

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.

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.

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-

No 109.

No 110.

The Court judge of the powers of magistrates of burghs, relative to their administration.

No 110. duced, a new duty equivalent to the duty on other articles is imposed. So in Glasgow, it was found legal to impose a duty on potatoes, then lately introduced. But when an alteration of a tax-table becomes necessary, this must be done by the magistrates themselves, and not by their tacksman. This was the opinion of the Court in this case.

Session Papers in Signet Hall.

S E C T. II.

Causes in which the Court cannot judge in the first Instance.

1630. July 23. L. PITSLIGO *against* DAVIDSON.

No 111.

A reduction of a service being raised on the head of bastardy, the Lords sustained themselves as judges, because it is only where a service is stopped by an allegiance of bastardy that it is remitted to the Commissaries.

THE deceased Forbes of Pitsligo, who was elder brother to this L. Pitsligo's goodsire's brother, and to whom the said pursuer's goodsire's brother succeeded in the lands and living of Pitsligo, had only two daughters, whereof the one being first married to Duguid of Achinhove, and from whom she being alleged to have been divorced, thereafter she is married upon umquhile Mr Thomas Davidson, minister, in which marriage there are two sons procreated, Alexander and Mr Thomas Davidsons. After the decease of the parents, Alexander is served and retoured heir to the said umquhile ——— Forbes of Pitsligo, his mother's father, one of the two heirs, whereupon he intents action of reduction and improbation of this L. Pitsligo, and his father, and goodsire's rights of the lands. This L. Pitsligo thereupon intents reduction of this retour and service of Alexander, upon that reason, because the said Alexander was a bastard, in so far as he was begotten upon his said mother, who then had a husband, viz. Achinhove living, with whom she was standing lawfully married, as the reason bears. This action upon the reason of bastardy was sustained, being pursued before the Court of Session, and they were found competent judges thereto, and that there was no necessity, as the defender alleged, that it should be remitted to be cognosed before the commissaries; but it was sustained, albeit there were also six months expired after the deducing of that service before it was quarrelled by this reduction; for that is only competent the time of the deduction of the service to the party, to oppone bastardy, to stay the service, and then the service and the trial of bastardy is remitted *ad judicium Christianitatis*, which is the commissariot, and which is appointed to be terminated within six months, and the opponent finds caution to satisfy the parties' charges, if he prevail not before the Commissaries; and upon occasion also,