

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.*

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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.*

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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.*

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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