years while he continues to discharge the duties of his office, and remit to the Lord Ordinary to proceed as may be just. DUN. M'NEILL, *I.P.D.*

Agents for *Curator Bonis*—Leburn, Henderson, & Wilson, S.S.C.

OUTER HOUSE.

(Before Lord Barcaple.)

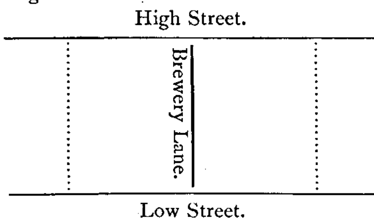
HEMPSEED AND OTHERS *v.* COLVILLE.

Public Road—Casting about—Statute 1661, *c.* 41.

Where two streets of a village ran parallel to each other, and a heritor proposed to shut up a portion in the middle of the lower, and connect either extremity with the upper, by means of two new roads at right angles to the lower street — Held (per Lord Barcaple and acquiesced in) that the proposed alterations were not such as were contemplated by the Act 1661, c. 41, and warrant of the Justices authorising the alterations reduced as incompetently pronounced.

This was an action of reduction at the instance of certain feuars in the village of Torryburn, of a warrant obtained by the defender from the Justices of the Peace for the county of Fife, under the statute 1661, c. 41, empowering "heritors, at the sight of the Justices, to cast about the highways to their convenience."

The village of Torryburn is situated near the seashore, on the highway between Dunfermline and Culross. At the east end of the village, the public road diverges into two branches, both of which run parallel to each other through the village, and meet again at its western extremity. The upper is called the High Street, and the lower the Low Street. They are also connected by a cross lane, called the Brewery Lane, or Brewery Wynd. The defender's house of Craigflower is situated at the south side of the village. He had recently purchased several feus in the village, and the operations he proposed will be seen from the following sketch:—



The defender proposed to open two new streets, represented by the dotted lines, and to inclose within his own grounds the intervening space south of High Street, thereby shutting up the Brewery Lane, and the portion of Low Street between the two dotted lines.

The Justices, after hearing parties, authorised the alterations to be made, and thereupon this action was raised, the pursuers maintaining that, being a feuar, the defender was not a heritor in the sense of the Act; that the roads being streets of a village, were not such as were contemplated by the statute; and that the operation contemplated was not a proper casting about.

The Lord Ordinary (Barcaple) pronounced the following interlocutor, which was acquiesced in:—

Edinburgh, 20*th March* 1866.—The Lord Ordinary, having heard counsel for the parties, and considered the closed record, productions, and whole process, Finds that the alterations on the roads in question complained of by the pursuers were not of such a kind as the Justices of Peace could competently authorise to be made, under the Act 1661, c. 41, and that said roads were incompetently shut up; repels the defences, reduces, decerns, and declares, in terms of the reductive conclusions of the libel: Finds it unnecessary to dispose of the declaratory conclusions, and decerns, interdicts, and prohibits in terms of the other conclusions: Finds the defender liable in expenses; allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report. E. F. MAITLAND.

Note.—It appears to the Lord Ordinary that the alterations in question are not of such a kind as is contemplated by the Act 1661, when it empowers heritors, at the sight of the Justices, "to cast about the highways to their convenience." The ground of this objection will best appear from the plan of process.

The roads which have been shut up were not portions of one distinct line, or of two distinct lines of highway. They were streets or public accesses in or immediately adjoining to the village of Torryburn, affording the means of passing from one part of the village to another, and also constituting two separate entrances to the village from the east, one by Brewery Wynd, and the other by Low Street. They converged at a point which they approached from three opposite quarters, High Street, west end of Low Street, and the road on the south of the church. From their relative position they constituted three several routes by which persons might pass through or from or to the village, from High Street to west end of Low Street, from west end of Low Street to the road on south of the church, and from that road to High Street. The defender has substituted for these various accesses two new roads made by him, and the use of a portion of the existing High Street, considerably longer than either of them.

The Lord Ordinary greatly doubts if roads of this kind, in or connected with a village, are within the provision of the statute. But apart from that, he is of opinion that it is incompetent for an heritor to substitute one new line of road in exchange for several accesses previously existing, and that the incompetency is not cured by showing that the new line may serve the purpose of all the routes which have been closed. In one sense the defender has closed only two roads, or rather one road diverging into two branches, and he has made two new roads. But neither of these new roads is by itself a casting about, as they do not either of them return to the highway which has been made the subject of the proceedings under the statute. In order to make out a case of casting about at all, it is necessary to connect both roads and the part of the High Street which lies between them into one line. The Lord Ordinary thinks that this is not casting about a highway in the sense of the statute, but that it is simply offering a new line of road in exchange for several accesses in different directions, the relative position of which did not admit of the defender, with any benefit to himself, casting them severally about.

The Lord Ordinary thinks it is a good separate objection to the competency of the proceeding, that the new line is composed in part of the High Street, a previously existing public highway. To the extent to which this is done, the public and the inhabitants of the village have only one road where they had two before. The Lord Ordinary

thinks that this is a result altogether at variance with the meaning of the statute.

The pursuers stated other objections, especially that the defender is only a feuar, holding small feus on the line of the roads in question, and that the *solum* of the roads belongs not to him but to the superior. The Lord Ordinary has not thought it necessary to go into these questions. E. F. M.

Counsel for Pursuers—Fraser and Guthrie Smith. Agent—David Crawford, S.S.C.

Counsel for Defender — Clark and Balfour. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

COURT OF JUSTICIARY.

Monday, June 4.

HIGH COURT.

(Before Full Bench.)

QUARNS *v.* HART AND GEMMEL.

Jurisdiction—Power to review law laid down by a Sheriff to a Jury in a Criminal Trial. Held that the Court of Justiciary has no power to entertain a suspension on the ground that a Sheriff at a criminal trial had laid down bad law to the Jury, and refused to note an exception taken thereto.

Proof—Previous Conviction—Reset. Opinions that in a case of reset a previous conviction of the same crime may be evidence to be laid before the Jury of the panel's guilty knowledge.

The suspender, Thomas Quarns, was on 8th May 1866 tried before Sheriff-Substitute Strathern and a jury at Glasgow on a libel raised at the instance of the respondents, Procurators-Fiscal of the Lower Ward of Lanarkshire, charging him with the crime of reset of theft, aggravated by previous conviction. One previous conviction, dated 27th August 1860, was libelled on. The jury, by a majority of twelve to three, found him guilty as libelled, and he was sentenced to nine months' imprisonment.

Quarns thereupon presented a note of suspension, in which he averred, *inter alia*, in regard to what took place at the trial—

"That the evidence for the prosecution and defence having been concluded, the prosecutors made no address to the jury, and William Brechin Faulds, writer in Glasgow, addressed the jury on behalf of the complainer. In the course of his address he referred to the previous conviction libelled against the prisoner, and stated to the jury that that previous conviction was in no way to enter their minds in judging of the crime libelled, and that they were to test the evidence and judge of the innocence or guilt of the prisoner of the crime of reset libelled as if no such previous conviction had existed.

"That the presiding Judge thereafter proceeded to charge the jury, and in the course of his charge he read from the Commentaries of Hume (vol. i., p. 114) the following passage :—'And of all these it is a powerful confirmation if the panel or his author is a reputed thief or resetter,' as being applicable to the charge then before them, and commented thereon. The said presiding Judge then charged the jury, and told them that the previous conviction for the same crime against the complainer was a strong circumstance against him, and was legal evidence to be taken into consideration by them as proof not only of a former conviction, but as evidence tending to show the guilt of the complainer of the special crime charged in the libel before the jury, and as proof of the complainer's guilty knowledge of the article having been stolen; and he further charged the jury that the complainer's character, as proved by the former conviction, was also a strong circumstance to be taken into consideration against him in judging of his guilty knowledge.

"That at the conclusion of the Judge's charge, James Caldwell, writer, Glasgow, the other agent for the complainer, took exception to the foresaid charge on the part of the Judge, and asked his Lordship to direct the jury to give no weight to the previous conviction against the complainer of reset of theft, or the previous character of the complainer in judging of the guilty knowledge libelled, or of the complainer's guilt under said criminal libel; and, farther, he took exception that the passage quoted by his Lordship from Hume, and above referred to, was not the present law of Scotland. That his Lordship refused to give such directions, and of new stated to the jury that a previous conviction for reset was good evidence in judging of the prisoner's guilt of a new charge of reset, and that the jury must take that law from him as conclusive, and he refused to hear any argument or further explanation, stating that the taking of such exceptions and asking such directions were competent in a civil trial by jury, but were irregular and incompetent in a criminal trial after the Judge's charge, and that he would not permit anything further to be said. The presiding Judge was then asked to note the exceptions and directions above stated, but he refused to do so."

The complainer also averred that, but for the foresaid misdirection of the presiding Judge a different verdict would have been returned by the jury.

The case was before the Court on 21st May, when the presiding Judges (Lord Justice-General, Lord Neaves, and Lord Jerviswoode) having expressed doubts as to the competency of instituting an inquiry into the averments of the complainer, the case was continued until to-day, that it might be argued before a full bench.

JOHN M'LAREN, for the complainer (A. R. CLARK with him), argued :—(1) On the question of jurisdiction—This is a conviction of a common law charge, and the Court is entitled to review it on its merits. The jury's verdict can be reviewed if it proceeds upon evidence which is not lawful (2 Hume 514). In this case the Sheriff admitted evidence as evidence of the charge which was only evidence of the aggravation. The complainer has done all in his power to preserve his right to obtain review by asking the Sheriff to note his objection. The Sheriff ought to have noted it, and he is required to do so by article 15 of the Act of Adjournal of March 17, 1827 (Alison's Practice, p. 42). The complainer is not to be deprived of his right to review because the Sheriff failed in his duty. The Act of 9 Geo. IV., c. 29, left the practice in regard to jury trials to be regulated by the Act of 1827, which has never been repealed. There was no objection taken to the proof of the previous conviction when led, because as evidence of the aggravation it was quite competent, and the complainer was not aware till the Sheriff charged the jury that it was to be used for any other purpose.

(LORD ARDMILLAN—If the Sheriff had laid down the law otherwise, and the panel had been acquitted, could the Fiscals have suspended?)

You cannot suspend a sentence of absolvitor; but besides, the panel would have tholed an assize and could not be again tried.