No. 63. 1753, Feb. 6, Dec. 18. THE DUKE OF DOUGLAS *against* TWO JUSTICES OF PEACE.

IN a case reported for advice by Kilkerran, (28th July 1752) on a question the Duke of Douglas and two Justices of Peace, the Lords found, that the 44th act 24th Geo. II. for rendering Justices of Peace, &c. more safe in the execution of their offices extends to Scotland as well as England, though the procedure must be in our own forms. *Vide* 19th December 1752 the same case.

On a reclaiming bill against Kilkerran's interlocutor, advising with us 28th July and answer, the Court (19th December) was much divided. The first question was, Whether that act (44) 24th Geo. II. extended to Scotland? The President thought it did as to the prescription or limitation of actions against Justices, but not as to the manner of trial which by that act can only be by Juries. Others again thought it impossible to separate the clauses of that act, and that if the limitation extended to Scotland so must the whole act, and as it was impossible that the Legislature could intend such an alteration of our law, which would confine all complaints against Justices of Peace to the Court of Justiciary, they thought that none of it extended. But upon the question it carried that it does extend to Scotland so far as concerns the prescription, *renit. multum* Murkle, Woodhall, *et me.* (Kames was *non liquet.*) The next question was, Whether this complaint fell under that act? and the President and Drummore, &c. thought it did not, because by the preamble it was intended only to save from innocent errors, whereas this was wilful and a plain collusion. Others again thought that the act could not be intended to save them from errors that either at common law or in common sense ought not to be punished either in six months or one month, that is innocent errors, but after so long a time they should not be obliged to justify their proceedings, and that all should be presumed innocent, the words being, "That no action shall be brought for any thing done in the execution of his office," and by the preamble the actions to be brought within the six months are for wilful and oppressive abuse of the laws. The President answered, That what was done collusively was not in the execution of the office. Upon the question it carried that it was within the act, *renit. multum* President, Drummore, Shewalton, and Kames. But 6th February 1753 found that the act does not extend to Scotland, and so also now thought the President.

No. 64. 1754, Feb. 1. SIR ROBERT GORDON *against* DUNBAR of Newton.

SIR ROBERT pursued declarator of property and of the marches of his lands of Roseisle wherein I gave an act before answer, and remitted to the Sheriff of Moray to take the the proof and to try the case by an inquest and to set march stones. The Sheriff summoned an inquest of some of the principal heritors in that part of the county, before whom a very laborious proof was led that took up several days, and in which the Jury appeared to have bestowed a great deal of pains and travel the whole ground with most of the witnesses, marking the places deposed to by them severally, and at last returned a very pointed verdict, bearing, that after consideration of the whole proof on both sides, "we

find from our own conviction that the boundaries are &c." The proof and verdict being reported was heard at our Bar yesterday and this day in course of the ordinary action roll. The whole verdict was acquiesced in by both parties except as to a part of the march betwixt Sir Robert's lands of Roseisle (whereof two-thirds belonged to the Duke of Gordon who was not a party) and Mr Dunbar's lands of Keams,—as to which Sir Robert objected that both parties had brought proofs of these marches but the inquest had followed neither of these proofs, but made a march of their own different from both, without any proof, as if they had been arbiters and not Judges or assizers, which they had no power to do; that he had proven his march to the rocks at the sea shore 70 paces further east than they had given him by 14 witnesses, whereas Mr Dunbar had proven his march a great deal farther west than the inquest had given him but only by six witnesses; and made many ingenious observations on their testimonies and credibility, so that his proof was much more pregnant, and the Jury's verdict had no other foundation but the oath of one witness. The defender's procurators again disputed our power to review or alter the verdict, and said at the same time that his proof was more pregnant than Sir Robert's, and made also a variety of observations on the proof led for Sir Robert to reduce his number of witnesses, and yet for peace were willing to acquiesce in the verdict, which they said was strongly supported by one witness, Ross a mason, who about 1730 or 1731 had taken a tack from Duke of Gordon and Sir Robert of the whole quarries on the shore, (which were truly the lands controverted in the process,) and called their ground officer to bring with him some of the oldest and most intelligent of the tenandry to show him the march in the quarries at the shore, and four of the oldest of them accordingly came; and when they came to the place that Sir Robert calls the march, they did not stop there but carried him further west till they came to the place where the verdict fixes the march, and told them that that was the march, though he several times cautioned them to be cautious what they did for that it might afterwards be of importance; and that in the place that they fixed on as the march he cut the letters D G on the rock which has since been broken off, and that there were other witnesses concurring that that was the place pointed out to him by these men, at least within two or three paces of it. We all agreed that we were not tied down that we could not alter the verdict, and Milton, Minto, and Kilkerran thought the marches proved by Sir Robert ought to be found the marches, for that his proof was most pregnant. But the most of us thought that great regard was due to a verdict of 15 sworn men of such rank and character in whose presence the proof was taken, and who appeared to have perambulated the ground with most of the witnesses: That the act appointing the proof in criminal trials to be taken in presence of the Jury was a most valuable law: That in proofs of marches every one must have observed that the witnesses have generally so great a bias to one side or to the other that an indifferent person has great difficulty to believe either side: That here the Jury did not act arbitrarily to make a march, but upon their great oath find that to their conviction the boundaries are such as they describe; and that therefore we who did not see the proof taken, nor ever saw the ground, ought not without the clearest proof judge against what they on their great oath report they were convinced of; and accordingly it carried to approve the report.