

ing for all concerned,—for themselves as the guardians of the church, and for the heritors, by whose money the work is to be performed: If any thing has been done amiss in the execution of this trust, the heritors may then appear in their own persons, and vindicate their civil rights.

No. 11.

This was clearly the unanimous opinion of the Court: They therefore remitted the petition to the Lord Ordinary, to receive a condescendence on the merits of the case; and recommended to the heritors to bring an advocacion of the proceedings of the presbytery, which, being conjoined with the other, the presbytery might become a party in the action against Mr. Sutherland.

Several of the Judges gave it as their opinion, that the presbytery, except from tolerance, have no jurisdiction whatever in the building of churches: The application in such a case should be made to the Judge-Ordinary. As to man'ses, they have the superintendence conferred upon them expressly by statute, subject, however, to review by the civil courts.

Lord Ordinary, *Cullen.* For petitioners, *Thomson.* Agent, *Ken. Mackenzie, W. S.*
Clerk, *Home.*

F. *Fac. Coll. No. 170. p. 384.*

1804. July 11. **CHIVAS against DUKE of GORDON and Others.**

A bill of suspension and interdict was presented by Alexander Chivas, cashier of the Commercial Bank of Aberdeen, complaining of certain proceedings of the lieutenantcy of that county, in the execution of the militia acts. The suspender was balloted for, instead of one who, having been drawn to supply the place of a discharged man, had paid the statutory penalty. He contended, that the Lieutenantcy were not warranted by the militia acts in balloting to supply the place of a man, who had paid the penalty, and that the law in making provision for the application of penalties, pointed out a different mode of supplying such a deficiency.

A preliminary objection upon the point of jurisdiction occurred, from a provision in one of the militia acts, the 42d of Geo. III. § 173, "That no order of conviction made by any Lieutenant, of any county, stewartry, city or place, or by any two or more Deputy-Lieutenants, or by any one Deputy-Lieutenant, together with any one Justice of the Peace, or by any Justice or Justices of the Peace, by virtue of this act, shall be removed by bill of advocacion out of the county, stewartry, city, town or place, wherein such order or conviction shall have been made, to the Court of Session; and that no bill of advocacion or suspension shall supersede execution, or other proceeding upon any such order or conviction so made in pursuance of this act, but that execution and other proceedings shall be forthwith had and made thereupon, immediately upon conviction."

No. 12.

When an act of parliament confers a special jurisdiction upon commissioners, and prohibits their decisions from being reviewed by advocacion and suspension, it is not competent to receive any such bills, although there be some reason for thinking that the commissioners have exceeded the powers vested in them by the act.

No: 12. The Lord Ordinary reported the case upon the papers in the Bill-Chamber ; and (June 28.) their Lordships pronounced an interlocutor, refusing the bill of suspension as incompetent. The suspender presented a reclaiming petition ; and

Pleaded : To decide the question of competency, it is necessary in some degree to enter into the merits, and to inquire, whether the Lieutenancy have in this case exceeded the powers vested in them by the acts of Parliament. So long as their proceedings are in conformity with the statute which confers upon them their jurisdiction, it is certainly incompetent to bring their decisions under review by advocation or suspension. But, whenever they depart from the statute, they exceed their powers ; the provision in the act prohibiting advocations and suspensions does not apply ; the ordinary jurisdiction of courts of law is no longer excluded ; and their decisions may therefore be reviewed, in the usual way by which the judgment of an inferior court is brought before the Court of Session.

The supreme Court possesses a radical and supereminent jurisdiction to protect the lieges from every usurpation of authority. When a statute delegates special powers to commissioners, and excludes the jurisdiction of the ordinary courts of law, the act of Parliament, which is the fountain of their jurisdiction, must also be the measure of their power. It can never be supposed to bestow upon commissioners a right of doing every thing they please under pretence of carrying into effect its provisions, or a licence to exercise usurped authority without allowing an opportunity of submitting their decisions to review. If, in carrying through the militia acts, the Lieutenancy had so far exceeded their powers as to ballot a clergyman or a woman, to serve in the militia ; such a decision might be reviewed in the ordinary forms of suspension and advocation ; for the jurisdiction of the supreme Court cannot be exercised to any efficient purpose, unless it includes a power to restrain, as well as to remedy, the evil. Although the ballot complained of in the present case, be not such a palpable infringement of the militia laws as in these cases, it is equally a departure from the enactments of the statute ; and therefore, in point of principle, equally entitles the suspender to the ordinary modes of redress.

All statutes which confer extraordinary jurisdiction, are to be strictly interpreted. In the exercise of their discretionary powers, the Lieutenancy, under the militia acts, may do certain things beyond all controul. But there are other things which by these acts they are expressly prohibited from doing, and if they act in opposition to the statute, they must be restrained by the supreme Court, as in ordinary cases. This distinction has accordingly been observed, whenever extraordinary powers have been delegated to the exclusion of the courts of ordinary jurisdiction ; Patillo against Maxwell, 25th June 1779, No. 101. p. 7386 ; Couper against Ogilvy, 22d June 1781, No. 102. p. 7388 ; Countess of Loudon against Ayrshire Trustees, May

28, 1793, No. 109. p. 7398 ; Raymond's Rep. 580. *Rex v Kepell* ; 1. Burr. No. 12. C. 37 ; Blackstone, Vol. 3. p. 85 *.

Answered : The prohibition in the statute is absolute and unqualified. The object of these acts of Parliament was, to obtain a speedy execution of the law, and an immediate effective force for the defence of the country ; which made it necessary to prevent the proceedings of the Lieutenancy from being brought under review by advocacy or suspension. The important branch of national defence, which depends upon the militia, would have been wholly defeated, if the cases of individuals had been allowed to undergo a tedious discussion in courts of law, while the military arrangements of the country were, in the mean time, left imperfect.

In the interpretation of statutes conferring special jurisdiction, the rule is, that they be so explained as to give the greatest effect to the law, by securing the object for which the enactment was framed. This rule ought more particularly to apply, when the question resolves not into a denial of the superintending power of the Supreme Court, but merely of a particular mode of exercising that power. And in this case there is much less inconvenience in obliging any individual, who may conceive himself aggrieved, to obtain redress by an action of reduction or damages, than in obstructing the execution of the militia laws, by which great mischief might arise to the public. Accordingly, in cases of statutory jurisdiction, the power of review has been very sparingly exercised by the supreme Court, and only in the form of a regular action ; Erskine, B. 1. T. 2. § 7 ; Robertson against Justices of Stirlingshire, July 25, 1744, No. 73. p. 7340.

There is no meaning whatever in the provision of the act of parliament, excluding advocations and suspensions, if the Court are to enter upon the merits when any such bill is presented. This is done in ordinary cases, whenever a bill is preferred, complaining of the judgment of an inferior court, and the bill is refused, unless it appear that there is some probable ground of complaint. The only object, therefore, which the Legislature could have in view in making this provision, was to prevent bills of suspension or advocacy from being presented, and to prohibit all discussion in such forms, which is expressly and unequivocally done in the statute. Such, accordingly, has been the practice of the Court in cases under the comprehending, turnpike, and militia acts, where statutory jurisdictions have been created ; Foot and Marshall against Stewart, August 9, 1778, No. 100. p. 7385 ; Clark against Lord Douglas, May 18, 1799, (not reported) ; Kingan and others against the Earl of Galloway, 27th February 1801 (not reported).

* An argument was likewise founded upon the term, " order of conviction," which occurs in the clause of the statute excluding advocations and suspensions, and which the suspender maintained did not apply to the case of a simple order for a ballot. But it was answered, and indeed it appeared from the context, that this was merely a typographical error, and that " order or conviction," was the real expression of the Legislature.

No. 12. It was farther contended upon the merits, that there was no reasonable ground of complaint in this case, and that the act of parliament conferred a power upon the Lieutenancy, of supplying all deficiencies as they arose, by ballot in the first instance, without waiting for the slow and inefficient mode of supplying them, by employing the penalties.

The Court, upon advising the petition and answers, by a very narrow majority, adhered to their former interlocutor.

There was great difference of opinion upon the Bench. It was conceived, on the one hand, that the supreme Court was bound to give redress in every case where a Lieutenancy had exceeded the powers committed to them, or proceeded in opposition to the act of parliament, and therefore that it was absolutely necessary to inquire into the merits of this case, to discover whether the jurisdiction of the Court, by means of advocacy and suspension, was excluded. It seemed likewise to be the opinion of several of the Judges, that the Lieutenancy had in fact exceeded their powers, and that a second ballot was not competent by the act of parliament in the present case. But the majority of their Lordships could not get over the express and direct terms in which advocations and suspensions are prohibited in the statute, for which there seemed a sufficient reason, in the necessity which existed, of having an immediate effective force: And therefore without entering deeply into the merits, they were of opinion that the bill should be refused as incompetent.

Lord Ordinary, *Cullen*. For Suspendor, *Gillies*. Agent *Jo. Peat*. Alt. Solicitor-General *Blair, Burnet, Ar. Campbell junior*. Agent, *Ja. Robertson, W. S.* Clerk, *Home*.

J. *Fac. Coll. No. 177. p. 398.*

1804. November 21.

RAITT, and Others, against MAGISTRATES of ABERDEEN.

No. 13.
The Magistrates of a royal burgh, have no jurisdiction entitling them to extend petty customs beyond use and wont.

THE Magistrates of Aberdeen have been in use, from time immemorial, to levy a small duty upon cloth manufactured in the neighbourhood, and exposed to sale in the public market. But though, in the table of duties issued by the Magistrates, their tacksmen were empowered, in general, to exact the duty on all cloth brought to market for sale, it was not levied upon foreign cloth sold in the market, or upon any cloth sold in the shops, but was confined entirely to home-made cloth, exposed to sale in booths upon the streets.

A few years ago, the Magistrates authorised their tacksmen to demand a duty upon all cloth without exception; upon which the dealers in cloth presented a bill of suspension, and raised an action of declarator, concluding, that the Magistrates had no powers to exact any duty upon cloth sold in their shops, either of home or foreign manufacture.

The Lord Ordinary found, ' That the Magistrates have no authority to introduce new petty customs, or extend the old ones, whether in their amount,