any possible personal collision. The question is not whether, in so doing, he acted rightly or wisely. *It is not whether his apprehension of violence was well founded or not.* The question is, exclusively, whether he acted maliciously and without probable cause. The Lord Ordinary thinks the evidence does not warrant him in branding the conduct of the respondent with such a mark. He is aware that the unavoidable alternative is to leave the suspender under the warrant to find caution to the extent of £50 to keep the peace towards the respondent. But this result does not follow from any judgment by the Lord Ordinary that it is proper that such caution should be exacted. It arises from the act of the law giving this effect to the oath of the respondent, if not proved to have been malicious and without probable cause. The law may be fit to be altered, but it must be given effect to so long as it subsists."

A reclaiming note was presented by the suspender, but an arrangement was subsequently come to whereby the case was taken out of Court, the decree and charge being suspended, the suspender paying £120 of expenses.

WATSON and BALFOUR for complainer.

YOUNG and JOHNSTONE for respondent.

Agents for Complainer — Jardine, Stodart, & Frasers, W.S.

Agents for Respondent—Ronald & Ritchie, S.S.C.

Wednesday, June 3.

FIRST DIVISION.

HOME-DRUMMOND, PETITIONER.

(*Ante*, vol. iv, pp. 14, 32.)

Summary Petition—Defining Public Right of Way—Public Road—Competency—Extracted Process. A petition presented in the Inner-House, to have a road—found by a verdict of a jury to be a public right of way—defined, *dismissed* as incompetent, in respect of the action of declarator in which the right of way had been established being an extracted process.

Certain parties brought an action against the petitioner, concluding for declarator of public right of way through the defender's lands along a certain line of road, and a public right of way for foot passengers in other two specified directions. The case was sent to a jury, who, on 21st December 1866, returned a verdict; and thereafter, on 24th May 1867, the Court pronounced an interlocutor in which they applied the verdict, and, in respect thereof, decerned in terms of the first and third heads of the declaratory conclusion; assoilzied the defender from the second head of the conclusion; *quoad ultra* dismissed the action with expenses; and remitted to the auditor, &c.

Home-Drummond now presented a petition to the First Division of the Court, craving them, after due intimation, to remit to a person of skill to lay out and define the ground now found by the interlocutor of Court to be public right of way.

DUNCAN, for petitioner, cited *White* v. *Lord Morton's Trs.*, 4 Macph. 53 (H. of L.)

At advising—

LORD PRESIDENT—I think this petition is incompetent. What is proposed to be done by this petition, which is a new process in this Court, is to carry out details which it may be assumed might have been done in the declarator, and this is proposed after the declarator has become an extracted process. I am not only unaware of such a thing having been proposed with reference to a case like this, but I am not aware of such a proposal with regard to any extracted process. It appears to me that the petition is utterly incompetent.

LORD CURRIEHILL concurred.

LORD DEAS—If this petition had been presented while the process was still depending, to have this line of road defined in conformity with the verdict, or in a way suitable to the parties entitled to use it, and least burdensome to the proprietor, I should have been slow to say that that was incompetent. But I am not aware that such a petition was ever presented when there was no depending process. Summary petitions are competent before the Sheriff. This petition may or may not be competent before the Sheriff; on that I give no opinion.

LORD ARDMILLAN concurred.

Agents for Petitioner — Jardine, Stodart, & Frasers, W.S.

HOUSE OF LORDS.

Thursday, May 14.

BELL *v.* KENNEDY AND OTHERS.

(1 Macph., 1127, and *ante*, vol. i, 105.)

Domicile—Goods in Communion—Husband and Wife. Circumstances in which *held* that a party was domiciled in Jamaica at the time of his wife's death in 1838; and a claim by his daughter for a share of the goods in communion between her father and mother at the death of the latter, founded on the Scotch law of succession existing at that date, *repelled.*

Mrs Mary Anne Bell or Kennedy brought an action against the appellant, her father, claiming a share of the goods in communion between her father and her mother at the death of the latter in 1838. The first plea stated by Mr Bell in defence was that Mrs Kennedy's claim did not apply, because at the date of his marriage, and at the date of his wife's death in 1838, his domicile was not in Scotland. Mr Bell also stated a plea, to the effect that Mrs Kennedy had discharged her claims by the terms of her marriage-contract, besides other pleas directed against the amount of the claim. A proof was allowed, in the course of which Mr Bell himself was examined as a witness; after which the Lord Ordinary (KINLOCH), on 12th November 1862, found that Mr Bell, at the date of his marriage was domiciled in Jamaica, and at the date of his wife's death was domiciled in Scotland, and that Mrs Kennedy had not, by her marriage-contract, discharged any claim that might be competent to her for a share in the goods in communion between her father and mother in 1838. On 17th July 1863 the Inner-House adhered. Mr Bell presented a petition for leave to appeal, which petition the Court refused. On 10th December 1863 the Lord Ordinary held that the question between the parties was to be determined by the law of Scotland at the date of the death of Mr Bell's wife in 1838, and appointed Mr Bell to lodge a state of the goods in communion. On 2d February 1864 the Court adhered. Various other interlocutors were pronounced in the action, chiefly on matters of accounting, the last being pronounced on 17th July 1866.

Mr Bell now presented this appeal against the interlocutor of 12th November 1862, and fifteen subsequent interlocutors.

Sir ROUNDELL PALMER, Q.C., and COTTON, Q.C., for appellant.

At advising—

The LORD CHANCELLOR said that he was sorry to observe that the date of the summons in this case was so far back as 1858, and that no less then sixteen interlocutors would be overturned if the house were to reverse the judgment of the Court of Session. A claim was made in the present case by a daughter of Mr Bell of Enterkin for a share of the goods in communion of her parents at the death of her mother. Whether she was entitled to this depended on the domicile of the mother at the date of her death, which took place in 1838, and this, again, depended on the domicile of the claimant's father. It was a curious and unusual duty the House had to perform—viz., to determine what was the domicile of a person who was still alive. Mr Bell, the claimant's father, had been born in Jamaica, had gone to Scotland for education, travelled, and then returned at the age of 22 to Jamaica, where he succeeded to and continued for many years to manage his father's estate of Woodstock. He became custos of the parish of St George, and a member of Assembly, and resided in the island till 1837. It was evident, therefore, that Jamaica was the domicile of his birth, and his undoubted domicile up to that time. In 1834 the emancipation of the slaves and his failing health caused Mr Bell to think of leaving the island, and about this time he purchased two small estates in Scotland; but as it is clear that he never meant to live on these, and was at the date of the purchase a Jamaican, these facts could not affect the question. The expressions used by him in his correspondence at this time, such as coming home, were merely the language of a colonist when speaking of the mother country. In these circumstances the *onus* of proof was on those alleging a change of domicile. There was every presumption in favour of the domicile of birth; and the question was, Had Mr Bell acquired a Scotch domicile before the death of his wife? When he came to Edinburgh from Jamaica he lived with his mother-in-law, and paid part of the home expenses, and was looking out for an estate in Scotland. He had evidently a preponderating desire to settle in Scotland. His wife and her mother and all their friends desired it. It is further undoubted that he has since become a domiciled Scotsman, but up to his wife's death in 1858 all this only amounted to an intention which might have been altered had an eligible property in England appeared in the market. That he thought of this appears from the fact that his family dreaded it. The evidence of the family servants on the question of intention was a mere matter of opinion on their part, and worthless unless they could point to something said or done by Mr Bell which indicated the state of his mind on the subject. His Lordship then examined the correspondence which was in evidence, and showed from it that, three months after Mr Bell's arrival in Scotland, he complained seriously of the climate, and spoke of settling in Canada or Australia; that three months after, he wrote that he had not bought an estate in Scotland, and was not likely to do so. At two months later, in March 1858, he wrote about returning to Jamaica, and leaving a country which was stormy, and a people who were always bragging about their great-grandfathers; and that, two months after, he leased Rochrigg for a year, but still complained of the cold climate. All this showed that if he had got a property he might have stayed in Scotland, but if not, then he would not have stayed; so that it could not be held that he was settled there, or that he had acquired a new domicile at this time, which was the date of his wife's death. He therefore advised their Lordships to sustain the appeal, and reverse the judgment of the court below.

LORD CRANWORTH said it was true that, *prima facie*, a man's domicile was where he resided, and so it had been argued that Mr Bell's residing at Rochrigg, in Scotland, raised the presumption of his Scotch domicile; but then there was a prior and stronger presumption created by the fact that there was a domicile of origin, and that was in no doubt. Mr Bell desired to domicile himself in Scotland, but his subsequent letters showed a change in his desires, and there was no fact following upon the *animus* which would create the new domicile.

LORD WESTBURY said the question in the present case was, had Mr Bell the settled purpose to make that change? The only thing which indicated this was his going to Scotland; but then this was explained by the natural desire he had to visit his wife's relatives. Residence was not domicile, though often confounded with it. The circumstances indicated only a resolution, but no fixity of purpose; and he therefere concurred in holding that no Scotch domicile had been acquired at the date of Mrs Bell's death. His Lordship concluded by expressing deep regret at the expense and time wasted in this suit, when it was clear from the very commencement that the only point which ought to have been discussed was that of domicile.

LORD COLONSAY said he thought the case a very nice and difficult one on the evidence, but on the whole concurred with the other noble Lords.

Judgment reversed, with costs.

Agents for Appellant—J. W. & J. Mackenzie, W.S., and Graham and Wardlaw, Westminster.

Agents for Respondents—George Cotton, S.S.C., and Uptons, Johnston, and Upton, Austin-Friars.

Thursday, May 28.

M'LAREN *v.* CLYDE NAVIGATION TRUSTEES.

Lands Valuation Act, 17 *and* 18 *Vict., c.* 91, *sections* 6, 33, *and* 41—*Parish Church—Assessment.* In an action raised by the collector of an assessment imposed upon heritors for the purpose of rebuilding a parish church, against tenants under leases for more than twenty-one years, who appeared on the valuation-roll as proprietors, *held* that tenants, not being subject to the assessment apart from the valuation-roll, were not rendered liable by its terms.

M'Laren, collector of an assessment imposed by the heritors of the parish of Renfrew for the purpose of rebuilding the parish church, brought an action against the respondents for payment of £107, 2s. as the proportion of the assessment due by them as proprietors, entered in the valuation-roll, of certain subjects on the river Clyde. Those subjects, it appeared, were held by the respondents under leases of ninety-nine years, dated in 1788 and 1795. The respondents pleaded that, not being heritors, they were not liable to the assessment; that the burden of building a new church fell on heritors,