

the defender forty barrels of flour and four casks of butter, of the value in all of £69 or thereby, or any part thereof, and that in security or satisfaction of a prior debt, contrary to the Act 1696, cap. 5?

“2. Whether, on or about the said 26th December 1864, the said A. & W. Gray delivered to the defender the said forty barrels of flour and four casks of butter, or any part thereof, fraudulently to disappoint the legal rights of the creditors of the said A. & W. Gray?”

The Lord Ordinary (Mure) reported these issues with the following

“*Note.*—In this case the defender when objecting to the terms of the issues, maintained that there was no issuable matter on record. The Lord Ordinary is, however, disposed to think that although the averments as to the defender being a creditor of the bankrupt at the date when the transactions under reduction occurred are not very specifically stated, there is sufficient set forth on the record to entitle the pursuer to an issue, both under the statute and at common law. But it appeared to him that the second issue would require alteration, so as to put in issue the fraudulent reception of the goods by the defender when in the knowledge of the bankrupt's insolvency, a point to be established under the issue at common law, as distinguished from that under the Statute 1696.”

At advising—

The LORD PRESIDENT—This record is somewhat vaguely expressed. At the same time I am not prepared to say that there is not in it sufficient for an issue. The question is whether there is an allegation of prior debt. There is an allegation in condescence 6 that “the defender took delivery with the view of securing a preference for a prior debt,” whatever it might be; and it is also said in cond. 9 that “there were numerous bill transactions between the bankrupts and the defender for the accommodation sometimes of the bankrupts and sometimes of the defender, and the bill founded on by the defender was one of these accommodation bills.” How that may turn out I don't know, but I think there are materials for going to trial. I think, however, that the common law issue should be placed first, and that on the statute second.

The other Judges concurred; and with this variation the issues proposed were approved of, and the defender was found liable in expenses since the date of closing the record.

Counsel for Pursuer—Clark and Gifford. Agents—Patrick, M' Ewen, & Carment, W.S.

Counsel for Defender—Solicitor-General and Pattison. Agent—John Robertson, S.S.C.

#### WATT'S CURATORY.

*Curator bonis*—Remuneration. A *curator bonis* who was nearest agnate to his ward allowed, in special circumstances, remuneration for his services.

In this curatory an objection was raised by the Accountant of Court to the accounts of a *curator bonis*, in regard to which he made a report to the Lord Ordinary, which his Lordship reported to the Court, adding to his interlocutor the following

*Note.*—As the point which has been brought under consideration by the Accountant—namely, whether, seeing that the *curator bonis* stands in the relation of that of nearest agnate to his ward, he is entitled to the usual allowances of commission—materially affects the interests of the curator in the present case, and involves a question of some general importance, and the estate is one of

very large amount, the Lord Ordinary has thought it right to report the case for decision.

The circumstances under which the point is raised are brought out in the report of the Accountant; and the questions for consideration are—1st, Whether, seeing that the appointment was made without any restriction or qualification, to the effect that the curator should act gratuitously, such as that inserted in the interlocutors in the cases of Jackson, 11th December 1821, and Robertson, 3d February 1830, and that an annual allowance had been hitherto made to the curator without objection, it would be proper now to disallow the payments so made; and, 2d, Whether, assuming that it would not be proper, *ex post facto*, to apply the condition as to acting gratuitously, the present position of matters is such as to render it necessary to impose that condition for the future.

With reference to the first of these questions, the curator relied on the decision in the case of Macdonald, 8th July 1854, in which the Court refused to apply the above rule, where it appeared, as it did here, *ex facie* of the petition at the date of the appointment, that the party proposed was the nearest agnate; and the curators had been allowed to enter upon the duties of the office without qualification or restriction as to remuneration; and to that extent the decision in the case of Macdonald seems to bear out the curator's view.

Upon the second question, the Lord Ordinary has not been able to find any express authority beyond the general rule that the office of tutor-at-law and curator is held to be gratuitous. But as against the view that this rule ought to be laid down for the future, in the present case it was strongly contended on the part of the curator that it was not imperative so to apply it, because the incapacity was not of that complete and permanent character which would necessarily warrant a cognition, and entitle the nearest agnate to demand the office of curator; and it would, moreover, not only be inexpedient, as regards the economical management of the estate, that the present curator should be changed, but also unjust, as matters now stand, to the curator himself, as depriving him of an occupation for which he had been all along trained, but the onerous duties of which he could not, without remuneration, be expected to undertake; and it is for the Court to judge whether, in these special circumstances, the appointment should be continued upon the footing on which it has hitherto been understood to have been made. (Initd.) D. M.

CLARK (with him SHAND) was heard for the *curator bonis*.

The LORD PRESIDENT—Are you willing, if we authorise this payment in the circumstances, that our doing so shall not be held to prejudice any objection which may be afterwards raised?

CLARK—We are.

H. J. MONCREIFF was heard for the Accountant of Court.

The Court then pronounced the following interlocutor:—

*Edinburgh, 2d June 1866.*—The Lords, on report of Lord Mure (Ordinary), having considered the report of the Accountant of Court, No. 13 of process, and heard the counsel for the *curator bonis*, and the counsel for the Accountant of Court, and having regard to the nature and extent of the duties performed by the curator, and to the special circumstances of this case, Find that the curator is entitled to credit for the allowances stated for the years from 1852-53 to 1863-64, inclusive, and to take credit for a reasonable allowance in future

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.)

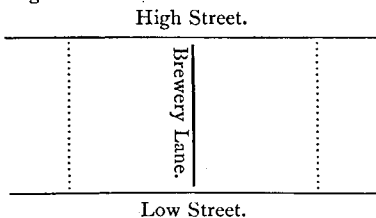
### HEMPSEED AND OTHERS *v.* COLVILLE.

*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, 20th 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