The pursuer reclaimed.

BALFOUR for reclaimer.

At advising—

LORD PRESIDENT—I see no ground for differing from the Lord Ordinary. A change has been introduced, with regard to the law of desertion, by the Conjugal Rights Act. A different kind of remedy has been provided from that contemplated by the old Statute. By the first section a wife is to be entitled to an order of protection, but that is not the case before us. The kind of desertion here in question is not described in the Conjugal Rights Act at all. We must go back for a description of this species of desertion to the Act 1573, c. 55, and there the language is very explicit, for it declares that if either the husband or wife "diverts frae other's companie without ane reasonable cause alledged or reduced before a judge, and remains in their malicious obstinacy be the space of foure zeires, and in the mean time refusis all privie admonitions—the husband of the wife, or the wife of the husband—from due adherence; that then the husband or the wife shall call and persew the obstinate person before the judge ordinar for adherence." All that takes place after this is altered by the recent Statute; many of the preliminaries are dispensed with, but what I have read is still in force, and contains the species of desertion. There must be desertion without reasonable cause for four years, and during that time the husband must remain in malicious obstinacy. The question is, is this the case here? It seems to me that we have merely the element of desertion. There is no doubt of the bad habits of the husband; but his continued absence does not seem to be the result of malicious obstinacy, for he would probably be glad to come back if he had the necessary means. And where are the invitations to come here, and the complaints by the wife to the husband that he is absent from her society? There are none of these elements in this case. There is nothing but the single element of absence. I am for adhering.

LORD CURRIEHILL concurred.

LORD DEAS—Whether it would be reasonable that the wife should get divorce in such circumstances, or not, it is certainly not the law. Mere absence will not do. There may be long-continued absence without any explanation, which may give rise to the presumption that it is malicious and wilful. But this is not a case of that kind. The absence of the husband in this case is explained in a way that is not creditable to the character of the man, but it shows that his purpose is not to get quit of his wife. His habits are unsteady, and he goes and enlists in a foreign army. He knows his own weakness, and laments it. But that is not malicious desertion in the sense of the Statute. It is quite true that, as we lately held in the case of *Chalmers* (*ante*, p. 357), it will not do for a man to turn round and say,—I am willing to live with you. That is not enough. But the question is whether there is any *mala fides* here? I think not. It is evident, from his letter, that the man is not pretending, but is expressing his real feelings when he laments that he must live away from his wife.

LORD ARDMILLAN concurred.

Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, June 2.

OUTER HOUSE.

(Before Lord Kinloch.)

RANDALL *v.* JOHNSTON.

(*Ante*, vol. iii, 322.)

Lawburrows—Suspension—Malice—Relevancy. Held (by LORD KINLOCH, and acquiesced in,) that malice and want of probable cause are a relevant ground of suspension of lawburrows. After a proof, reasons of suspension *repelled.*

This was a suspension presented by the Reverend Edward Randall, of St Ninian's Chapel, Castle-Douglas, of a charge given him to find caution of lawburrows that the respondent, General Thomas Henry Johnston, of Carnsalloch, "shall be kept harmless and scatheless in his body, possessions, goods and gear, and in noways molested or troubled therein by the complainer." In March 1867 the Court, recalling an interlocutor of the Lord Ordinary, remitted to his Lordship to pass the note on caution. The Lord Ordinary accordingly passed the note on caution of lawburrows, binding the complainer to keep the peace towards the respondent in common form, under a penalty of £50 sterling *ad interim*, and until the note of suspension was disposed of. A record was made up in the suspension, and thereafter, on 28th June 1867, the Lord Ordinary (KINLOCH) found that the suspender had averred competent and relevant grounds of suspension, and allowed a proof, appending to his interlocutor the following note:—

"The process of lawburrows is one of the most ancient known to our law. It had its origin in times of barbarism and violence, when life was continually in peril. It may be fairly said to be unsuitable to the condition of modern society, in which a well regulated police affords amply sufficient protection. But it holds its place in the law, and must be dealt with according to its own legal rules.

"It is not matter of dispute that to obtain letters of lawburrows, or the equivalent warrant from an inferior judge, nothing more is requisite in the general case than the oath of the applicant that he dreads bodily harm at the instance of the party against whom the application is made; and that no further proof is requisite,—as in the present case a lieutenant-general in the army may, on such an oath, at once obtain a warrant of lawburrows against a minister of the gospel. At the time of origin of the proceeding, it was probably felt that to require a proof as to the threatened injury before the lawburrows was granted, would frustrate the object in view. It is undoubtedly no defence against the issuing of the warrant, on the due oath being emitted, to say that there is no good ground for the application. It probably follows as a necessary consequence, that to allege that no good ground existed for the application is unavailing to obtain suspension of its effect from a higher tribunal; for there seems no good reason why this objection should be more admissible in the court of review than in the primary jurisdiction.

"But the ground of suspension now presented goes a good deal further. The suspender offers to prove that the application was made maliciously and without probable cause. He does not merely say that it was groundless; but that it had not even

a probable foundation, but was the pure offspring of ill-nature and spite. The question is, whether this is a relevant ground of suspension,—in other words, whether, if the averment be established, the warrant of the Inferior Court will not fall to be suspended? The view of the Lord Ordinary on this question is in accordance with the suspender's contention.

"There can be no doubt that suspension of the warrant is a competent proceeding on certain legally recognised grounds. To this all the authorities testify. The warrant may be suspended on the ground of technical irregularity. It may be suspended in those exceptional cases in which the warrant is sought against a near relative, and where, exceptionally, some preliminary proof is necessary, on the ground that no such proof has been brought. In the case of a warrant obtained maliciously and without probable cause, there cannot be a moment's doubt that an action of damages will lie against the obtainer at the instance of the party thereby wronged. All the authorities speak to this effect. It seems to the Lord Ordinary that the averment must be alike receivable to prevent the wrong being completed. There is no possible injustice in so holding. The supender must prove his case before obtaining suspension; and the Court may, in the meantime, protect the party alleged to be in peril by requiring interim caution, as was done in the present case. It would be against all rules of justice, as the Lord Ordinary thinks, to hold that the fullest proof of malice and want of probable cause would not suffice to suspend the warrant; and that the only remedy allowed is an after action of damages, which the circumstances of the party in the wrong may deprive of the very slightest value.

"The case of *Smith* v. *Baird*, 26th June 1799, Mor. 8043, is a direct authority for sustaining the relevancy of such a ground of suspension, and it appears to the Lord Ordinary that the weight of this authority is not destroyed by the after cases of *Barbour* v. *Hogg*, 11th March 1825, 3 Shaw, 453, and *Baxter* v. *Ewart*, 16th June 1827, 5 Shaw, 752. These cases are reported much too briefly to afford a satisfactory apprehension of the grounds of judgment. It is said that in both cases a suspension of a lawburrows, presented on the ground that the application was made maliciously, was refused by the Court. But it does not appear in either case whether the Court found it *incompetent* to present the suspension (indeed, whether even a plea of incompetency was stated), or merely found that the statements made were not such as sufficiently to raise a *prima facie* case of malice. What the respondent contends is, that the proceeding is incompetent in any circumstances whatever. The Lord Ordinary is not prepared to deduce this conclusion from the two cases in question. Besides, the present case differs so far from these two others that the complainer does not merely aver that the application was made maliciously, but without 'probable cause.' There are several well-known cases in everyday life, in which, on views of public policy, the law will not give redress on a mere statement of malice when feasible grounds existed for the application complained of, but will grant its interposition when the malice is combined with a want of probable cause.

"The suspender distinctly avers both these elements in the present case, and he further sets forth special facts, which, if established by proof, will reasonably infer that the proceeding complained of was dictated by ill-temper, not by any reasonable apprehension of personal damage.

"The Lord Ordinary will only add that he has been confirmed in his present conclusion by a judgment to a somewhat similar effect (which was acquiesced in), pronounced by Lord Ardmillan in the case of *Gadois* v. *Baird*, June 1856, reported in the Scottish Jurist, vol. xxviii, p. 602. The note attached to his Lordship's interlocutor in that case is very instructive, and the Lord Ordinary entirely concurs in the views expressed in it."

A proof was taken, after which the Lord Ordinary, on 5th February 1868, pronounced an interlocutor, finding that the suspender had not sufficiently proved that the petition to the Sheriff complained of was presented by the respondent maliciously and without probable cause, repelling the reasons of suspension, finding the decree and charge orderly proceeded, and finding the suspender liable to the respondent in expenses.

His Lordship added the following note—

"In the note to his interlocutor of 28th June 1867, the Lord Ordinary threw out a doubt as to whether the process of lawburrows was suited to the condition of modern society. The proceedings in the present case have greatly strengthened this doubt. But so long as the process is allowed to exist in our law, the Lord Ordinary is bound to give to it its established legal effect.

"There can be no doubt that, as between the lieges generally, it is the rule of law that any one individual who states upon oath that he dreads bodily harm from another is entitled, on his bare deposition, to obtain an order on that other from the Sheriff, appointing him to find security to keep the peace towards him. The applicant is under no necessity to lead any evidence in support of his application. His own statement on oath is, by itself, sufficient. The party complained of can only obtain suspension of the warrant by proving that the application was made maliciously and without probable cause. That proof to this effect will be sufficient, the Lord Ordinary found by the interlocutor before referred to; and that interlocutor was acquiesced in. The whole question, therefore, remaining in the case is, whether the suspender, on whom the *onus* lies, has sufficiently established the malice and want of probable cause alleged. Unless he has done so, the law declares that the warrant must stand. On the policy of the law there is no room for discussion in the present proceedings.

"There is a great deal of contradiction in the evidence as to what took place at the meeting between the parties on 14th December 1866, the occurrences at which were the avowed ground of the application to the Sheriff. Putting aside the parties themselves, whose feelings may be thought not unlikely to afford an unconscious colouring to the proceedings, the Lord Ordinary has no hesitation, in the matter of reliability, in giving a decided preference to the witnesses for the suspender Mr Randall, over those on the other side. It is not merely that their number is greater. Their opportunity of observation was much better; they could not well mistake what happened; and as to the larger part of them, there is no room, in the evidence, for holding them tainted with partiality or partizanship. It is quite possible that, in speaking to events now more than a year old, some circumstances may have escaped their recollection, so as to induce the belief, always to be entertained except under the pressure of an unavoidable inference, that there is no wilful untruth on either hand, and

at the utmost only an exaggeration, or misrecollection, of something actually happening. But after every allowance on this account, the Lord Ordinary has formed a clear opinion that nothing occurred at the meeting in question warranting an apprehension on the part of the respondent of a personal assault on that occasion. The Lord Ordinary may indeed go further, and say that, in his estimation, even the evidence of the respondent's own witnesses falls short of presenting facts which give a reasonable ground for believing that a personal assault was intended. If the point, so much controverted, as to whether the suspender had a stick in his hand or not, were assumed in the respondent's favour, there would still, as the Lord Ordinary thinks, be a destitution of evidence to establish any likelihood of its being used for a purpose of violence. Did the case depend on the opinion of the Lord Ordinary as to the occurrences of the 14th December, he would at once pronounce judgment in favour of the suspender, because he thinks that nothing occurred at that meeting affording any ground for considering a personal attack to be then imminent.

"But the case cannot be thus ended. The Lord Ordinary's opinion on this point is not conclusive of the matter at issue. It is not the Lord Ordinary's belief which is important, but the belief or impression of the respondent General Johnston. And further, it must be remembered that the question is not one of condemnation or punishment of the proceedings of the 14th December. The question regards protection for the future. The proceedings of the 14th December were only used as a reason why such protection should be sought and granted. The respondent himself scarcely says that he dreaded personal injury on the 14th. It would be absurd to suppose that he did. The sight of the two men was sufficient to show that, in a personal conflict, the respondent was likely at least to hold his own. What is said in substance by the respondent is, that the occurrences of that day, taken in connection with some others happening previously, had affected him with the apprehension that on some future occasion a collision might take place, in the course of which a personal attack might be made on him by the suspender, placing him in the unfavourable position of not being able to defend himself by a retort of the like on a person of the suspender's sacred calling. It was under this apprehension, and for the purpose of preventing all risk of personal collision, that he says he took the oath that he dreaded bodily harm from the suspender, and obtained in consequence an order on him to find security to keep the peace. And the question on the proof is, not whether the respondent acted wisely or judiciously, or as any other might think it proper he should act, but whether he acted in good faith, and on a true conviction, or maliciously and without probable cause. If the former, the law will sustain his proceeding, whatever opinion the merely moral critic may form concerning it.

"The Lord Ordinary has no doubt of the competency of the respondent's combining in his view the proceedings of the 14th December with previous proceedings in the intercourse between him and the suspender. Although the scene of the 14th December was the immediate cause of the application, it might properly receive a colour and character from prior circumstances. The Lord Ordinary puts entirely aside the alleged rumours of the suspender's conduct towards another or others. He can find no authority for sustaining these as a competent ground for such an application. If idle gossip of this sort is to be regarded there is no one safe. But circumstances in the prior intercourse of the two parties themselves have, in the Lord Ordinary's estimation, an undoubted relevancy.

"It appears that, for some months previous to this 14th December, unfortunate differences had arisen between the suspender, as incumbent of St Ninian's Episcopal Chapel, and the trustees of the chapel, of whom the respondent General Johnston was one. The trustees had found fault with the suspender for allowing some lay members of the congregation to entry by the vestry door, and to walk across the chancel into the body of the church, which they thought a breach of decorum, if not a graver offence. The suspender seems, on his side, to have thought that the view of the trustees savoured of Romish superstition. The question is not one for the present place. The trustees, right or wrong, considered themselves entitled to shut up the vestry door, leaving the clergyman to enter the vestry through the church. The suspender took a mode of redressing himself deeply to be regretted. He broke open the vestry door with his own hands at the very time the congregation was assembling for worship on Sunday; and, according to the testimony of Mr Richard Jones Congreve, after a warm altercation at the church door with himself as one of the trustees. The feelings of the suspender were perhaps naturally excited, but they shewed themselves in an act of violence deeply to be lamented in a clergyman, and leaving behind a remembrance of temper and disposition not calculated to afford a comfortable view of any probable personal collision.

"The Lord Ordinary lays little or no stress on the circumstance spoken to by the respondent, but by no one else, of the suspender, as he alleges, violently wrenching some prayer or hymn books out of his hands in the face of the congregation. This is probably a somewhat trivial matter highly coloured. But the Lord Ordinary cannot think of light importance one feature in the conduct of the suspender on the 14th December, divested, as the Lord Ordinary assumes his proceedings to be, of all real purpose of personal violence. The suspender had it then in view formally to demand from the respondent the keys of the chapel, which was at that time shut up,—the trustees say for repairs; the suspender, for his permanent exclusion. This demand of the keys might be an extremely proper step to take; but why take it in the form of walking up to the respondent in the public street of Castle-Douglas, and, in the hearing of all around, demanding the keys three successive times? The demand might have been made as effectually by a letter from himself or his law-agent, or through the calm medium of a notary-public. It appears to the Lord Ordinary that the step taken by the suspender was inconsiderate in the extreme. Deliberately to seek out the respondent in the public street, and there to make an open demand on him for the keys, repeated three successive times, in the same words, was a thing of all most likely to produce a personal altercation, if nothing worse. Here, again, the suspender took a proceeding of which the Lord Ordinary cannot approve, and which was too likely to give to his conduct the aspect of a violence which might be altogether alien from his intentions.

"It was with these proceedings fully in view, and under the impressions produced by them, that the respondent says he made application to the Sheriff for a warrant of lawburrows, intending nothing more than to protect himself for the future against

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.