

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*. Cujacæ *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. *2do*, 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 compensate the clear liquid bond.

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

1677. *July.*

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

and water, and caused one having jurisdiction as the bailie or heritor of the bounds, apprise the scaith, and then offer it back to the owner on payment thereof. *Vide, L. 39, § 1. D. and L. 5tam C. ad legem Aquilianam*; see act 11, Parliament 1535, and Bartolus there cited.

Thir two decisions I read in the President's *Collection of Practicks*.
Advocates' MS. No. 632, § 5, folio 299.

1677. *July.*

ANENT PRESCRIPTION.

IT was affirmed to me that the King's taxation, and Lords of Session's taxation in 1633, do not prescribe within the 40 years: at least that the ten years of the English usurpation must not be reckoned in that count; because they were then *non valentes agere, contra quos nulla currit præscriptio*. *Vide No. 631, Lindsay and Fraser, [30th July, 1677.]* There was two years, viz. from *February* 1659, till the end of 1660, that must be discounted in all prescriptions; because there was then no courts in Scotland: which is much to be attended in counting prescription, where it is but shortly past. *Advocates' MS. No. 632, § 6, folio 299.*

1677. *August 1.*

ANENT ADJUDICATIONS.

THE President caused the Lords call back for a decret of adjudication of some of my Lord Cathcart's lands; and stopped the signature of infestment, sought to be expedie thereon at Exchequer, though it was extracted ten days before; only because it was not inrolled, but called and decerned amongst the acts; whereas the new adjudications use all to be so called, unless where there is compearance for the debtor; in which case, conform to the act in 1672, he will get a day to prove the value of the lands, and to produce the writs; and if this were an informality, then 20 decreets of adjudication will fall. Yea, in this case the master of Cathcart had written a letter to the party, acknowledging the debt, and offering to take a course therewith. But he is the President's son-in-law. See of concussion, *supra, in July 1677, No. 592, Mistress Jean Gray contra Sir A. Primerose*. Anent the summary calling of adjudications, see *No. 453, supra, Nasmith and Kello, § 3, [February 1676.]* *Advocates' MS. No. 634, folio 299.*

1677. *August 3.*

SIR ANDREW RAMSAY'S signature of the lands of Waughton, Abotshall, &c. upon his father's resignation was passed in Exchequer. But in regard there were sundry feu-duties owing for Linton, East-Forton, AuldCambus, Fast-Castle, &c.