

them, it is all that can reasonably be required. The regulation may be extremely proper when confined to the market of the Burgh; but the Bailie has no power to enact any regulation to be binding over the whole country, and to apply to persons over whom he has no jurisdiction. *Edly*, Even if the complaint were just, the tallow-searchers are not the persons who have a right to make it.

No. 10.

The Court, upon considering the petition with answers, (8th February 1804) altered the interlocutor of the Lord Ordinary, and remitted to his Lordship to refuse the bill, and to find expenses due.

A reclaiming petition against this interlocutor was refused without answers.

Some of the Judges thought, that the regulation of the Baron-Bailie was strictly local, and could not be extended over the trade in general. But the majority of the Court held, that this regulation, which seemed proper in itself, would be totally nugatory, if the commodity sold by the butchers within the Burgh to strangers were not be comprehended under it.

Lord Ordinary, *Cullen*.

For Advocators, *Baird*.

Agent, *Geo. Clapherton*, W. S.

Alt. *Corbet*.

Agent, *Alex. Ferris*.

Clerk, *Menzies*.

J.

*Fas. Coll. No. 154. p. 345.*

\* \* On the same same day, in the case of *Still, &c.* against the Magistrates of Aberdeen, the Court found the same duty exigible upon rough tallow as upon refined.

1804. *June 29.* Sir BENJAMIN DUNBAR and Others, Petitioners.

THE presbytery of Caithness having assessed the heritors in the sum of £1250. 15s. 11d. for rebuilding the church of Wick, the Reverend William Sutherland, the minister of the parish, became the undertaker of the building. For this purpose, he granted to the presbytery (7th May 1796) a bond along with cautioners, under a penalty of £250, for executing the work properly.

The price was payable by instalments, and accordingly was regularly paid by the heritors.

By the terms of the bond, the church was to be finished in the month of January 1798, according to a particular plan. When Mr. Sutherland applied to the presbytery (18th June 1799) to have the church inspected, the heritors contended, that besides not having finished the work in the time to which he had been restricted, he had not acquitted himself of the obligation, either in his observance of the plan, or in the execution of the work. This the heritors offered to verify, by the testimony of the tradesmen who had been employed.

No. 11.

In building a church, the heritors have the right of superintending the operation; and when the presbytery act, they are held to act entirely for the heritors.

No. 11. The presbytery, however, declined to admit their testimony, but ordered an inspection by tradesmen selected by Mr. Sutherland, reserving to the heritors the power of objecting to their report.

After various proceedings, the presbytery discharged Mr. Sutherland (12th July 1799), and found the building sufficient, upon his performing some insignificant additional work, till which the bond was not to be delivered up.

In the mean time, Sir. Benjamin Dunbar, and the other heritors of the parish, brought an action against Mr. Sutherland and his cautioners, concluding, that they should be ordained to fulfil the contract they had undertaken, and deliver over the church finished, in a substantial manner, in terms of the plan, or to pay a certain sum in name of damages.

Against this action, Mr. Sutherland pleaded, That in the business of erecting the church, he was accountable only to the presbytery of Caithness: That at the hands of the presbytery he had already been in a great measure exonerated of his engagements, and would be so completely, when the few repairs pointed out by them were finished.

The Lord Ordinary pronounced this interlocutor, (18th January 1804):  
 “ In respect that the defender Mr. Sutherland was appointed by the presbytery  
 “ of Wick to be undertaker for building the church in question, and that it  
 “ was to the presbytery he and his cautioners granted bond for the due execu-  
 “ tion of the work; in respect farther, that by the said bond granted by him  
 “ and his cautioners, it was expressly provided, that execution should pass at  
 “ the instance of the presbytery and their moderator, and that it is not the  
 “ heritors, but the presbytery, who can effectually discharge the said bond, and  
 “ exoner the defenders of their obligation; and, lastly, in respect that the  
 “ heritors, from time to time, while the work was going on, paid their several  
 “ instalments for the expense of the building, without making any objections  
 “ thereto as improperly or insufficiently executed; dismisses the present action,  
 “ sustains the defences, assoilzies the defenders from the conclusions of the  
 “ pursuers’ libel, and decerns; finds expenses due, and allows an account there-  
 “ of to be given in.”

The heritors reclaimed, and

Pleaded: In all cases where a burden is to be imposed upon the heritors of a parish for the execution of those works which are connected with the Ecclesiastical Establishment, the interference of the presbytery becomes necessary to legalize the assessment upon the heritors, and to make it exigible from those who have not given their consent to it. Thus far the presbytery is the guardian of the public interests, and their guardianship is exerted as well in the assessment as in seeing that the purpose for which it is made has been fulfilled. But if they should at any time neglect this, the Supreme Court has the power of controul, at the instance of the heritors who have the chief interest in it, as upon them the whole burden is imposed. When the contract is entered into with the presbytery, and the bond executed in their favour, they there are act-

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.

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 lieutenancy 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 Lieutenancy 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. 11.

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.