which he would not naturally be conveyed, as, for example, where a person was to be conveyed to the prison of Perth, a separate warrant would be necessary. And where there was a well established form of practice, it was not to be easily inferred that that was altered by the Summary Procedure Act. The form in the Act might be imperative as regarded the sentence, without being imperative as regarded the appendage to the sentence, which was not necessary when the party was in Court.

Lords Neaves and Jerviswoode and the Lord Justice-Clerk concurred with Lords Deas and Ardmillan.

Agents for Complainers—Henry & Shiress, S.S.C.

Monday, May 25.

M'DADE *v.* HENSHILWOOD.

Master and Servant Act 1867—*Contract of Service—Amendment of Complaint—Illegal Contract—Standard Measure.* Objections to complaint under the Master and Servant Act 1867, (1) on the ground that it did not set forth a contract of service, and (2) that it bore to be a contract based on the use of an illegal measure, *repelled.*

The suspender was convicted at Lanark in March last, on a complaint under the Master and Servant Act 1867, for neglecting to fulfil his contract. He suspended chiefly on the ground (1) that the complaint did not set forth a contract of service in terms of the Act. It appeared, farther, that the complaint had been amended by an addition to it of the quantity of material retained by the suspender, stated as about 135 ells; and the question was raised (2) whether the contract was not void, in respect that it contained an agreement for wearing a certain quantity of *ells* of cloth, without specifying the proportion of that measure to some standard measure.

Mackenzie for suspender.

Balfour for respondent.

The Court held (1) though with difficulty, that the expressions in the complaint, of the suspender being a workman of the respondent, and so on, were a sufficient averment of service; and (2) that the statement of quantity did not appear to be an integral part of the statement of the contract set forth in the complaint, and therefore sustained the conviction.

Agent for Complainer—R. Denholme, S.S.C.

COURT OF SESSION.

Tuesday, May 26.

FIRST DIVISION.

GRAHAM *v.* GRAHAM AND OTHERS.

(*Ante*, p. 402.)

Multiplepoinding—Claim—Amendment of Claim—Opening up Record. The Court having decided that W. H. had no claim for any portion of the fund *in medio*, F.'s trustees, who had claimed one-fifth on the footing of W. H.'s claim being good, moved to have the record opened up so as to allow them to amend their claim, and claim one-fourth. Motion refused.

Lee, for Frederick Graham's trustees, claimants in the competition, moved the Court to open up the record so as to allow the claimants to alter their claim, and claim one-fourth instead of one fifth of the estate. He cited *Ferguson's Trustees*, 22 D. 1442, and 4 M'Q. 397.

The Court unanimously refused the motion.

Lord President—The motion now made is, as I understand it, that the trustees of Frederick Graham, claimants in this multiplepoinding, shall be allowed to alter the second head of their claim so as to enable them to claim one-fourth instead of one-fifth of one-sixth of the whole estate, with interest from 5th February 1853. I am of opinion that that is an incompetent motion, and that we have not the power, even if we had the will, to grant it. There is a closed record here in a competition, and distinct claims lodged in a competition in which the trustees, holders of the fund, have no interest. They have surrendered the fund into the hands of the Court, and left the Court to say in what way the fund is to be divided. The Court having called on the parties to come forward and compete, they have come and competed for the division of this one-sixth of the estate. The claimants, with the exception of Frederick Graham's trustees, *i.e.*, Humphrey Graham and Miss Susan Graham and her sister's trustees, claimed each one-fourth of this share. There was another competitor, William Henry Graham, who insisted that the division should be into five parts, so as to let in him; and the trustees of Frederick Graham, concurring in that view, also claimed one-fifth, while, if they had chosen, they might have claimed one-fourth like the other claimants. It seems to me that if a record is closed in these circumstances, and the judgment of the Lord Ordinary pronounced, giving effect to one construction of the settlement, it is impossible for a party then to alter his ground, and to say, "I have begun to see that my construction is wrong, and that another construction is better for me than my own." I think it is not competent to open up a record so as to enable a party to make a change of ground in that way. There is no contenance for that contention to be derived from the case of *Ferguson's* trustees. That was a case of a different character. There was no proper competition there, and no judgment on the competition, the only judgment was between the trustees and certain legatees. The interlocutor of the Lord Ordinary was brought up on a reclaiming note, asking the Court to consider the whole matter of the sound construction of the deed, and the trustees were quite entitled to present that reclaiming note and have it considered. In these circumstances, the Second Division, finding that the claims thus brought up proceeded on a false principle of law, remitted to open up the record, but that was necessary for a proper distribution of the estate. But that does not apply here. The trustees of Frederick Graham have themselves to blame for having made their claim with their eyes open. I am therefore for refusiug the motion.

Lord Curriehill concurred.

Lord Deas—I am of the same opinion. There were a great many elements in the case of *Ferguson's Trustees*, the combination of which justified the judgment, although even then the result was reached with difficulty. But this case differs in many respects. I do not mean to go into the details of the case, for that would require to be done very fully or not at all, but, having looked into that case, I think it essentially differs from the present.

Lord Ardmillan—I am of the same opinion. The question whether the fund was divisible into four or five parts depended on the question whether William Henry Graham had a good claim or not. If his claim was not good, the estate was divisible into four parts, and, if good, into five. Frederick Graham's trustees appear to have concurred with William Henry Graham in his view of his rights, and therefore claimed one-fifth. Humphrey Graham and the others declined to recognise William Henry's right, and claimed one-fourth. That was not done by inadvertence, but advisedly, and there is no ground for now going back upon the claims.

Agents for F. Graham's Trustees—Maconochie & Hare, W.S.

Wednesday, May 27.

COCKBURN AND OTHERS *v.* WATSON AND ANOTHER.

Title to Sue—Promissory-note—Creditor—Advocation—Competency. Action for payment of the sum in a promissory-note *dismissed*, the pursuer not averring any title.

William Watson and William Wilson, sometime preses and secretary of "The Brisbane Place Benevolent Society," Kelso, brought this action, in the Sheriff-court of Roxburghshire, against Cockburn and others, members of the said society, concluding that the defenders ought to be decerned, conjunctly and severally, "to pay to the pursuers the sum of £100 sterling, being the amount of a promissory-note, dated at Kelso the 29th day of December 1864 years, payable five months after date, granted to the Bank of Scotland by William Townley, residing in Kelso, treasurer to said society, and as a member thereof, and the said William Watson, as secretary to said society, and as a member thereof, and the said William Wilson, as preses of said society, and as a member thereof for the years 1864 and 1865, for behoof of the whole members of said society, and which sum of £100 sterling was paid over by the pursuers to the said defenders and others, members of said society for the years 1864 and 1865, but whose names are not known to the pursuers, the said James Walker, defender, who acts as present secretary to the society, and is in possession of the books thereof, having refused access to the said books, or to give a list of the names of the members; but which sum the said defenders refuse to pay to the pursuers, with expenses," etc.

The pursuers, in their condescendence, alleged (Cond. 10), that "The society having failed to pay said promissory-note when it became due on the 1st of June last, and the bank having raised diligence thereon, the pursuers instructed proceedings against the society, but as it was not incorporated, nor had taken the benefit of the Friendly Society Acts, and the whole members (consisting of upwards of 300) not known to the pursuers, their procurator applied to the secretary of the said society for the names of the office-bearers, committee, and members thereof, explaining that the object in making the request was to enable the pursuers to bring an action against the society for said bill of £100, and stating that, unless an answer was returned within two posts, it would be taken as granted that the society declined to comply with the request. To this letter, which was received by the secretary and laid before the society, no answer was returned." (Cond 11). "No other course was then left to the pursuers than to raise an action against the members of said association, so far as known to them."

After various procedure in the Sheriff-court, including the raising of a supplementary action in consequence of a plea by the defenders that all parties were not called, the Sheriff, recalling the judgment of the Sheriff-substitute, pronounced this interlocutor:—"Finds that the members of the society in the year 1865 benefitted by the proceeds of the bill, the amount of which is pursued for, and therefore decerns against the defenders in this and the supplementary process; and, in absence, against those who have been summoned and not entered appearance in their respective proportions of the said bill, deducting the sums for which those not summoned; for which reserves to the pursuers recourse against them, and remits to the clerk to make up a state showing the sum due by each member during said year: Finds the defenders liable in expenses in their respective proportions, and allows an account to be given in to be taxed, and decerns."

The defenders advocated.

The respondents, besides pleas on the merits, pleaded that, the whole merits of the cause not having been disposed of, the advocation was incompetent.

The Lord Ordinary (Ormidale) repelled the preliminary plea, and, on the merits, dismissed the action at the instance of the respondents (pursuers in the Inferior Court), and found them liable in expenses, adding this note:—"The only ground on which it was contended by the respondents that this cause had not been exhausted, and no judgment pronounced in the Sheriff-court 'disposing of the whole merits of the cause,' in terms of section 24 of the Sheriff-court Act 16 and 17 Vict., c. 80, and that therefore the advocation was incompetent, was, that the Sheriff's last interlocutor of 6th November 1866 contains a remit to the clerk to make up a state showing the precise sum due by each defender. But, looking at the whole interlocutor, and the decernitures embodied in it, as well as the Sheriff's relative explanatory note, the Lord Ordinary thinks the interlocutor referred to must be held, in all substantial respects, and in every reasonable sense, such a final and exhaustive judgment in regard to the merits of the cause as to render the advocation competent. It will be observed that the Clerk is not directed to report the state to be prepared by him to the Court, and probably all that was meant was that he should perform the arithmetical apportionment of the defenders' liabilities as decerned for, to facilitate the extracting of the decree, instead of leaving that more piece of form—for it was little, if anything more—to be attended to by the extractor himself; or, perhaps, the clerk is himself extractor. A great many cases were cited in argument, having some bearing on the question of competency, but none of them exactly in point, and none of them, indeed, appear to have occurred under the Act 16 and 17 Vict., cap. 80.

"Assuming the advocation to be competent, it is obvious that the Sheriff has fallen into a mistake in deciding the cause, on its supposed merits, against the advocators (defenders in the Sheriff-court), without hearing them, or giving them an opportunity of being heard, and without a proof or inquiry of any kind. The Lord Ordinary thinks it also clear that the actions, original and supple-