

been often resolved, to order the former to be expung'd out of the Records of parliament: but they are still printed, because when frequent-ly argu'd from abrogated Lawes Mr. Kenzie observ. on Act. 37. par. 2. J. 6. and on Act. 6. par. 2. J. 8. Thus altho' Act. 201. par. 14. J. 6. Appoints the Act. 37. par. 2. J. 6. to be delete out of the Records; and the Lord Stair (Just. lib. 3. Tit. 3. §. 39) says, that it is delete and not extant: yet we have it printed.

By George McKenzie (Just. lib. Tit. i. §. 10) says that the King-council of Scotland tho' they could not make Lawes yet they might revive them. Whose Definition I can hardly go in to. Because a Statute that hath gone into Dis-use, and been taken away or enervated by contrary Custom, would seem to require no less power than the legislative Authority, to give unto it that Force which it had quite lost. Nor do I think, that Mr. Spotswood's Argument (Notes upon Mr. Kenz. Just. lib. Tit. 1.) in Vindication of his Design in his Name, or rather that his Majesty did it with Advice of his Council, is of any weight; unless the King alone could make Lawes, or the Legislative power were the Kings prerogative, which both the Auth- or and Annotator advance with Book.

Sect. 6. Ancient Customs.

An Ancient Custom is a Law not written, established by long Use and so that it wants the express Sanction of the Legislative Authority, and derives its Force from a presumed Consent thereof. l. 32. §. 1. ff. de Legib. upon which Account it is call'd a Facit-Law.

The Origin of all Customs is obscure, because they are not, as Laws im-posed, tho' committed to Writing. 'Tis not till after they have been estab-lished by long practice that the King requires to give the Force of a Law to Custom is in Arbitrio Judicis. It is impossible at this Day to assign a Reason for every Ancient Custom l. 20. ff. de Legib.

The Force of a received Custom is very great in all places: for a Law is com-pared to a Tyrant; but a Custom to a good King; Laws which are given by Pre-cept having a kind of servitude in them; whereas Customs that are received by Consent govern those that are still free. Their Authority is founded on this Reason, that it ought to be presumed, that what hath been observed for a long Time is usefull and just.

Co. and Feud. lib. 1. Tit. 2. §. 9. thinks that Custom tho' never so ancient is not to be observed if contrary to our written Law; but yet on the contrary we find long Custom to be of such Force in Scotland that it hinders an Act of Par-liament that was never observed to take Effect; and renders such as have been observed ineffectual for the future. For it would be extremely hard to

rouse up an old antiquated Law, which perhaps for many Centuries had quietly slept, without exerting itself, or fixing any Mark of leaving any Traces of its Force and Vigour, to point out the Danger attending such a Prac-tice, which for so long Time hath been ~~and~~ and countenanced as fair and in-nocent, and never objected to: it would be hard I say, without some previous Notice of the Danger, to put such a Law in Execution, to unsheath such a rusty Sword to wound the Lieges with Custom doth also qualifie Statutes V. G. Act. 37. par. 5. J. 3. requires only 13 Men in an Inquest of Apprising. But long Custom hath made the Inquest to consist of 15. The said Act 37 again allows Tenants to be poynded for their Lords Debt in general, without Distinction of real and personal Debts. But Custom hath restricted it to poynding for their Masters Debts that are real by Infeoffment. Stair Just. Tit. 2. §. 13. lib. 4. Tit. 23. §. 4. Tit. 27. §. 24. The Act 94. par. 6. J. 4. allows in the Service of a Brief of Mortmainstry, Exceptions only against the Judge and Inquest and that of Bastardy, if the Brief was cried openly upon 15 Days, and the Execution thereof indorsed. But Custom contains many more Exceptions. Act. 62. par. 5. Feb. 1. Ch. 2. requires Infeoffment or exact Diligence for obtaining the Same, to make the first effectual Apprising. But Custom requires no more than a Charge against the Superior. Customs must be reasonable and according to Justice, or they are void and ought not to be followed. Coke 1. Just. 62. a. 140. & 141. a. But sometimes Deeds past according to long common Use and Apprehension, tho' wrong, informal, have been sustain'd with a Declaration, that such should be null in Time coming. 16 November 1709 Crombie contra Robertson. 14 of February 1706. E. Levin contra Larrar of Largo and Grabrown 7. February 1700 Calderwood of Pittedie contra Young of Rosebank, which see in 11 February 1708 subjoyn'd to an Act of Sedition. A Custom beneficial to one, and injuri-ous to a Multitude, is void Dav. 1. Janistry 32. 6.

If any Custom hath been a long Time in Disuse, it is abolish'd: for as its Authority was founded upon long Usage, the like Disuse can take it away, from a presumption of its being no longer usefull, be-cause it had ceased to be observed.

Custom cannot exalt itself against the Kings prerogative Dav. 1. Janistry 33. b. Coke 1. Just. 15. b. but it may support that which the Kings Grant cannot support Coke 8. Rep. 125.

Custom ought to be proved by some Sentence given in Court con-tradict or is where the Judge allow'd it and found it prov'd, and not by the Tes-timony of a Burgh V. G. declaring that to be their Custom, or by any Trial of the actual doing so and so, 26 June 1627 E. Gallaway contra Fairlyfer.

Customs are to be construed according to the vulgar Apprehension, and are to be taken strictly, tho' not literally, because they tend to the De-rogation of the Common Law. And as Custom is a good Interpreter of Laws l. 37. ff. de Legib. so if any provinces or other places want certain

Vertical marginal notes in the gutter between pages 102 and 103, containing references and commentary.