

imprisonment for three months. But as there is no such form known in the law of England as levying *nomina* (which are not comprehended under goods and chattles) by arrestment and furthcoming, the Justices have no such power by the laws of Excise; and whatever might be said for the *bona fides* of the officer to entitle him to the whole expenses, were it true that such illegal form of proceeding had crept into the practice of Scotland, as is averred; yet it is not true, that the Justices of the Peace in the shire of Edinburgh have been in use to sustain furthcomings on arrestments laid on their Excise decrees, though the clerks may have been in use in their extracts to subjoin warrants of arrestment *in communi forma*, misled by the usual form in other cases, but which is only the operation of the clerk, and not of the Judge.

THE LORDS, upon the 26th of June 1747, 'Found the pursuer entitled to the expenses of the original prosecution before the Justices of the Peace, so far as the same were really laid out by him; refused him the expenses of the arrestment and process of furthcoming, and of the suspension before the decree was turned into a libel; but found him entitled to the expense of the suspension after the decree was turned into a libel, and before the indemnity was properly pleaded; and remitted to the Ordinary to proceed accordingly;' and on the 30th July thereafter 'Adhered.'

THE LORDS were, upon the above reasoning, of opinion, that the Justices had no power to grant warrant for arrestment on Excise decrees, and that the arrestment and furthcoming were inept proceedings.

Fol. Dic. v. 3. p. 359. Kilkerran, (JURISDICTION, &c.) No 4. p. 310.

1749. June 14. THOMAS TURNER *against* The DUKE of ROXBURGH.

THOMAS TURNER's lands of Pinaclehill lay upon the river Tweed, and were intersected by a road to a boat upon it. Another road struck off from this, before entering these lands, and led through the lands of Easterwoden to a ford lower; from which, amongst the banks of the river, run a road to the boat.

Thomas Turner obtained a sentence of the Justices of the Peace, granting warrant to him to stop the road through his grounds, and ordaining that through Easterwoden to be the high-road in time coming.

In a suspension at the instance of the Duke of Roxburgh, Park of Easterwoden and other Heritors, the LORD ORDINARY 'having considered that the road leading to the boat through Pinaclehill was a high-way, found that the Justices of the Peace had no power to suppress it; and that the confining the high-way to that which past through Easterwoden to the ford, did not fall under the powers given to the Judge Ordinary by the act 41st Parliament 1661.'

Where there are two roads to the same place, the Justices of Peace have no power to close up one of them which runs through an heritor's ground, where the other is not equally straight or near.

No 322.

Pleaded in a reclaiming bill, It cannot be properly said a road is suppressed, since there is left one which leads to the boat, without turning about from the former more than 200 yards; and suppose several roads cutting the same field, it were unreasonable to contend these could not be turned into one; here no body is hurt, by throwing the turned about road into a high way.

Answered, The person who throws about a road, must give a new one on his own ground, and cannot suppress one; else the heritor, whose ground the road that is left goes through, might cast it about again, and so the people be obliged to go farther about than the law allows.

THE LORDS, 14th February 1749, adhered; and on another bill and answers, again adhered.

Act. Ferguson & A. Pringle. - Alt. C. Binning & R. Dundas. Clerk, Murray.
Fol. Dic. v. 3. p. 356. D. Falconer, v. 2. No 67. p. 73.

* * * Kilkerran reports this case :

THE road from the south to the river Tweed, about a mile's distance from the river, divides into two branches; one leading through the lands of Westerwooden, belonging to Turner of Pinnaclehill, to the boat; the other through the lands of Easterwooden to the ford; and by that same ford there is also access to the boat along the river side from the ford, when Wodenburn is passible.

Upon the representation of Thomas Turner of Pinnaclehill, that he intended to inclose his lands of Westerwoden, which could not be done with convenience or regularity, so long as the road to the boat remained through his ground, that the other road was sufficient to answer both boat and ford, and that he had the consent of the heritor of Easterwoden, to have that through his land declared to be the only road; the Justices, upon a report of a committee of their number, that the road through Easterwooden to the ford was the better road of the two, even to the boat, provided there was a bridge laid over Wodenburn; and after having caused measure the two roads from the point at which they divide, and found that the road to the ford, and thence to the boat, was not above 200 yards longer to the boat than the other; and after hearing the objections made by certain of the neighbourhood, 'Granted warrant to Mr Turner to stop the road leading through his grounds, and ordered the road leading through Easterwoden to be the high-road in all time coming, he being always obliged to make a bridge over Wodenburn at the sight of the Justices of the Peace.'

At discussing the suspension obtained by the Duke of Roxburgh, Robert Park of Easterwoden, James Murray of Cherrytrees, and others, of this act of the Justices of the Peace, the LORD ORDINARY having advised the debate, and considered that the road leading through Westerwoden and Pinnaclehill to the boat is an high-way, 'Found that the Justices of the Peace have no

‘ power to suppress it, and that the confining the high-way to that which passes through Easterwoden to the ford, does not fall under the powers given to the Judge Ordinary by the act 41st Parliament 1661 ; and therefore suspended the act of the Justices of Peace.’

And the LORDS ‘Adhered.’

It was thought immaterial to make a strict inquiry, whether one of the roads might not answer the purposes of both ; neither was it thought a proper consideration, whether it might not be expedient that the Justices of the Peace should have power, if they should see cause, to make one high-way serve in place of two ; because, if they had no such powers, as the law now stands, the Legislature only could enlarge them. That they could suppress bye-roads, which travellers are apt to take, was admitted, as by that nothing is taken from them, but what they had no right to have. It also was admitted, that where any part of a road cannot be repaired or made of the breadth the law requires, the Justices of the Peace may throw it upon the next adjacent ground, and estimate the damage of parties, for so much they are empowered to do by the act 1669, c. 16. But where the lieges have two public high-ways, which both the roads were in this case, as the one led to the boat, and the other to the ford, there is no power given by any statute to the Justices to take one of them from them, nor can they alter any of them, farther than such power is specially given them by the statute 1661, which only gives liberty to every proprietor for his own convenience at the sight of the Justices of the Peace, or other Judge Ordinary, to cast about the high-way upon his own ground, not exceeding 200 yards ; but as that was not the present case, it was not thought material, what the difference was of the lengths of the two roads, nor was even the consent of the heritor of Easterwoden thought sufficient to alter the case (which at the same time he now recalled) as the objection to the power of the Justices lies to all and sundry.

Kilkerran, (HIGH-WAYS.) No 1. p. 252.

1749. July 13.

HAIRGRIEVE and JANET DONALDSON *against* The MINISTERS and KIRK-SESSIONS of Linton and Eckford.

THE Ministers and Session-clerks of the said two parishes, having refused to proclaim the banns of the said persons in their respective parishes, for this cause, that they would not comply with the established custom to consign a dollar, which is to be restored in the event it appear that they have not become impatient before marriage, were by them pursued before the Justices of the Peace of Roxburghshire for said refusal ; who, notwithstanding a declinator of their jurisdiction, proceeded to give sentence, “ Ordaining the respective Session-clerks to make proclamation of the pursuers banns on Sunday then next ;