

Leven. *Con.* were Milton, Minto, Shewalton. But Murkle and Kilkerran did not vote. 16th July, They Adhered.

No. 22. 1751, Nov. 12. STEWART, Surveyor-General, *against* LAMONT,

THE tenants of Lamont, and eight other heritors in Argyleshire, having committed a great riot on the Custom-house officers, the matter was compromised by their masters with the officers, with consent of the Commissioners. They paid damages and expenses, and entered into a bond each for his own tenants to Stewart of Surveyor-General, that no person in their respective lands should for seven years be concerned in running or smuggling any kind of foreign spirits, black cattle, or Irish meal, against the laws made or to be made, under the penalty of L.100 sterling, to be paid the said William Stewart, or his successors in office, or to the Collector of Customs for the time, for every such delinquent or delinquency, which might be proven by confession of the delinquents, or by witnesses, and cognizable by the Sheriff of Argyleshire, or his Deputes, in a summary way by petition or supplication, or otherwise, dated February 1743, and signed by seven of those Gentlemen. On this bond a suit was brought before the Sheriff, and being advocated, was by Strichen remitted, with instruction to take the proof before answer, and to allow a joint proof. But on a reclaiming bill and answers, we this day found that the bond was illegal, and could not produce action. We thought, if this was considered as a bond for the King's use, it ought to have been in the King's name, and then must have gone to Exchequer; but which was worse, it was imposing penalties on the subject against law; but if it was considered only as a conditional penal bond to a private subject, then he could not sue for the penalty further than he had interest, which was none at all.

No. 23. 1752, Jan. 14. SCOTT HEPBURN of Kingston *against* A. STEWART.

IN the time of the Rebellion Stewart of Ardshiel and the deceased M'Lachlan of that ilk were sent to levy the Cess of East Lothian; and the deceased Hepburn of Kingston having refused to pay any, they took him prisoner, entered his house, broke up his cabinets, and took out L.740 sterling in gold and silver, which they carried to Haddington without counting, and then called for some people of note in the place, and even a notary, and counted the money; and some days thereafter sent a bond by the young Pretender under the style and title of Charles Prince Regent; this bond, I say, M'Lachlan sent to Congleton a friend of Kingston's to be delivered to him. Ardshiel was attainted of treason, and his estate vested in the Crown from 24th June 1715, so that little redress was to be expected from him; but M'Lachlan was killed at the battle of Culloden and thereby escaped being attainted; and therefore Scott Hepburn as executor to Kingston sued M'Lachlan's son and heir for payment of the money. The chief defence was that this was *actio penalis ex delicto*, and therefore *non transit in heredes*. I was Ordinary, and gave an act before answer for both parties to prove; and the proof, after two days debate at the Bar, was this day advised. It appeared pretty clear from the proof that Ardshiel had the chief command of the party, but that M'Lachlan was the principal man of business, and that it was happy for the country that he was so. The defence was that above mentioned branched out into many particulars, and many authorities quoted on both