORDS having tried at the town clerk, and having found there were many in the same condition, they sustained the sasine and resignation, and repelled the nullity; but resolved to make an act of sederunt discharging that practice in time coming, under the pain of nullity, in all competitions with other creditors, more formally infeft.

Fol. Dic. v. 1. p. 203. Fountainhall, v. 2. p. 428.

SECT. V.

Process carried on in a wrong form.

No 23.
A decree of lining given by the provost and bailies of Dumfermline was reduced, because the brieve was not proclaimed upon 15 days, nor a precept directed upon a claim given in by the purchaser of the brieve against the special parties having interest, nor any formal order of process kept, (tho' it was alleged to be conform to the ordinary custom and manner of proceeding in that burgh.

1629. *February* 14. WRIGHT *against* STIRK.

IN a reduction of a brieve of lining or limiting, and decreet conform thereto, given by the Provost and Bailies of Dumfermline, to whom the brieve out of the chapel of Dumfermline was directed to that effect; this reason of reduction was found relevant, and the brieve was reduced, because the brieve was not proclaimed upon 15 days, not a precept direct upon a claim, given in by the purchaser of the brieve against the special parties, having interest in the lining of the tenement therein contained, for summoning them thereto, nor no formal order of process keeped; which reason was found relevant, albeit the defender contended, it was not relevant in this case of brieves of lining, which hath a summary proceeding; and that by the consuetude in the burgh of Dumfermline, no other claim is given in but summary trial taken betwixt the parties; likeas the parties are summoned by the brieve and warrant thereof; which exception was repelled.

Act. *Mowat.* Alt. ———. Clerk, *Gibson.*

Fol. Dic. v. 1. p. 204. Durie, p. 425.

No 24.
Decree subscribed by the commissary in place of the clerk sustained, because of the custom, but

1631. *February* 10. A. *against* B.

THE Commissary of Brichen having pronounced a decreet betwixt two parties, which being extracted, was subscribed by the Commissary, who was judge thereto, and not by his clerk, and therefore was quarrelled as null, seeing these being two distinct offices, as the clerk could not be judge, no more could the judge be clerk; for, as the judge could not sit down and minute processes, and

write his own ordinances, no more could he subscribe decreets; notwithstanding whereof the decreet was sustained, seeing it was the custom of that court, and divers other inferior judicatures to do the same; but the LORDS found it a custom unlawful, and not to be hereafter allowed, and ordained the Commissary to abstain therefrom in time coming.

No 24. the custom found not right, and therefore not to be sustained in time coming.

Fol. Dic. v. 1. p. 204. Durie, p. 567.

1708. *July* 15.

GEORG HOUSTOUN, and his TUTORS and his CURATORS, *against* LORD ROSS.

No 25. An admiral's decree in absence for not finding caution *judicio sisti et judicatum solvi*, found null, and turned into a libel, on this ground, that the decerniture or warrant thereof, was not signed by the judge, notwithstanding that, by custom of the court, the judge had not for a long time signed any such decernitures.

GEORGE HOUSTOUN having raised suspension and reduction of a decreet in absence, obtained by the Lord Ross before the Admiral, against the deceast Patrick Houstoun the pursuer's father, upon this ground; That the same was null for being extracted without the warrant of a decerniture signed by the Judge, contrary to the act 3d, Parliament 1686, and might have been of the clerk's manufacture;

Alleged for my Lord Ross: The custom of the Admiral court requires no decreets in absence to be signed by the Judge, but only decernitures upon debate; and the customs of particular places derogate even from a general custom, witness December 14. 1671, Duff and Brown *contra* Forbes of Culloden, *voce* PROOF; and the case of Ross of Tullisnaught *contra* Turner.

Answered for the pursuer: The argument from the custom of the Admiralty is most irrelevant, unless they pretend a power of dispensing with acts of Parliament. For though it be not necessary for a Judge to sign ordinary steps of process, such as continuation of diets, orders about seeing and returning, or production of writs, whereupon nothing is to be extracted; the Judge's interlocutors for an act or decreet, is an indispensable check upon the clerk, any contrary custom notwithstanding. Because indeed, *consuetudinis usúsque longævi non vilis est auctoritas, sed non usque sui valitura momento, ut rationem vincat aut legem.* So custom did not sustain an unwarrantable adjection to a tax-roll, December 15. 1666 *. Laws concerning the public good and regulation cannot run in desuetude, Jack *contra* Town of Stirling, No 3. p. 1838. Yea, the town of Edinburgh's decreet as patrons, against Mr Andrew Massie a professor of philosophy in their college, was reduced, for that some of the interlocutors were not signed; and the commissary of St Andrews's subscribing only the docquet after all the depositions of witnesses, was found to annul the decreet extracted thereon. The decision, December 14. 1671, concerns only the special set of a particular burgh, which differs in different burghs. Nor is that betwixt Ross of Tullisnaught and Turner any more to the purpose; for there the interlocutor not having been signed when pronounced, in expectation of agreement

* L. Colvil against Feuars of Kinross, Stair, v. 1. p. 413, *voce* PUBLIC BURDEN.