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.