

1673. *November.* CLAUD HAMILTON of Parkhead *against* MILLER of Milnheugh.

CLAUD HAMILTON of Parkhead having charged Miller of Milnheugh on a decret of the regality-court of Hamilton, it was suspended. Amongst other reasons this was one, That it was null, being subscribed by the judge-pronouncer; as was found by the Lords,—Dury, 10th February, 1631, Commissary of Brechin.

ANSWERED,—Though the office of Judge and clerk be distinct, and not to be confounded, yet here there was some necessity for it, the clerk being dead, and no other as yet sworn and admitted; and it is offered to be proven, it was the custom of the court, that the Judge signed all his own sentences during the interval and vacancy; which is sufficient to the parties, the deed being true, and they *in damno vitando*.

I scarce think the Lords would sustain the decret so subscribed. See also Dury, 10th January, 1623, M'Dougall; 29th January, 1629, Gibsone.

*Advocates' MS. No. 425, folio 227.*

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1673. *November.* ANENT PRECEPTS OF CLARE CONSTAT.

ABOUT this time, *quærebatur*, if a precept of *clare constat* granted by a superior to his vassal's heir, for infesting him in the lands holden of him, prejudices the superior of any preceding duties, non-entries, or casualties, due furth thereof. It seems to be no discharge or exoneration of preceding casualties unless it bear a *novodamus*.—See M'Keinzie's Pleadings, p. 144.; and Dury, 23d March, 1630, Tourelands *contra* Auchnames.

*Advocates' MS. No. 426, folio 227.*

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1673. *November.* RUTHVEN of Reidcastle *against* PITCAIRNE and ARBUTHNET.

IN an action pursued by Ruthven of Reidcastle *contra* Pitcairne, and one Arbuthnet, for redelivery of some corns and other goods and cattle, the first had poinded, and the second had bought from one of his tenants, the same being hypothecated to him for his year's farm.

ALLEGED for Mr Pitcairne, That the master's hypothec could not be so exorbitantly extended, as to give him interest to repete his tenant's goods or corns poinded for lawful debt, unless either he had appeared at the poinding or apprising, and stopped the same upon his right of prelation to all creditors *quoad* an year's rent, or that he will say that *ipsa corpora* are extant; for if the *species* be *bona fide consumptæ* before any question was moved by the master against him, how can they be conducted? Besides, it were to destroy all commerce.