what not. These two, viz. Forret and Newton, to whom it was recommended, drew them all under general heads, and marked what each of them materially deponed, and how many agreed in one thing.

Advocates' MS. No. 624, § 1, *folio* 297.

1677. *July* 27. The DUKE OF YORK *against* The EARL OF ARGILE.

THE Duke of York, as High-Admiral of Scotland, raised a declarator against the Earl of Argile, that the Spanish ship cast away upon the isles of Scotland *in anno* 1588, being one of the prime ships of that Armada, belonged to him as Admiral, by which office he has undoubted right to all wrecks. See a little of this action in another little MS. beside me.

It was ANSWERED for Argile, that he had the sole right to that ship, because his father had a gift of it from the Duke of Lennox, who was high-admiral for the time, and it was confirmed in Parliament, and clad with possession by taking guns and other things furth thereof.

REPLIED, The gift was null, not being subscribed by his Majesty, though by the narrative it appeared it was so intended, for his Majesty was inserted as a disponer. *2do*, The *quota* to be given to the Duke of Lennox was left blank, which proves it was but an imperfect evident; whereas lately, to ocular inspection, there is filled up the fiftieth part, which is so unsuitable and disproportionate to his interest, that it clearly appears that could never be communed. *3tio*, The Duke of Lennox could not dispose upon that which was not *in illius dominio;* but such was this ship, for the law has condescended on certain ways how property shall be acquired, and has determined that it is not *nudis pactis*, but *traditionibus*. And possession is an essential requisite and ingredient to the constitution of property with us. Now Lennox had no possession of it. And as to those faint deeds of possession that Argile condescends upon; whatever they might import in things lying upon the earth, they can never pass for a sufficient possession of things lying in the bottom of the sea, *in fundo maris;* for they require another kind of possession ere one can have right thereto, and that is locomotion, they must be stirred out of the place that possesses them. This ship is in a manner *sub maris dominio et potestate*, the sea is the *medius obex*, the *medium impedimentum* that hinders acquisition of property in it; this *obex* is not removed nor overcome but by *locomotion*, which Argile cannot pretend to. Then Sir George Lockhart urged, with a great deal of elegancy and subtilty, the parallels of a *fera bestia* wounded, of a treasure found, or of mines in the bowels of the earth, and of the *aper* taken *in rete et cassibus* mentioned by *Ulpian Pomponius Proculus, in L.* 44 *and* 45 *D. de acquirendo rerum dominio.* Vide supra, *June* 1677, No. 578, anent mines, from act 12 in 1424, and act 27 in 1649. Supra *January* 24, 1677, *the Tortoise*, No. 535. See our 124th act, of Shipwrecks, in 1429. He farther alleged the giving the admiral right to wrecks *in fundo maris*, before he apprehended any possession, was to state the right of property of these wrecks in the person of each admiral, so that he might dispose upon them as freely and absolutely as he might have done upon any other thing that was his uncontroverted property; and at this rate, that ship of the 1588 would, by thir principles, have belonged to the Earl of Bothwell who was

then Admiral of Scotland, and would have transmitted and devolved to his heirs and successors if it was his property, which is absurd. He might have gifted it and in general all the wreck that had happened on the coast of Scotland since the flood of Noah: which is equally absurd as to imagine that an administrator of an office can gift its casualties, in great, or thereby forestal, prevent, and anticipate the benefit of his successors. *Vide supra, No.* 588, [*Archbishop of Glasgow* against *Commissary Clerks of Peebles, June* 29, 1677.] For an admiral can dispose upon no more of naufrage goods than he knew, and no more of what he knew than he had by a fixed and solid possession (though not total) put himself in a rational hope of compassing. All the rest stands as it were in its native freedom, continues to be *nullius,* and remains to be the fruit of some succeeding industry.

DUPLIED,—That the King being heir to Lennox, is bound to warrant his gift in favours of the Earl's father, since the Admiralty accresced to the King, and was by him conferred on his brother. That there is no warrant in law for that distinction, why more solemn possession is requisite of things detained *in fundo maris,* than of any other; that law attends no more but a symbolical possession, a possession of a part to give right to the whole. So Craig, in the symbolic possession by seasine and tradition of earth and stone, pag. 133 and 175, and the marginal notes there. So Dury, 17 *December,* 1628, *Chalmer* and *Craigievar:* and they argued from the fens in England and sands at Montrose; *de quo vide supra, hoc mense.* See the Rhodian laws, *apud me,* published by Gothofred. *Vide Tit. C. de Naufragiis, libro* 11, *Tit.* 4*to; item, Authenticam de Naufragiis, C. de furtis; Grotius, de jure belli et pacis, libro* 3, *cap.* 6, *N.* 3 *et* 4, *pag.* 474. *Non omnis possessio* (*inquit Grotius,*) *sufficit; sed requiritur firma permanens.* And locomotion was called an idle fancy; for it was supposed the ship were brought to the surface of the water, and fell down again, were not that a pregnant deed of possession?

Argile himself had a little discourse, showing the vast expense he had been at in making the discovery: and wished once it were brought above board, and were on the dry land, ere we discorded about the division of it; else it should in earnest verify the proverb of the King of Spain's gold; that if any of these gentlemen doubted of the truth of his discovery, he should take them down and let them see it, if they were content.

The Earl of Kincarden, as Judge-Admiral, had also a short address to the Lords.

But they found, *una voce, nemine contradicente,* (that the Duke of York might not imagine he had got wrong, which might have been imagined if any had voted for him,) that the Earl of Argile had best right; and therefore they preferred his gift, and sustained his defence thereon, and assoilyied from the Duke of York's libel.

The Duke would think himself but soberly obliged to them who advised him to this groundless process, which was thought to be by the information of S. G. L. But his Highness wrote down a very complimenting letter to Argile, approving the justice of the Lords' sentence, and showing his hearty compliance and acquiescence therewith.

There was also another claim to this ship in the person of Tillibardin, now of the Marquis of Atholl, who laid it at the Duke of York's feet; it was a gift from King James to it, in favours of Tullibairden. But it was of no moment; for, 1*mo,* It was prescribed, nothing having followed upon it by the space of 40 years, neither was it ever clad with the least possession. 2*do,* It was only granted by the King, and so

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,