

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

sides. But the Court *nem. con.* found the defender liable for the principal sum with interest and expenses of process. I was in the Outer-House during this day's debate, (22d January 1751) and gave no opinion.

17th December 1751, Scott as executor decerned to Hepburn of Kingston sued M'Lachlan for L.700 and some more robbed from him in October 1745, when his father M'Lachlan levying the Pretender's Cess in East Lothian, and for which M'Lachlan sent the young Pretender's bond to a friend of Kingston; and on a proof led and litigious debate, the defender as heir was found liable. Scott then applied for confirmation, but was opposed by a brother and sister, who claimed as nearest of kin, upon which he produced a writing by Kingston, which happened to bear even date with the young Pretender's bond, assigning the money to the pursuer's father for his behoof, and requesting the father to call for and require payment of the money, wherein he describes the money thus, "L.740 agreed upon to be levied by Colonel M'Lachlan for behoof of," &c.—then gives the young Pretender all the titles assumed by himself. This pleaded first as evidence that the money was paid voluntarily; but that we repelled on the 4th, in respect of the proof of force brought in the process. Next, some of us had a difficulty whether process could be sustained on such a writing, particularly Kilkerran and President, (which last thought it evidence of voluntary payment;) but as the money could not thereby be forfeited, and all the question was whether it belongs to the pursuer or his brother and sister, we thought that this deed was a sufficient proof of his will that the pursuer should have it; and the purpose of the deed, and circumstances of the person were some sort of excuse for the treasonable expressions in it. The Pretender was then in possession of this country, and this deed intended as a title to solicit payment from him, and therefore he behaved to give him the titles that he assumed to himself.

14th January 1752, On a reclaiming bill against the interlocutor marked 17th December, and answers, and after calling the parties, Whether they could offer any other proof, besides this odd assignation, of Kingston's disloyalty, or his being reputed a Jacobite? we so far adhered to the former interlocutor, as to find that notwithstanding this assignation there was sufficient evidence that the money was by force taken from Kingston. But on the second point both Milton and I and others altered our opinion, and by a great majority found that no action could be sustained on this assignation. I thought it deserved to be burnt by the hands of the common hangman, and therefore could not be the title of an action.

No. 24. 1752, June 3. EARL OF GALLOWAY *against* A. STEWART.

THE Lords found that action did not lie on a bond granted in order to procure to the granter the King's remission.

No. 25. 1752, Feb. 7. SIR MICHAEL STEWART *against* EARL DUNDONALD.

IN 1698 when John Lord Cochran had two sons alive, William Cochran of Kilmaronock, his uncle, gave a bond to Mr John Stewart of Blackhall, bearing for a certain sum of money received to pay 100 guineas, how soon he or heirs of his body should succeed to the honours and estate of the Earldom of Dundonald. Sir Michael sued the present