No 108. A petition reclaiming against this judgment was presented, to which answers, by appointment, were given in; but the question was not again brought to a decision.

For the Complainer, *Tait, et alii.* Alt. *Dean of Faculty, & G. Fergusson.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 341. *Fac. Coll. No.* 107. *p.* 199.

1793. *May* 28.

COUNTESS of LOUDON, and Others, *against* The TRUSTEES on the High Roads in Ayrshire.

No 109.
Trustees acting under a turnpike act, which allows an appeal from them to the next meeting of the Quarter Sessions, whose judgements are declared to be final and conclusive, shut up a road, after a sist upon a bill of advocation, complaining of their procedure, had been intimated to them. The Court sustained its own jurisdiction, ordained the road to be again opened, and decreed expenses against the trustees.

By the Turnpike Act for the county of Ayr, the Trustees are authorised 'to suppress any *by-roads* that do not appear to be *of importance* to the public;' and an appeal from their judgment is declared competent to the next general meeting of the Quarter Sessions, when it shall be 'heard and determined, and the order and sentence shall be final and conclusive.'

The trustees, by the vote of a majority, resolved to suppress the road from Rosefenwick by Crawfordland Bridge; upon which the Countess of Loudon, and others, presented a bill of advocation to the Court of Session, and also entered an appeal to the next meeting of the Quarter Sessions. At that meeting, as the sist granted on the bill of advocation had been intimated to them a doubt arose, whether the discussion of the appeal should not be superseded, till a final judgment of the Court of Session was obtained.

The point being put to the vote, the Gentlemen present were equally divided in opinion. The Preses, who, in his individual capacity, had voted "not "to proceed," now gave a casting vote in the same manner. His right to a second vote being disputed, he quitted the chair, protesting against the after proceedings of the meeting, and, along with several other Gentlemen, left the room.

The resolution complained of was then unanimously affirmed by those who remained; it being understood, however, that the road should be kept open, till the advocation was discussed.

In the advocation, besides the propriety of suppressing the road, the competency of the complaint was disputed. And, upon that point, the complainers

Pleaded, Any statute which introduces an unusual and peculiar jurisdiction, and excludes the cognizance of the ordinary Courts, must be strictly interpreted; Blackstone, b. 3. c. 6. § 10.; and wherever the Legislature intends that the sentences of inferior Judges shall not be subject to review, the jurisdiction of the superior Courts is in use to be expressly excluded; Erskine, b. 1. tit. 2. § 7. Of this many instances might be given from English sta-

tutes, and from the Revenue laws in Scotland. See also 13th Geo. I. c. 26. § 31. and 23d Geo. II. c. 17. No 109.

The jurisdiction of the Court of Session is not excluded by the act now in question; by the expression "final and conclusive," nothing more is meant than that a judgment of the Quarter Sessions should, *quoad* them and the trustees, have the effect of a *res judicata*, so as to prevent the repeated introduction of the same subjects of controversy *in their Court;* but without excluding the means of relief to those aggrieved, by complaint to the Court of Session and by appeal from them to the House of Lords.

In a question on the act 1st Geo. I. c. 18. which authorises the Justices of Peace "finally to determine" certain points, it was found, that the jurisdiction of the Court of Session was not excluded; 10th March, 1754, Buchanan against Towart, No 81. p. 7347. Upon these principles, it has been found, both in England and Scotland, that an appeal lies to the superior Courts from the sentences of the Commissioners acting under the comprehending acts, although they enact, that no person enlisted, in consequence of them, 'shall be 'liable to be taken out of his Majesty's service, by any process, other than for 'some criminal cause;' 18th Geo. III. c. 53.; 19th Geo. III. c. 10.; 13th June, 1758, Rex against Thomas Dawes, and Rex against Kesel; Burrow-vol. i. p. 636. 637.; Letter of Lord Ashburton; 25th June, 1779, Patullo against Sir William Maxwell, No 101. p. 7386.; and 10th August, 1780, Cooper against Ogilvie, No 102. p. 7388.

2*do*, At any rate, relief must lie by application to this Court, where the trustees have exceeded their powers. The road in question does not fall under the description of a by or secondary road, but is a public cross road, which passes between other two, not otherwise connected, and one which a solemn judgment of the Court, pronounced in 1782, declared to be of importance to the public.

Answered, The words employed in the statute are not naturally, nor with any propriety, susceptible of any meaning but this, that the judgment of the Quarter Sessions shall not be subject to review; and the same terms have been so construed, when used in other statutes; *e. g.* in the statute, 20th Geo. II. c. 43. which introduces the power of appeal in civil cases to the Judges of Justiciary on their circuit, and declares that their judgments shall be final.

The argument of the complainers confounds two enactments which are distinct. Where a statute says that the Judge "shall finally determine," it only means to prescribe, that the cause shall not be removed out of his Court, till he has given his definitive judgment. Thus, by 1663, c. 9. no cause for a sum under 200 merks, and which by 20th Geo. II. c. 43. is extended to L. 12 Sterling, can be brought by advocation before the Court of Session. Such cases, therefore, the inferior Judge must "finally determine;" but it does not

No 109.

follow, that his judgments are "final and conclusive," which they can only be, if the cause is not in any Court liable to be re-heard.

But even if the expressions used were equivocal, this would not be decisive of the question. The statute bestows a new jurisdiction; and in all such cases, it is to be considered whether the matter to which it relates is one in which the ordinary courts already enjoyed a jurisdiction, or, on the contrary, is created by the statute itself. In the one case, the presumption lies *in dubio* for the power of review, and in the other it lies against it. The statute then does not derogate from the jurisdiction of the ordinary courts, and there is no reason why a new branch of jurisdiction should be given to these courts by implication. The argument will be the stronger, if the statute relate solely to a matter of police, or to such a thing as is of more suitable discussion for a jury of neighbours than for a court of law; Hist. Law Tracts, vol. i. p. 422.; Erskine, b. 1. tit. 2. § 7. which is precisely true of a turnpike act.

In England, the courts at Westminster never review the proceedings of particular jurisdictions introduced by statute, unless where it is alleged that the Judge has exceeded his powers; Raymond, Report 580.; Viner, *Certiorari*, p. 334. 336.

The Court of Session has adopted the same principle, in questions both on the turnpike and comprehending acts; 1st Feb. 1757, Trustees for Queensferry, &c. against Magistrates of Perth, *voce* Public Police; 18th Jan. 1764, Russel and Others against Trustees, &c., No. 85. p. 7353.; 9th August 1778, Foote and Marshall against Stewart, No 100. p. 7385.; 25th July 1744, Robertson, No 73. p. 7340.; 27th July 1781, Earl of Galloway against Hawthorn; 1777, Andrew against Dalrymple.* In the cases of Patullo, &c. the Commissioners had exceeded their powers.

2*do*, Every turnpike-act considers all the public roads in a county to be either turnpike-roads or by-roads. With private roads, such as the avenues to gentlemen's houses, it has no connection. The road suppressed, therefore, being a by-road, the trustees, who were not parties in the former action, are the only competent judges of its utility.

Replied, In some respects a turnpike-act does introduce new objects of jurisdiction, such as the direction of the roads, or the situation of the toll-bar; and in these points there may be more room for argument against the power of review. But this Court has a radical jurisdiction with respect to roads, wherever private right is concerned. It is acknowledged the trustees cannot shut up a private road, it would therefore be singular, if they could shut up one, which a final decree of this Court has declared to be beneficial to the public.

The Court were of opinion, that the judgments of the quarter sessions were not liable to review in such points, as fixing the line of road, or the position

* The two last not reported.

of the toll-bars, which were discretionary in their nature, and in the exercise of the powers exclusively committed to the trustees. But it was on the other hand agreed, that a right to review, in case of the smallest excess of power, was essential, and was not excluded by the words of the act. It could not be supposed, (it was observed,) that the trustees or Justices were meant to be themselves the sole and exclusive judges of the extent of their own powers, or that such a jurisdiction, which might even be held to be in some measure unconstitutional, was intended to be given. In this way, the question of competency came to be blended with the question of merits; and with respect to this last, the Court were clear, that the trustees had done wrong, in shutting up a road as a by-road, which had, by a judgment of the supreme Court, been found a public and useful road to the country; and that as in doing so, they had exceeded their powers, their judgment was liable to review. No 109.

The very same rule (it was said) would apply to questions which might arise out of the comprehending acts; as if the Justices should comprehend a physician, a lawyer, or a judge. The case of Marshall was indeed decided on other notions, but was immediately set aside by the judgment in the later one of Cooper, &c. where the point was fully considered.

The Court unanimously "advocated the cause, found that the road in question cannot be legally shut up, found the respondents (trustees) liable to the petitioners (complainers) in the full expense of extract, and that they are not at liberty to charge the expenses incurred by them in this process, to the public funds of the county."

Lord Ordinary, *Justice-Clerk.* For the Complainers, *Lord Advocate, Geo. Fergusson.*
Alt. *Dean of Faculty, Tait.* Clerk, *Sinclair.*

D. D. *Fol. Dic. v. 3. p. 344. Fac. Coll. No. 55. p. 115.*

1794. *June* 17.

ANDREW SKENE of Dyce *against* JOHN ROSS, Tacksman of Bell and Petty Customs of Aberdeen.

No 110.
The Court judge of the powers of magistrates of burghs, relative to their administration.

SEVERAL points occurred in this case, relative to the powers of magistrates to exact petty customs of a burgh.

By a table of dues made in 1707, it was provided, that victual and grain coming into market, should pay the ordinary dues for custom and toll. It was found by the Court, that this included sids and bran. By the table, a sum was to be levied for the *cart*-load of fruit. In virtue of this article, the tacksman levied a larger sum for a cart-load. It was found, that this exceeded the powers given.

The magistrates of a Royal Burgh have a right to levy petty customs; and the practice of doing so is universal. When a new article of food is intro-