Airth, and are now in the possession of the defender; but though the pursuer has repeatedly requested the defender to allow her to have access to or exhibition of these documents, he refuses to do so." Also, "that William Cunninghame Bontine of Ardoch and Gartmore, Esq., by his *curator bonis*, George Auldjo Jamieson, Esq., chartered accountant in Edinburgh, presented a petition in the claim of the pursuer to the said titles of Monteith and Airth in opposition to the claim of the pursuer, upon which sundry proceedings have taken place in the House of Lords before their Committee for Privileges, which are herein referred to. While the defender has given the said William Cunninghame Bontine and his advisers unlimited access to and use of the documents in his possession, and permitted them to produce, as they have produced, those which tend to support Mr Bontine's claim, he has refused the pursuer all access to them. It is not in accordance with the rules or practice of the House of Lords, or their Committee of Privileges, to make orders for the exhibition or production of the documents, and the pursuer has consequently been unable to obtain from that House or Committee an order for the exhibition or production of the requisite documents. Unless she shall obtain an order for production and exhibition as concluded for, she will be unable to recover highly material, and, as she believes, essential evidence, in support of her claims to the foresaid honours and dignities."

The pursuer pleaded "(1) As heir duly served and retoured to the last Earl of Monteith and Airth, and as the claimant of the titles, dignities, and honours above condescended on, the pursuer is entitled to exhibition of the whole of the said documents, and to have the same made available in proof and support of her claims to the said titles, dignities, and honours, under such conditions as the Court may appoint; (2) the pursuer is entitled to such exhibition in respect that the same is essential or highly material to her proving and establishing her said claims."

The defender pleaded "(1) The action ought to be dismissed, in respect it is incompetent; (2) the statements of the pursuer are not relevant or sufficient to support the conclusions of the summons."

The Lord Ordinary (Mure) sustained the second plea in law for the defender, and dismissed the action, with expenses.

The pursuer reclaimed to the Second Division of the Court.

Balfour and Watson for pursuer.

Asher and Solicitor General for defender.

Authorities cited—Stair iv. 33, 1. 2. 3.; Erskine I. 4, 1; *Lindsay Crawford* v. *Campbell*, 26th May 1826, Wilson & Shaw's Ap. vol. ii. p. 440; *Campbell*, 6 Macpherson, 632; H. L., 7 Macph. 101; *Campbell*, 1 Morison, 759.

At advising—

Lord Justice Clerk—This is a very unusual and singular application. The conclusions in the summons are of the most vague and general kind, and amount to a petition for probation ancillary to a question in which we have no jurisdiction, viz., who is entitled to a Peerage. It amounts to an action in aid of the House of Lords. The Committee of Privileges alone is judge of the advisability of orders for documents, and it is incompetent for us to interfere. The views in the case of *Campbell* entirely to my mind rule this case. No doubt there is this distinction, that here there is a general service, but that does not appear to me to be of importance in a question of this kind.

Lord Cowan—I concur. This is an action for exhibition, and such as an heir usually would not be entitled to. It is substantially in aid of a claim now before the House of Lords. The case of *Campbell* is a direct authority; the mere expeding of a general service is not material. We have no evidence that the House of Lords would not do what justice to the parties required. I cannot take mere evidence of the minutes of the Committee on Privileges as conclusive, as it does not appear what would have been done if a special application had been made. The statement on this point amounts to nothing more than a statement of what the House of Lords consider fair and just, and it is out of the question for us to interfere.

Lord Benholme—I concur, on the ground that the action is incompetent.

Lord Neaves—I lean to Lord Benholme's view that it is incompetent. The question here is the bearing of these documents on the distinction in the Peerage patent—a matter entirely out of our jurisdiction. The House of Lords must know its own forms and machinery for doing justice between claimants, and we cannot interfere to assist them. We have the case of *Campbell*. It was argued that the want of service there was the turning point, but as dignities and titles of honour descend *jure sanguinis*, no one is bound to take service, so that the want of service cannot afford a distinction between the two cases, although, as the question there was one of propinquity, the absence of service might be of importance.

The vagueness of this demand is another element in my judgment—a general demand to walk into a man's charter-chest, and precognosce the title deeds, which the Court cannot entertain.

The Court unanimously found the action incompetent, and adhered to the Lord Ordinary's interlocutor in so far as it dismissed the action.

Agent for Pursuer and Reclaimer—John Shand, W.S.

Agents for Defender and Respondent—Dundas & Wilson, W.S.

Friday, June 7.

LOVE *v* LANG.

(Before seven Judges).

General Turnpike Act, 1 *and* 2 *Will. IV. c.* 43, § 70 —*Expenses*—*Petty Sessions.*

> The justices in the Petty Sessions act ministerially under the above section of the General Turnpike Act, and have no power to award expenses.

William Fulton Love, the pursuer, who was clerk to the Turnpike Road Trs. of Beith and Largs, in January 1866 presented a petition to the Justices of the Peace for Ayrshire, under § 70 of the General Turnpike Act, craving to have a certain road shut up. The shutting up of the road was opposed by the defenders, Mr Lang of Groatholm and others. A proof was allowed by the Justices, and various procedure took place. The pursuer averred—"After the conclusion of the proof allowed by the Justices' order of 2d April, the said Patrick Blair,

at a meeting of the Justices held on 17th July 1866, again tendered condescendence for William Lang and William Scott and the said additional objectors, and the Justices then allowed these papers to be received. Thereafter, on the same day, the Justices pronounced an order or resolution, finding by a majority that the pursuer had failed to prove that the road in question had become useless and of no importance to the public, and refusing to grant authority for shutting up the said road as craved, and finding the defenders entitled to expenses, as the same should be taxed by the Clerk of Court, and remitting the accounts of said expenses, when lodged, for taxation. Accounts of expenses were shortly afterwards lodged by four separate sets of respondents, being the defenders in this action, and which were claimed as due to them respectively under the foregoing findings of the Justices. These accounts were taxed by the Depute Justice of Peace Clerk, and on 6th August 1866 the Justices pronounced an order in these terms:—'The respondents' accounts of expenses were produced as taxed by the Clerk of Court at £156, 18s. sterling, for which sum decern against the petitioner, as Clerk to the said Road Trustees.' The defenders extracted the said pretended decree for expenses, which is now brought under reduction. On the 18th October 1867 they charged the pursuer thereon as clerk to the said trustees, and he having, as an individual, brought the said charge under suspension, the same was suspended by interlocutor of Lord Mure, Ordinary, which was affirmed by the Inner House (Jan. 30, 1869) 7 Macph., 448, with the qualification and declaration that the charge, and grounds and warrants and proof, were only suspended in so far as they might be made the foundation of personal diligence against the pursuer as an individual, or his individual funds and estate; and with a view to which the defenders admitted that the charge had been given, but without prejudice to the said charge, and grounds and warrants, to any other effect."

The defenders answered—"Ans. 12. Admitted that the defenders extracted the decree, and thereon charged the pursuer. Admitted that the pursuer brought a suspension of this charge. Explained, that during the proceedings which followed in the process of suspension, the Court suggested that intimation of the process should be made to the Road Trustees, which was accordingly done, but they declined to make any separate appearance in said process. Farther explained, that in said suspension the pursuer pleaded, *inter alia*, as follows:—'It is incompetent and *ultra vires* to insert in the extract of the Justices' alleged decree a warrant to charge, such warrant being only legal in decrees of the Court of Session, or of the Sheriff, and the charge is therefore illegal. The Justices had no power to pronounce the foresaid decree for expenses, and the same is illegal, and null, and void. The said decree is invalid, in respect of the illegality and gross irregularity of the procedure in the Inferior Court.' The interlocutors pronounced by Lord Mure and by the Second Division are referred to for their terms."

The pursuer therefore brought this action of reduction of the decree, and pleaded—"(1) The said decree ought to be reduced, in respect that the Justices had no power to pronounce a decree for expenses against the pursuer, and the same is illegal, and null and void. (2) The proceedings in which the said decree was pronounced were not of a judicial nature, and it was *ultra vires* of the Justices to deal with them as such. (3) The Justices had no authority, under the Acts of Parliament founded on, to deal with the matter of expenses of the said proceedings. (4) The said decrees, and all that has followed thereon, are invalid, in respect of the illegality and gross irregularity of the procedure before the said Justices."

The defender pleaded—"(1) The action is incompetent, and should be dismissed, in respect that under the 70th section of the General Turnpike Act (1 and 2 Will. IV. c. 43), the proceedings of the Justices are not subject to reduction. (2) In respect that the pursuer did not avail himself of the only means of review permitted by said 70th section of the General Turnpike Act, by an appeal to the Quarter Sessions or to the Sheriff, he is not entitled to raise or insist in the present action, and the same should be dismissed. (3) It is *res judicata* that as against the Road Trustees the decree of the Justices is valid and effectual, and more particularly that it cannot legally be challenged upon any of the grounds on which the present action of reduction is rested."

The Lord Ordinary (Ormidale) reported the case to the Second Division, in consequence of the statement as to *res judicata* under the judgment in the suspension (7 Macph. 448).

After hearing counsel, the Court appointed the case to be heard before seven Judges.

Solicitor-General (Clark) and Adam for pursuer.

Millar, Q.C., and Watson for defender.

At advising—

Lord President—My Lords, the cause in which this reference is made to us by the Second Division of the Court is an action of reduction at the instance of Mr Fulton Love, who is clerk to the trustees on the turnpike and parish roads in the district of Beith and Largs, in Ayrshire, by which he seeks to reduce two decrees of the Justices of the Peace for the County of Ayr, the first dated 17th July 1866, by which the Justices found by a majority that the petitioner—that is, the pursuer of this action—had failed to prove that a road had become useless and of no importance to the public, and refused to authorise the shutting up of that road, and found the defenders entitled to expenses. The second decree was dated 6th August 1866, and in it the Justices decerned against Mr Love for £156, 18s. of expenses, being the amount of the defenders' account, as taxed. The grounds of reduction are distinctly stated in the first and second pleas in law for the pursuer, and are as follows:—"(1) The said decree ought to be reduced, in respect that the Justices had no power to pronounce a decree for expenses against the pursuer, and the same is illegal, and null and void. (2) The proceedings in which the said decree was pronounced were not of a judicial nature, and it was *ultra vires* of the Justices to deal with them as such." The proceedings before the Justices commenced with a petition by the pursuer, as the clerk of the trustees, setting forth that a particular road in the district under their charge had become useless and of no importance to the public, and that the trustees had come to a resolution that it ought to be shut up, and had instructed the pursuer to institute the necessary proceedings for that purpose. The petitioner accordingly prayed the Justices to appoint a day for hearing parties, and to direct and ordain that thirty days' notice of the intention to propose a resolution or order for shutting up the road should be given; and thereafter

that the Justices should order the road to be shut up.

When this petition was called in Court, a number of parties appeared as respondents, and these, or some of them, are the defenders in the present action. The case came before the Justices on several days, and a proof was ordered, which extended over several adjournments, and at length, after a consideration of the whole matter, the Justices, on 17th July 1866, by a majority, found that the petitioner had failed to prove that the road in question had become useless and of no importance to the public, and refused to grant authority for shutting it up, and found the defenders entitled to expenses. Thereafter, upon 6th August, the defenders' account having been taxed, they decerned for the amount thereof against the pursuer. In these circumstances the question put to us by the Second Division asks us to decide as to the power of the Justices of the Peace to pronounce decree for expenses against the pursuer. But it appears to me there is another question which arises in order to enable us to decide that one, which is, whether the proceedings before the Justices were proper judicial proceedings. I mean not in form, because, as far as one can judge from the extracts, everything that was done was done in the most regular and praiseworthy way, but whether, acting under the statute, the Justices were acting in a judicial or ministerial capacity, because if they acted judicially when only authorised by the statute to act ministerially, then what they may have done will not be protected so as to become a judicial proceeding. As far as one can see, all they did do was regular and orderly, if they had only been entitled so to proceed. But the whole question turns upon the interpretation of the 70th section of the General Turnpike Act. That section provides for the procedure in three cases: (1) where any new turnpike road is made in lieu of an old road; (2) where any bye-road is used for the purpose of evading the toll duties imposed by any local act; and (3) where any old road or any bye-road does become useless or of no importance to the public—the case we have here. In all these cases it is provided that "it shall be lawful for the Justices at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye-road, after the expiration of six months from the date of such order or resolution, if not appealed, as hereinafter mentioned." Now, considering this part of the clause by itself, it appears that the Justices are to be set in motion by an application by the trustees, and upon that application they are to give the required order. This order is not to take effect until "six months from the date of such order or resolution," and then only if not appealed from. There is a further provision that "thirty days' notice of the intention to propose a resolution or order to that effect shall be given," as therein directed. This notice is not of the application of the trustees, still less of the resolution to which the trustees have come, but it is a notice of an intention on the part of a Justice or Justices to propose to make a resolution or order, that is, an intention on the part of the Justices to endorse the resolution of the trustees, and so to give it practical and legal effect. So far there appears somewhat of a judicial character in the proceedings. There is notice to all parties interested, and the operation of the order is suspended that an opportunity of appeal may be given. If the statute had stopped there it would have been more difficult to construe. I am prepared to say I would then have been rather in favour of the judicial character of the proceedings. But when the nature of the appeal "hereinafter mentioned" is taken into account, the state of matters is changed. The statute proceeds as follows:—"But any person interested may complain of this determination of the trustees in any such matter within six months after the date of such order or resolution, but not afterwards, to the Justices of the Peace assembled in their Quarter Sessions, or to the Sheriff of any County through any part of which the road so proposed to be shut up may pass, which Justices or Sheriff are hereby authorised finally to determine all such complaints." Now, by that clause, the right given to any person interested is not to appeal against the order of the Justices, but to complain of the resolution of the trustees, and it cannot be said that that is a judicial proceeding. The trustees pass the resolution at their own meeting, and it is that, and that only, against which any person interested may complain. A complainer cannot go to the Petty Sessions. He may go either to the Quarter Sessions or to one of the Sheriffs, as already described. But what he is to complain of is the determination of the trustees, and if that be not complained of for six months it becomes final. It seems to me, therefore, upon the whole construction of this clause, that the meaning of the Legislature is that the trustees at their own meeting, and in consequence of their own knowledge, are intended to come to a resolution to close the road if they see fit. That resolution is of no avail until it is endorsed by the Justices in Petty Sessions. It has no effect without this order of the Justices. The fact that six months is given for what in one part of the clause is called an appeal, but in another and more important part, and also more properly, is called a complaint, does not necessarily make the granting of the order a judicial proceeding. The only judicial proceeding commences with that complaint. I do not think that the framers of the Act meant that there should be a law-suit in the Petty Sessions, only to go over ground which would require to be gone over before the Quarter Sessions or the Sheriff, if there were a complaint.

It is also most important to observe that only one party can complain, not both. The private party only, and not the trustees. That this is so is evident, because the complaint is only against the determination of the road trustees, and that they should complain of their own determination is absurd.

I therefore come to the conclusion that the whole of this procedure is entirely without warrant in the statute; and the award of expenses here in question is vitiated and inept, but only because it was completely *ultra vires* of the Justices, under this clause of the statute.

Lords Cowan, Deas, Benholme, Ardmillan, Neaves, Kinloch, and Ormidale concurred.

The Court pronounced this interlocutor:—

"*Edinburgh*, 11*th June* 1872.—The Lords of the Second Division having, along with three Judges of the First Division and Lord Ormidale, in room of the Lord Justice-Clerk, heard counsel for the parties upon the question stated in the interlocutor of 7th March last,—find, in conformity with the opinion of the whole seven Judges, that the Jus-

tices of Ayrshire had no power to pronounce a decreet for expenses against the pursuer; and reduce, decern, and declare in terms of the second conclusion of the summons: Find no expenses due to or by either party.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.
Agents for Defender—J. & R. D. Ross, W.S.

LANDS VALUATION APPEAL COURT.

(Before Lords Ormidale and Mure.)

No. 88.—(LANARK.)

28*th May* 1872.

ROBERT BINNING.

Value—Dwelling-House (Glasgow)—Owner the Occupier—Comparison with other Houses—One House less in size in same Terrace let—Last year's value fixed at £140—*This year reduced to* £135.

The appellant is owner and occupier of a house in Princes Terrace, Glasgow, which is assessed at the value of £175. Last year it was assessed at £155, and was reduced on appeal to £140. The terrace consists of 12 houses, all of the same size, excepting Nos. 6 and 7, which are two-thirds the size of the appellant's, and all occupied by the owners, excepting No. 7, which is let at £125. The appellant referred to the value, as assessed, of other houses in the West End of Glasgow, and stated if his house were valued at the same rate of floorage the assessment would be £115. The assessor alleged the houses referred to were entered at too low a rate, and although houses of the same description were seldom let, yet, where let. the rent obtained bore out his valuation. The Commissioners reduced the valuation to £135.

Held that the Commissioners were wrong, and that the assessable value of appellant's house should be £140.

No. 89.—(LANARK.)

28*th May* 1872.

CALEDONIAN RAILWAY COMPANY.

Railway (Caledonian)—Dwelling-Houses outside the Railway Fence—Occupiers Employees of Railway Company—Whether they should be in Railway Assessment or County Assessment?

Dwelling-houses belonging to the Caledonian Railway Company, in the parishes of Dalziel and Bothwell, situated beyond the railway fence, occupied by employees of the Railway, are entered in the County Lands Valuation Roll—the Caledonian Railway Company as proprietors, and the employees as occupiers. The employees occupy the houses only while in the service, and on leaving service must vacate the houses without formal notice. They pay rent, which is deducted from their wages. They consist of five classes, who are entitled to different periods of warning: 1. Heads of departments, three months; 2. Chief clerks, &c., two months; 3. Other clerks, one month; 4. Guards, &c., two weeks; 5. Porters, &c., one week. They are all liable to immediate dismissal for disobedience, &c.

The appellants alleged the houses were included in the Valuation Roll made up by the Assessor of Railways, and fell within "stations, wharfs, docks, depots, counting-houses, and other houses and places of business," in § 21 of 17 and 18 Vict., cap. 91.

The Commissioners refused the appeal.

Held that the Commissioners were right.

COURT OF SESSION.

Friday, May 31.

FIRST DIVISION.

STOPFORD BLAIR'S TRUSTEES AND OTHERS, PETITIONERS.

(FOR OPINION OF THE COURT.)

An unfortunate error has crept into our report of this case, on pp. 490, 491, which we take the earliest opportunity of correcting.

The conclusion of the report should be, as is correctly set forth in the rubric, — The Court answered the first alternative in the negative, and the second in the affirmative.

Saturday, June 8.

SECOND DIVISION.

SPECIAL CASE—TENNENT (MURRAY'S TRUSTEE) AND OTHERS.

Apportionment.

A father (in implement of a reserved power of dividing his estate among his children in such share and proportion, or shares and proportions, as he might appoint by a writing under his hand, which failing, equally among them), disponed one third of his estate to his second son. This deed was delivered, and infeftment followed on it. Ten years afterwards, his second son being alive, he executed a settlement in which he directed his trustee at his death to sell his estate, and divide the proceeds among his children in certain proportions, viz., to his eldest son the sum of £3000, the balance to be equally divided among his other children. *Held* that the first deed was a valid exercise of the reserved power of apportionment, and irrevocable; that the second deed was inept; and that the second son was entitled to share the two thirds unapportioned, equally with the other children.

By disposition in trust, dated 3d April 1829, granted by Robert Rollo, writer in Edinburgh, he sold and disponed to Dorothy Elizabeth Boehm, Mark Kennoway, and Henry Charles Gibbs, and to the survivors or survivor of them, and to the heirs of the longest liver, as trustees and fiduciaries, and in trust for the use and behoof of Margaret Maxwell Hamilton, otherwise Murray, wife of John Murray, Esquire, in liferent, for her liferent alimentary use allenarly, and exclusive always of the *jus mariti* and right of administration of the said John Murray, her husband, and not affectable or attachable by the debts or deeds of her, or of her said husband, or by any diligence or execution