1774. *July* 14. WILLIAM MAXWELL of Dalswinton *against* ALEXANDER BLAIR of Dunrod and OTHERS.

PACTUM ILLICITUM.

In a question relative to the validity of a bill granted as the amount of a wager, lost upon a horse-race, the Lords found that the 14th Act Parliament 1621, relative to game-debts, was not in desuetude.

[*Fac. Coll. VI.* 338 ; *Dictionary*, 9522.]

AUCHINLECK. There is no law against horse-racing.

MONBODDO. This is a case *ubi de virtute certatur ;* where skill, strength, and judgment.

GARDENSTON. I do not think that the statute 1621 is in desuetude: should be sorry if it was, for then we should lose a very good statute, and get nothing in its place. I do not think that the English statutes extend to Scotland. The two first provisions in the Act 1621 have never taken place. As to the *third*, it is a very valuable and wise provision; no relief is given to the loser, who, from point of honour, is unwilling to complain. Hence the English statutes are eluded. By our statute, a loss to any extent is a matter of action; the winner gets a hundred merks, the surplus goes to the poor of the parish. The Act 1621 was found not to be in desuetude, *Park* against *Somerville*, 1668. Dirleton was king's advocate at that time, and he appeared for the poor, and pleaded on the Act 1621. Sir George M'Kenzie, writing some years after, affirms that the Act 1621 was in force; and so the Court of Session again found 1688, in a case observed by Harcarse, between *Craigmiller* and an old gentleman whom I knew, *Captain Straiton.*

PRESIDENT. Confirmed this by quoting a more recent case, of *Sir Scipio Hill*, in 1711, observed by Fountainhall.

On the 14th July 1774, "the Lords found the statute 1621 not to be in desuetude, appointed the Sheriff of Dumfries, and the Steward of Kirkcudbright to intimate to the kirk-sessions of Dumfries and Kirkcudbright, that a process was depending for a game debt, and remitted to the Ordinary to proceed accordingly;" altering Lord Kennet's interlocutor.

Act. A. Crosbie. *Alt.* A. Wight.

1774. *December* 16. MONBODDO. There are various enactments in this statute singular and severe, as that inflicting a fine on the keeper of a public-house for the *first* offence, and loss of liberty, which I suppose implies perpetual imprisonment, for the *second.* It may be that the statute has not gone into desuetude as to cards and dice; but it may have gone into desuetude as to horse-racing. Besides, riding on a road and horse-racing are very different. In this case it was not a match on plain ground between horses trained for the purpose, but a contest on uneven ground over a tract of twenty-four miles, be-

tween the riding horses of two private gentlemen. Would a race for taking up the hare be gaming on the statute 1621?

HAILES. The history and fates of the Act 1621 are singular: the statutes of that Parliament were drawn up by President Haddington, who conducted the business of that Parliament. This I could show, were it necessary, or did time permit. The *first* time that the statute came to be taken notice of in Court was in 1668, when Sir John Nisbet of Dirleton was king's advocate. He interposed officially for the poor; and the Court found that the Act was not in desuetude;—and the second time was in 1688, when Sir George Mackenzie was king's advocate: he interposed officially for the poor; the Court then thought, according to Harcarse, that the statute was in desuetude; that is, as explained by the proceedings themselves, that the statute had been overlooked, not that it was obsolete. The *third* time in 1711, when Sir James Stewart, the queen's advocate, interposed officially for the poor, and then the Court thought that the statute was in force. Here then we have a statute which originated from one eminent author in our law, and has been acknowledged by other authors since his time, and has been received as a subsisting statute by the Court in different cases. There has nothing happened since 1711 to render this statute obsolete. A distinction is made between cards and dice and horse-racing. I cannot understand the distinction. Cards, dice, and horses are merely the implements of gaming; and if cards or dice have received the judgment of the Court, it was because the *species facti* brought into judgment respected cards and dice. We cannot suppose that part of *one* clause is in observance, and at the same time that the rest of the same clause has gone into desuetude. A distinction also is made between this match and a horse-race. It is said that a contest between horses on a course may be horse-racing, but that a contest on the highway is not. I think that the highway was a course *pro tempore*, and that it will make no difference in the law, whether the question is as to a circle or as to a straight line. As to the case of riding a match to take up the hare, If the question is, who shall be first at the hare?—the hare is the goal as much as a post would be.

GARDENSTON. A law may go into desuetude as to some clauses, while as to others it remains in full force. The essential part of this statute is that which allows the claim for the poor. *This* is a wise regulation, far excelling the modern elusory regulations. By the modern regulations, gamesters have recourse against each other. *This* is so adverse to their *point of honour*, that they will rather steal, rob, or cheat their lawful creditors, than use the remedy which the law has provided. But, by the statute 1621, the loser is entitled to nothing: he must pay whatever he loses. At the same time the winner must restrict his gains to 100 merks; the residue goes to the poor. I cannot relish Lord Monboddo's distinction. A trial of skill between two horses is a horse-race, wherever the course is.

COALSTON. The more I consider this Act, the more I see the wisdom of it. We cannot expect that in these days statutes against gaming should be *in viridi observantia*. Even the Act of Q. Anne is not in daily observance. I should think the clause as to keepers of public-houses very severe, if by *loss of liberty* we were to understand *perpetual imprisonment;* but the *privileges of the town* are meant by that phrase. The statute is a wise one, and is still in force.

PRESIDENT. I cannot think that a statute of this nature can be set aside, as

in desuetude. All the arguments against its validity are merely arguments *ab incommodo*. The wisdom of the statute is this, that it does not restrain gaming, but only prevents the excess, and disappoints the harpies who would otherwise prey on the young and unwary. There is no great harm although the law were put in execution as to public-houses. If inn-keepers were deprived of the privilege of the burgh when they offended, it would give me no pain. I cannot distinguish between this question and a horse-race. It is a mistake to suppose that a horse-race is always run on level ground. The course at Penrith is on the side of a hill. If the law were to be so interpreted, men would have nothing more to do than to use the highway instead of a course. *First at the hare* is a trial of skill. But suppose it a race, I should think that he who ventures more than 100 merks on such a wager, acts injudiciously, and must stand to the consequences.

On the 16th December 1774, "the Lords sustained the title of the Kirk-session;" adhering to their interlocutor of the 14th July 1774.

Act. A. Wight. *Alt.* A. Crosbie.

1774. *December* 24. ARMSTRONG *against* His CREDITORS.

CESSIO BONORUM.

IN this case the pursuer of the *cessio bonorum* made oath that he had not *cancelled* any writings, but he omitted to say that he had not *put any writings away*. The Lords found that the oath was incomplete, and refused to set him at liberty, although there was no opposition made by the creditors. It was said that the modern practice of paying creditors by a *cessio* ought not to be favoured beyond the letter of the law; and that a man, making such an oath, might put away writings, and so defraud his creditors: That if he had sworn that he had not *put away*, it might be concluded that he had not *cancelled* any writings; but not *vice versa*.

For Petitioner, D. Armstrong.

1775. *January* 17. GEORGE HAY *against* JAMES HAY.

PASSIVE TITLE.

Found that a person passing by his father, who was three years in possession, as apparent heir, and also passing by his grandfather;—the person last infeft base, and making up titles to a remoter predecessor, who was the last publicly infeft in the lands, is liable for the debts contracted by his father upon the statute 1695.

[*Folio Dict., VII.* 4; *Dictionary*, 9755.]

COALSTON. The words of the statute are *remoter predecessor*: the defender