

D E S U E T U D E.

1668. November 12. PATRICK PARK *against* NICOL SOMMERVILLE.

PATRICK PARK pursues a reduction of a bond of 1200 merks Scots, upon these reasons, *first*, Because albeit the bond bears borrowed money, and be in the name of Nicol Sommerville; yet he offers to prove by Nicol's oath, that when he received the bond, it was blank in the creditor's name, and offers to prove by witnesses, that the true cause thereof was, that ——— Sommerville, Nicol's brother, having win all the pursuer's money he had at the cards, he being then distempered with drink, caused him subscribe a blank bond, for filling up what sum he should win from him, and that this sum was filled up in this bond, which he offers to prove by the oath of Nicol's brother that won the money, and the other witnesses insert; so that the cause of the bond being played money, by the act of Parliament 1621, the winner can have no more but 100 merks thereof; *2dly*, Before Nicol's name was filled up, or any diligence or intimation thereof, there was a decret arbitral betwixt the winner and the pursuer, wherein all sums were discharged; which discharge being by the cedent, to whom the bond was delivered before the filling up of Nicol's name, or intimation thereof, which is in effect an assignation, excludes the assignee.—It was *answered* for the defender, That he opposed the bond, bearing borrowed money, granted in his own name; and though he should acknowledge that the bond was blank in the name, and that thereby his name being filled up, he is in effect an assignee; yet the bond being his writ, the bond cannot be taken away but by writ or oath of party, and not by his cedent's oath, or witnesses insert, unless it were to the cedent's behoof, or without a cause onerous, as the Lords have found by their interlocutor already; *3dly*, Albeit it were acknowledged to be played money, the act of Parliament is in desuetude, and it is now frequent by persons of all quality to play, and to pay a greater sum than 100 merks; *4thly*, The pursuer who loseth the money, hath no interest by the act of Parliament, because thereby he is appointed to pay the money; but the superplus money more than

No 1.
The act 14th,
Parliament
1621, as to
playing at
cards and
dice, found
not to be in
desuetude.

No 1. 100 merks, is appointed to belong to the poor ; and the defender shall answer the poor whenever they shall pursue ; but it is *jus tertii* to the loser, who cannot detain the money thereupon ; but whatever was the cause, the defender having received the bond for a cause onerous, and being ignorant that it was for any other cause but true bestowed money, he must be *in tuto* ; otherwise, upon this pretence, any bond may be suspected, and the cedent, after he is denounced by witnesses, may take the same way.

The Lord Advocate did also appear for the poor, and claimed the superplus of the money more than 100 merks, and alleged that the act of Parliament did induce a *vitium reale*, which follows the sum to all singular successors ; and that though ordinarily the cedent's oath or witnesses be not taken against the writ, yet where there is fraud, force, or fault, witnesses are always receiveable, *ex officio* at least, and ought to be in this case, where there is such evidence of fraud, that it is acknowledged the bond was blank in the creditor's name, when Nicol received it, and the filling up was betwixt two brethren, and the debtor dwelling in town, did not ask him what was the cause of the bond ; and that an act of Parliament cannot fall in desuetude by a contrary voluntary custom never allowed by the Lords, but being vitious against so good and so public a law.

THE LORDS found the act of Parliament to stand in vigour, and that the loser was liable upon the same grounds, and therefore ordained the sum to be consigned in the clerk's hands ; and before answer, to whom the sum should be given up, ordained Nicol's oath to be taken when his name was filled, and for what cause.

Fol. Dic. v. I. p. 235. Stair, v. I. p. 561.

No 2.

The heritable right of presentation to an office, exercised contrary to the terms of an act of Parliament, was found not null by exception ; and that the question of the desuetude of the statute must be tried in a reduction.

1693. January 11. KING'S ADVOCATE against MONCRIEFF.

THE LORDS advised the debate, mentioned 3d November last,* between Moncrieff of Reidy and John Adam, craving to be admitted a macer on the King's gift. It was moved by some of the Lords, that there was a competition between two gifts, and each of them objected subreption and obreption against the other, and that there was no way to know if his Majesty proceeded *ex certa scientia et proprio motu*, but by consulting himself, and laying the case before him. Others answered, That this might be a bad preparative, to trouble the King with points of law, and that it would reflect on the secretaries if the King should say, that the one or both were impetrate from him without making him understand the state of the case ; and that wherever there were double gifts, one of the parties would crave to have it remitted to the King. So it was voted, recommend to the King, or decide ; and the last carried ; though all gifts

* See APPENDIX.