

No. 18. 1745, July 24. SIR GEORGE M'KENZIE *against* ROBERT HAMILTON.

THE Lords found the objections against a bill founded on the game act, not competent against an onerous indorsee, to be proven by the indorser's oath, as we did formerly, 25th January 1740, Nelson against Bruce of Newgrange. 2dly, That the clause in the act anent the L.10, concerned only the case of ready money lost and paid at the gaming; but that a bill or other security for the smallest sum lost at game is void and null.

No. 19. 1747, July 17. RAMSAY *against* ADDERTON.

KILKERRAN had found, that the Custom-house officers may sue before Justices of Peace for condemnation of brandy, that yet the person from whom seized cannot sue the Custom-house officers before the Justices of Peace on the act 6th Annæ; and we Adhered.

No. 20. 1751, June 14, July 16. THE TREASURER OF HERRIOT'S HOSPITAL *against* GARDENER OF HERRIOT'S GARDEN.

DAVID WADDEL, who having a tack of 19 years of Herriot's Work Gardens, with a limitation that he prevent the use of all such diversions as kites, bowl and ring, and pennystone, &c. and shall not pasture horses or cows in the walks of the said garden, contracted with Mr Lampe, musician, to give him the use of the inner garden for musical entertainments during the summer season, for which purpose a theatre for the music was erected in the middle of the garden, and advertisements at 1s. the person issued, after the example of Raneleigh and Vauxhall gardens; upon which the Treasurer of the Hospital and Procurator-Fiscal complained to the Magistrates, who found it to be highly prejudicial to the inhabitants of the city, contrary to the meaning of the act, and detrimental to the Hospital;—of which sentence a bill of suspension was exhibited to us; and the gardener alleged, that by his lease he was only obliged to debar those diversions that withdrew from their employments the meanest sort of people, whereas musical entertainments were for higher rank; that such diversions had been authorized, at least connived at in the gardens, and guard-soldiers placed to keep off the mob even before his lease; that the diversion was innocent and lawful, and encouraged by the best people in the south part of the island, and cannot be restricted without a statute; that entertainments of the same kind are allowed in houses in this town, and are equally lawful in open air; and there can be no prejudice to the Hospital, whose boys can have no access there. In the answers, this was said to be prejudicial to the gardens, to spoil the walks, &c.; that it was hurtful to the boys, but especially as the hour was six at night, the hour for prayers in the Hospital. But the chief objection, as it appeared to me, was, that it had an evident tendency to debauch the young people in this town, to bring about clandestine, imprudent, unreasonable marriages, and even worse. Upon the question, it carried to refuse the bill; wherein I did not vote, because I had never seen any of these entertainments, and knew not whether they tended to promote debauchery and lewdness or not. *Pro* were, besides the President, Drummore, Strichen, Justice-Clerk, Woodhall,

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