flowed *a non habente potestatem*, the King being denuded in favours of the Admiral, by the patent. *Advocates' MS. No.* 625, *folio* 297.

1677. *July* 28. GRIERSON *against* COLQUHON.

GRIERSON and Colquhon, anent the returning of the prentice fee, or a part of it, conform to the time the prenticeship stood, or that was to run when the prentice died. See of this a little note, *supra, No.* 133. It seems not so precisely reasonable that it should divide equally *pro rata temporis:* but more should be allowed to the master the first year, than for the second or subsequent ones; because he is at the same expence upon his prentice the first year, that he is afterwards, and at much more trouble and pains in teaching him his calling, and gets far less service from him, whereof the boy is not yet capable; and so the master's benefit and acknowledgment, upon that account, should be more in the beginning of the apprenticeship than afterwards. But Mr Colquhon's bond he gave, providing how it should return and when, would regulate that case. *Vide Paullum in L.* 4, § 5, *D. de Statuliberis: Joannem Vandum, libro* 1 *Variarum Quæstionum.*

Advocates' MS. No. 628, *folio* 298.

1677. *July.*

A WOMAN is provided to the half of the fee of some lands, failyieing of children of the marriage, the other half going to the heirs of the husband: the husband dies and leaves a son: the woman raises a pursuit of declarator that she ought to have right to the half of the fee, because the child was not her husband's but got upon her by another man, and not procreated of that marriage by him. Sir John Gilmour, being president, took the summons and tore it, and imprisoned the woman. See Craig, page 270, *de quadam regina* that in spleen against her son called him a bastard. In the Countess Dowager of Erroll's pursuit against the Earl, it was alleged against her, that she could not crave the additional jointure of 10 chalders of victual, provided to her in case there were no children procreated of the marriage betwixt them, because it was her own wyte that did not cohabit: *sibi imputet* that she had no children.

The Lords laughed heartily at the defence: and it is true indeed in one sense that *per eum non stetit* there was no bairns.

Advocates' MS. No. 632, § 1, *folio* 299.

1677. *July.* ANENT CLAUSES OF CONQUEST, IN CONTRACTS OF MARRIAGE.

CLAUSES of conquest, in contracts matrimonial, provided to heirs of the marriage,

are very far different as to legal effects, from clauses providing the conquest to the bairns procreated; for bairns *qua* bairns, they are not bound to warrant their father's deed. Thir clauses of conquest impede the father's disposal of the conquest to other bairns of another bed, but do not hinder his free disposal of it to strangers, unless he were inhibited. See this *supra, Catharine Mitchell's* process against the *Littlejohns*, in *June*, 1676, *No.* 478.

Thus Sir G. Lockhart resolved in *Seton of Barnes* his Irish affair.

Advocates' MS. No. 632, § 2, *folio* 299.

1677. *July.* ANENT CONSUETUDE.

PEOPLE run a great risk by consuetudes, at the beginning, because of the power and arbitrariness left to judges; but after it is brought to a ripeness and a consistency, it may be very profitable. See Stair's system, *Titulo* 1, *Of Common Principles, parag.* 9, *in fine.*—Oldendorii *Classes in argumento operis, Titulo de Ordine juris,* § 10. Cujace *ad Titulum C. Quæ sit longa consuetudo.* And it is hard in a monarchy to give people the power of introducing or abrogating laws; for they may kick the wholesomest laws out of doors; and it is undetermined how many acts, and how much time must go to the making of a fixed and settled consuetude; and it is not easy to discriminate if it be *bona* or *mala consuetudo,* or *vetustas erroris,* or *originem a viris probis trahens.*

Advocates' MS. No. 632, § 3, *folio* 299.

IN November, 1676, one having charged on a liquid bond, it was suspended on this reason, that the charger above his annualrent had received stones of cheese, which behoved either to be usury, which is not to be presumed, being a crime, or must be ascribed to defalk of the principal. 2*do,* Cheese is not liquid, nor commutable with money, and so not compensable, since all compensations must be, by 141 act of Parliament 1592, *de liquido in liquidum.* ANSWERED, The cheese was gifted, and nothing spoke of at the time to signify in the least that it was in part of payment. REPLIED, He must prove it was a donation; for debtor *non presumitur donare.* The Lords allowed the cheese, its price being presently liquidated and constituted to compense the clear liquid bond.

Advocates' MS. No. 632, § 4, *folio* 299.

1677. *July.*

ONE is pursued for a spuilyie; he defends that he found the horse eating his grass, and he poinded it till the scaith were prized. The Lords found his allegeance and defence only relevant in thir terms;—that he put it in a poind-fauld beside grass