and had become personally liable, he might have been subject to the jurisdiction; but that is not the case here. Therefore, if this were an original action there would be no jurisdiction. Then comes the question whether, because this is an action of transference, there is jurisdiction? That is put on this footing—that except for the original action we have no jurisdiction, but because of that action we have jurisdiction. If that were an open question I should think it a matter of some difficulty. I don't think the case of *Dundas* decides that either way. Reports vary as to the ground of judgment; and it is not clear that it was matter of decision that the representatives were liable. His Lordship then commented on the case of *Dundas*, and continued—But I agree that the subsequent cases of *Reoch* and *Cameron* decide this very point,—that in an action of transference there must be jurisdiction over the representatives, founded in the same way as against the original party. What the result of that may be, and whether there may be an action against the representatives in England, I don't know, but I concur with your Lordship that this action must be dismissed.

Lord Ardmillan, not having heard the argument, gave no opinion.

Agent for Pursuer—Colin Mackenzie, W.S.

Agent for Defender—Thomas Ranken, S.S.C.

Friday, June 19.

MACKENZIE *v.* BANKES.

Public Road—Right of Way—Cart Road. Held, on a proof, that a pursuer had established a public road (1) for foot-passengers, and for horses, cattle, and sheep; but (2) not for carts or carriages, the road not being capable of being used for such purposes from end to end.

This was an action of right of way, at the instance of Mr Mackenzie of Ardross and Dundonnell, in the county of Ross, against Mr Bankes of Letterewe and Gruinard. After a proof, the Lord Ordinary found that there was a road capable of being used, and in fact used, as a public road for horses, with or without burdens, and for cattle and sheep, and for foot-passengers, running in an easterly direction from the quay across the river Meikle Gruinard, along the south bank of the said river and Lochnashalag, and following the course of the said river and loch through the defender's lands of Fisherfield and others to the property and township of Auchnevie and Lochnet; and thereafter proceeding in two directions—the one in a south-easterly direction by Ballachnacross, Lecky, Strathcromble, and Corryvach, to the public road leading from Lochcarron and Auchnasheen; and the other in a north-easterly direction by Lochcruin to the public road through the Derrymoor, leading from Ullapool to Dingwall. After farther argument as to whether the road could also be used for carts and carriages, the Lord Ordinary pronounced another interlocutor, decerning in favour of the pursuer.

Both parties reclaimed.

Fraser and W. F. Hunter for pursuer.

Clark and Watson for defender.

At advising—

The Lord President, after stating that there were two questions for determination, first, whether the findings in the Lord Ordinary's interlocutor were justified by the evidence; and second, whether there was evidence that this was a public road for carts and carriages as well as for horses, cattle, sheep, and foot-passengers, observed:—As to the first question, it is a pure question of fact; and while it is obvious that in a Highland district, where the population is much scattered, the evidence of use of a public road cannot be of the same character as in a Lowland district, I have come without any difficulty to the conclusion that there is sufficient evidence to support the Lord Ordinary's findings.

But the second point raises a question of some delicacy. It is obvious that, for some considerable time, such things as carts have never been seen in this valley, and have scarcely made their appearance yet. But it is said that whenever carts did come into use in this district, that is, this glen, these carts made use of this road. I am not sure that I quite understand the pursuer's contention, but it appears to amount to this, that occasionally carts have been seen on this road, and that is said to bring the case under the principle of *Forbes* (20 February 1829, 7 S. 441). I can understand that if a public road had been used for all the purposes for which it was useful to the public from time immemorial, for the passage of goods and passengers in every way in which they were in use to pass, then, on the introduction of carts, the right of the public to use them would be undoubted. But that must be subject to this limit, that the road must be capable of being used for such a purpose. It won't do merely to say that the public have had carts on this road, and that the carts have gone up or down a little way and then returned. That is not the use of a public road. A public road is a road between one public place and another, and therefore, that is not the use by carts of a public road. But the important point is, that this road cannot in fact be traversed by carts from one end to the other. In short, it is not a road which is capable, without engineering operations, of being made a cart road. In these circumstances we would not be justified in holding that the public have a right to use it as a cart road, for the result would be, that if the authorities took in hand to maintain this road for the public benefit, they would proceed to make the road a cart road, and that would be a conversion from the physical state of the road in which the public have used it, into a different state altogether. That would be an unjust result. The case of *Forbes* was quite different. There the road was suitable for the passage of carts. It required no conversion. The public had used it from time immemorial as a public road for the transport of goods; and when carts came into use they found no difficulty in driving carts from end to end. The best evidence of that was, that though the use by carts had not endured for the prescriptive period, it had endured for thirty years, showing that there was no difficulty in so using the road. The report of *Forbes* in Shaw is not very satisfactory; and, in particular, the opinion ascribed to Lord Glenlee, is such that I could not accept it. The report of Lord Glenlee's opinion in the Faculty Collection is much more satisfactory. In Shaw, he is made to announce the proposition that the property of the *solum* is in the public, but it is plain that that is not what he said. What he says, as reported in the Faculty Collection, is, "this implies that the surface of the road belongs to the public, and that they are entitled to use it in the manner most beneficial for the uses in which public roads are employed." That I quite ascribe to him. The surface of this road I hold to belong to the public

as a means of transport, but they must take it as they find it, and not alter its character. The other part of Lord Glenlee's opinion points clearly to the distinction I am now trying to explain. He says, "I could understand that, if the road had been lined and marked off by walls and fences, and were so narrow that no cart could use it, the public might have no right to make it broader, and thus might be confined to the use of it as a horse or foot road." That is just the principle on which I proceed here. No doubt there is here no wall or fence, for the nature of the country precludes that idea, but there are natural obstructions and difficulties which prevent the road from being used from end to end as a cart road—as difficult to overcome as the walls or fences in that case. Therefore, we are not interfering with that case of *Forbes*, but on the contrary, we are applying the principle which it contains. I am, therefore, for rejecting the contention of the pursuer, so far as he insists upon this as a public road for carts and carriages.

Lord Curriehill and Lord Deas concurred.

Lord Ardmillan, not having heard the argument, gave no opinion.

Agents for Pursuer—Skene & Peacock, W.S.

Agents for Defender—Murray, Beith, and Murray, W.S.

Friday, June 19.

SECOND DIVISION.

CAMPBELL *v.* THE CLYDESDALE BANKING COMPANY.

Superior and Vassal—Conditions of Feu-contract—Acquiescence—Suspension and Interdict—Declarator. Circumstances in which *held* that a superior who had acquiesced in a departure from one of the conditions of the feu-contract in regard to the number of storeys to be put upon buildings by certain of the feuars, was barred from insisting in implement of the condition by another individual feuar, the superior having qualified no interest to enforce the condition.

These are conjoined actions at the instance of Mr Campbell of Blythswood against the Clydesdale Bank, in which he seeks interdict against the bank from building upon a piece of ground on the north side of George Street, Glasgow—of which Mr Campbell is superior, and to which the respondents have acquired right—any house or building exceeding in height two square storeys, besides a sunk storey in front to either George Street or Renfield Street. The complainers make the following statement:—"The complainer, Archibald Campbell, Esquire, is heir of entail infeft and seized and in possession of the entailed estate of Blythswood in the county of Lanark, on which a large portion of the west end of the city of Glasgow has been built, under feu-contracts or feu-rights granted to sundry feuars by the complainer and his predecessors. In particular, the greater part of the street called George Street, and the whole of Renfield Street, are built on the Blythswood estate, and the complainer is the superior of the various feus of said streets, so far as part of said estate, and *inter alia* of the subjects aftermentioned, now belonging to the respondents, the said Clydesdale Banking Company."

After narrating the feu-contracts under which the respondents, in virtue of several intervening transmissions, have acquired right, and which contain the following clause:—"Declaring always that the house to be built upon the steading of ground hereby feued, and the houses to be erected on the other parts of the compartment or division to which it belongs, shall not exceed two square storeys in height, besides a sunk storey in front to either of the said streets . . . . . which last mentioned provisions, regulations, and conditions, specifying the dimensions of the said streets and other matters therewith connected, shall be engrossed in the infeftment to follow on this feu-contract, but may not be necessary to be engrossed in the subsequent dispositions, infeftments, and charters of the whole or part of the lands above feued, providing always that the same be therein referred to as contained in the original investiture, specifying the dates of this feu-contract and the date and registration of the infeftment to follow hereon; and the disponees of the said Thomas Brown, and his successors in said lands, shall be expressly taken bound to observe and fulfil the same, and shall also be taken bound, if required, to subscribe a copy thereof to be kept as a table of regulations for preserving the utility and ornament of the said streets in all time coming. And in these terms the said William Mure and Robert Davidson bind and oblige themselves, as trustees foresaid, and their successors in office, duly and validly to infeft and seize the said Thomas Brown and his foresaids, upon their own proper charges and expenses, in the lands above feued."

The complainers aver:—"(5) When the said respondents acquired the said feu, there existed thereon a house or building of the height, in so far as fronting George Street or Renfield Street, of two square storeys above the sunk storey. The respondents have pulled down said building to the extent at least of the front to George Street, and part of the front of Renfield Street; and at the date of presenting the note of suspension, they were intending, in contravention of the foresaid conditions, restrictions, prohibitions, and other clauses which form real liens and burdens on their feu-right, to erect in its stead a building of the height of not less than three square storeys fronting George Street, as appeared from the plans of their intended buildings, which they were and are again called on to produce; and they had further, in contravention as aforesaid, commenced to erect a third storey on the house or building where it fronts Renfield Street. Since the note was presented they have continued, and are continuing in contravention as aforesaid, the erection of said third storey on the Renfield Street front, and have commenced the erection of a third storey fronting George Street. (6) By the original feu-contract above specified, the south boundary of said subjects, being the boundary towards George Street, is declared to be 'a straight line running parallel with the middle line of George Street, and situated at the distance of thirty feet northward therefrom,' and the boundary on the east, being the boundary towards Renfield Street, is declared to be 'the west side of Renfield Street.' The *solum* of both George Street and Renfield Street, adjoining said feu, belongs *in pleno dominio* to the complainer. *Quoad ultra*, and under reference to the statutes mentioned by the respondents, the statements in the answer are denied, except in so far as coinciding herewith. (7) The operations complained of interfere with and injuriously affect the utility and ornament of George Street and Renfield Street. The complainer has repeatedly desired and required