3*tio*, The bill ought at least to be sustained to the amount of the advances and furnishings made by the charger. No 63.

Answered to the *first*; The statute only allows recovery where the sum amounts to L. 10, yet it has declared all securities void, whatever sum they may be granted for; and there are very solid grounds for the distinction.

The law allows to play for any sum under L. 10. provided it be paid in ready money, presuming that those who are possessed of so much cash cannot suffer by losing that sum. But, if securities were allowed for any sum at all, they might be multiplied without end, which would be very dangerous, especially to the lower class of people.

To the *second*; The statute voids all securities, granted either for money, or other valuable thing won by gaming; nor is there any real difference whether this bill was granted for money lost at play, or the price of liquor lost at play.

To the *third*; The statute declares the security null, where either the whole, or any part of the consideration of such securities, is for money won at play, and sufficient justice is done the suspender, by the reservation in the Lord Ordinary's interlocutor.

"THE LORDS adhered."

For the Charger, *Wight*. For the Suspender, *Armstrong*.

A. R. *Fol. Dic. v.* 4. *p.* 34. *Fac. Col. No* 61. *p.* 105.

1770. *February* 14.

JEAN THOMSON, Spouse to George Dallas, Writer in Edinburgh, *against* HEW MACKAILE, Writer in Edinburgh.

No 64.
A marriage-brokage obligation *contra bonos mores*, and not actionable.

HEW and WALTER MACKAILE, father and son, on the 16th March 1769, granted an obligation addressed to George Dallas, which, after a long preamble, subsuming the intention, which was to provide a suitable wife for the son, concludes thus: 'I hereby promise to pay to you, or order, at your house in Edinburgh, 'three days after date, for behoof of Mrs Dallas, your spouse, 21s. Sterling mo-'ney, for the trouble and time she hath hitherto bestowed in our business with-'in mentioned; as also L. 9: 9s. money foresaid, three days after the date of the 'contract of marriage that shall, by the providence of God, be voluntarily en-'tered into and signed and delivered betwixt our son and a young gentlewoman, 'described as within. (Signed) HEW MACKAILE.

WALTER MACKAILE."

By the assiduity and management of Dallas and his wife, a marriage was accordingly brought about betwixt Walter Mackaile and a young woman, not unsuitable in rank, but who had no fortune, and without the consent and approbation of her own parents. The pursuer then brought an action upon the obligation before the Magistrates of Edinburgh, who at first refused to sustain it;

No 64. but afterwards, in respect that the marriage had taken place from the suggestion and recommendation of Dallas's wife, and that the person was a virtuous young gentlewoman of good reputation and character, found the defender liable.

The cause having been brought into the Court by advocation, it was

Pleaded for the defender, That this was an illicit contract, a *pactum turpe et contra bonos mores*, and upon which no action could lie. For,

1*mo*, In order to constitute what is called in law a *turpe pactum*, or *contra bonos mores*, it was not necessary that there should be any natural depravity or inherent turpitude in the transaction; the legal idea of the phrase implied no more than that the contract was prohibited by law, or discouraged by the Judge, on account of its dangerous or pernicious effects on society. Of this there were many instances among the Romans; as the *pacta successoria*, or *pacta de hæreditate viventis*; the *pacta de lite*, and the *pactum medici cum ægroto*; and, in this country, the purchase of depending pleas by a member of Court, being productive of bad consequences, was prohibited by the Legislature.

The contract in the present instance was still more deserving of being reprobated. To sustain an action of this nature would give encouragement to interested and designing men to earn an infamous profit, by destroying the peace of families, by rendering children undutiful to their parents, and leading them to ruin unperceived till it was past redress.

2*do*, By the civil law, a stipulated reward of this nature, which was termed *proxeneticum*, was not recoverable in the ordinary course of procedure; and it appears even to have been regarded in the same light as a *pactum de lite*, and of course reprobated by law. If such rewards were recoverable at all, it could only be by the *cognitio extraordinaria*; and as this took place only where there was no stipulation express or implied, it proved that such demands had no foundation on contract or agreement. Such appears to have been the doctrine in the earlier periods of the Roman law. L. 1. D. De proxenet. Paratit. ad l. 50. tit. 14. D. L. 2. 3. D. De proxenet. L. 1. §. 7. 12. D. De extraord. cognit. And though, by the later laws of the empire, stipulations for the *proxeneticum* were authorised, they were laid under such restrictions as to guard against their dangerous consequences. L. 6. C. De sponsalibus, &c.

3*tio*, Though there had been few decisions in this country that bore directly upon the point, the principle of such as had occurred was directly adverse to the legality of such a stipulation. 9th Feb. 1676, No 52. p. 9505; Sir Michael Stewart *contra* Earl of Dundonald, No 61. p. 9514.; and in one precisely upon this point, Sir William Campbell *contra* Banes and Stewart, No 53. p. 9505., though the question was not determined, very little countenance seems to have been given to the action.

In the law of England this subject was well known; and marriage brokage bonds, as they were called, not only discountenanced and set aside, but the procurement of marriages in that way held to be an indictable offence. Jacob's Law Dict. *voce* Marriage; Bacon's Abridgement, tit. Marriage and Divorce;

Abridgement of Cases in Equity, p. 90.; 1. Vernon, 402.; 2. Vernon, 652.; Shower's Cases in Parliament, p. 76. Executors of Thomas Thynne *versus* Potter; and in the case of Earl Powis, the argument never was put upon the ground of there being a marriage brokage contract; which, if there had been any foundation for it, would not have been overlooked. No 64.

Answered for the pursuer:

1*mo*, That marriage ought to be free, was a proposition which admitted not of dispute; and that whatever tended to destroy that freedom ought to be avoided. But when it was considered from what quarter the liberty of choice and freedom were in danger, and what sort of interposition was most dissonant to that principle, an obvious distinction occurred, favourable to the doctrine the pursuer maintained. Wherever a father, guardians, brother, or other near relation, who were supposed to have a natural influence and authority, stipulated a reward, either for giving their consent, or for influencing or procuring a marriage; such agreement, as it was truly destructive to the freedom of choice and inclination, might very properly, as it was a betraying of trust, be called a *turpe pactum*, and as *contra bonos mores* declared void. But the case was very different here; for the pursuer had no connection with the young lady, or with either of the parties; she had no authority over either, nor any farther influence than that of mere advice and commendation. As she was not therefore in a situation to exert any improper or undue means upon the inclinations of either party, so far from putting any restraint upon their choice, she in fact contributed to the indulgence of their mutual wishes.

There were perhaps very few marriages which were not in some measure brought about by the intervention of third parties; and if it be *contra bonos mores* to interpose when a reward was promised, it must, upon the defender's principles of the infringement of freedom, be equally the same, when the interpositions proceeded merely from friendly motives; so that the argument maintained, by necessarily going too far, and leading into a manifest absurdity, was truly devoid of just or legal foundation.

2*do*, The determination of the question was affected by no precedent in the law of this country, or decision of the Court. The Roman law was clear on this head, 'Proxenetica jure licito petuntur;' and as that law had always been considered as a part of our own system, it was more to be regarded than the laws of our neighbouring country, which with us had certainly no authority. In judging of this case, the Court was bound by the laws of no nation whatever; as the question, being one of general and natural law, fell to be determined by those principles which were most favourable to matrimony, and most conducive to the happiness of mankind.

Upon advising informations, the following judgment was given:

"Find, That the offer undertaken by the pursuer, in terms of the missive pursued on, dated 16th March 1767, was *contra bonos mores*; and therefore find,

No 64. that no action lies upon the said missive; assoilzies the defender, and decerns; and finds expences due."

Lord Ordinary, *Kames.* For Thomson, *James Grant.*
Clerk, *Kirkpatrisk.* For Mackaile, *Geo. Fergusson.*

R. H. *Fol. Dic. v.* 4. *p.* 27. *Fac. Col.* No 21. *p.* 51.

1774. *July* 14.

WILLIAM MAXWELL of Dalswinton *against* ALEXANDER BLAIR of Dunrod, and the TRUSTEES appointed by the deceased HUGH BLAIR of Dunrod, Father to the said ALEXANDER.

No 65.
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.

THE statute 14th, Parliament 1621, *inter alia*, enacts, That, wherever any person wins above 100 merks, within 24 hours, upon cards, dice, or horse-racing, the surplus shall, within 24 hours thereafter, be consigned in the hands of the Kirk-Treasurer, if in Edinburgh, or of the Kirk-Session in the country, to be applied for the use of the poor.

In a question between these parties, relative to the payment of a bill that was granted to the pursuer, by the deceased Hugh Blair, in consequence of his having lost a bett of L. 200 Sterling upon this feat of horsemanship, which of them should ride in the shortest time from Dumfries to Kirkcudbright?—the pursuer having *contended*, That betts of this kind were not illegal, the point deliberated upon by the Court was, Whether or not the act 1621 was in desuetude? And, for showing that it was not, reference was made to the decision in the case of Sir Scipio Hill, 9th February 1711, *voce* POOR.

The Court "found, that the 14th act, Parliament 1621, is not in desuetude; and ordain the Clerk of this process to intimate to the Kirk-Sessions of Dumfries, Kirkcudbright, and Kelton, that they may appear for their interest in this cause; and, this intimation being made, remit to the Lord Ordinary to proceed in the cause, and to do therein as he shall see just."

Act. *Crosbie.* Alt. *Wight.* Clerk, *Kirkpatrick.*
Fol. Dic. v. 4. *p.* 34. *Fac. Col. No* 126. *p.* 338.

*** See the competition between the Kirk Sessions, decided 15th June 1775, in favour of the poor of the parish of Dumfries, *voce* POOR.

No 66. 1776. *December* 3. HOPE *against* TWEEDIE.

THE LORDS sustained action for a wager of a pipe of Port wine between two Gentlemen, to be paid to him who should walk first to Edinburgh from a cer-