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

CLAUD HAMILTON of Parkhead having charged Miller of Milnheugh on a decreet 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 decreet so subscribed. See also Dury, 10th January, 1623, M'Dougall; 29th January, 1629, Gibsone.

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

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 infefting him in the lands holden of him, prejudges 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.

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 condicted? Besides, it were to destroy all commerce.

The Lords inclined to repel the allegeance, and find the goods poinded, though *bona fide* used and alienated, might *quoad* their value be repeated. But this were to make it a very hask privilege. See Sir George Lockhart's thoughts against it *supra*, February, 1671, No. 146, and the citations from Dury there.*

For the other defender I alleged *absolvitor;* because I offered to prove by witnesses, that the tenant had, at the time when he sold these goods, at least betwixt Yule and Candlemas, as much corns (for *utensilia* and stocking is not enough) as would pay his master that year's farm. But in proving thereof, special notice would be taken, that witnesses be used who know what was his yearly duty he paid to the master, and the precise quantity of the corns he had in his barn or barn-yard, (for his growing corns will not be accounted as sufficient, since they must pass in account for another year,) and be interrogated particularly thereon; and if either this be omitted, or the witnesses ignorant thereof, the exception at the advising will be found not proven by the Lords.

Advocates' MS. No. 427, folio 228.

1673. *November.* ANENT LIFERENTRIXES.

ABOUT this time it was queried, If a woman, liferentrix provided to so many bolls or chalders of victual, or infeft in an annuity or annualrent furth of lands for her liferent use, will be liable proportionally, and *pro rata* of what she possesses, to the public burdens, with the fiar.† Either it is declared she shall have right to such an annuity free of all incumbrances, or that her jointure be worth so many chalders of victual, or it is due merely by a personal obligement to pay as well infeft as not infeft; and in either of thir three cases it is thought she will have right to her full liferent, without allowance of any defalcation for burdens: but if her liferent right be constituted by infeftment, and she in possession, she will in that case be liable for her proportion of the public burdens. I said, in this second member of the distinction, that she must be in possession, else it is thought she will not be obliged to acknowledge these *debita ex fundo provenientia, et quæ rem afficiunt et sequuntur*. And thus inclines the act 3. made on the 10th of December, 1646; and it is affirmed, the Lords have so decided, first between the Lady Rossyth and her son, and then between the Lady Cassills and the Earl of Roxburgh.—*Vide* l. 27. p. 3. D. *de Usufructu. Vide jurisconsultissimum Joannem Vandum*, lib. 2. quæs. 22. See act 20, in 1663, and some observations, *alibi*, anent tercers undergoing public burdens. See 23d February, 1681, Lady Aberlady.

And, really, it cannot be thought rational, that the fiar shall bear the burdens imposed *intuitu* of land, whereof he is not in possession, but debarred by liferenters. Natural equity provides, *ut eum sequantur incommoda qui habet commoda;* they who reap the emolument ought not to grudge *onus ei annexum*, l. 10. D. *de Regulis Juris*. What if the heir have little or no profit? sure it is hard to require brick

* See M'Kenzie's Observes on the Act 1621, p. 104. Dury, 3d February, 1624, Hayes *contra* Keith, *in fine*.

† If she be infeft, some determine she is liable; otherwise, is not. *Onus temporariæ indictionis ad fructuarium pertinet*, l. 28. D. *de Usu et Usufructu Legato*. See February, 1680, Absents from the Host, p. 27, Mr De Ferriere cited.