ing bears that the cargo was shipped [*reads*]. The obligation on the consignees is, that they shall pay "freight for the goods according to the charter-party, with per cent. primage and average accustomed." The reference to the charter-party in this bill of lading is only for the amount of the freight. But I think it is a well settled principle of our law that a reference of that kind is to be read as importing into the bill of lading only what is expressed, as, in the present instance, the amount of the freight. Therefore there is not here a transference to the bill of lading of anything except the obligation of payment of freight, and therefore, on the face of these documents, there is not in law any liability against the consignees but for the money. It is quite true that, notwithstanding, a consignee may become liable for demurrage. He may incur liability through his own fault or negligence. It is difficult to define under what circumstances such fault will be established, but it was a safe rule laid down in the case of *Wegener*, that such a question, when not solved by the terms of the shipping documents, was a question for a jury; in short, that when a shipmaster claims demurrage against a consignee, he must show that he has a case in fact. It lies on the pursuer, in the first instance, to show that he has such a claim; and, looking at this proof, I see no such claim made out. The case is peculiar. It seems to turn very much on whether a certain letter was given to the shipmaster before sailing from the foreign port by the shipper, to be delivered or posted to the consignee on arrival here. If that letter was given, the fault lies with the shipmaster. If not, then an inquiry would arise, In what state of knowledge or information were the consignees? The proof is not satisfactory either one way or another, and that is not a case in which the pursuer of such an action is entitled to prevail. But, further, if we are compelled to decide it as matter of fact, the balance of evidence—that is, of so many words which we have written down before us—is in favour of the defender, for two witnesses swear as to such a letter being delivered, and the only evidence to put against that is the evidence of the master himself. Therefore, on the whole matter, I am inclined to adhere.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

Agent for Pursuer—Wm. Mason, S.S.C.

Agents for Defenders—J. & R. D. Ross, W.S.

Friday, June 19.

MACKENZIE *v.* DRUMMOND'S EXECUTORS.

(*Ante*, iv, 231.)

Jurisdiction—Foreign—Executor—Action of Transference—Litiscontestation. Held that the possession of a heritable estate in Scotland by one of two foreign executors, on his own account, did not found jurisdiction against them *qua* executors, either (1) in an original action, or (2) in an action of transference, whether there was litiscontestation or not.

Mackenzie of Seaforth brought an action of damages against Henry Dundas Drummond of Devonshire Place, Portland Place, London; and, on 22d July 1867, obtained a verdict in which the damages were assessed at £300. On 25th July Drummond died—Mrs Drummond, his widow, residing in London, and Thomas Dempster Gordon of Balmaghee in Kirkcudbrightshire, but also resident in London, being appointed his executors. Mackenzie now brought this action of transference against these executors, but they pleaded that they were not subject to the jurisdiction of the Court.

The Lord Ordinary (Jerviswoode) pronounced this interlocutor:—"Finds that the defender, Mr Gordon, is personally subject to the jurisdiction of this Court, but that the other defender, Mrs Drummond, is not so: Finds that the defenders, as the executors of the deceased Henry Dundas Drummond, have obtained probate in the Court of Probate in England, and that administration of his estate has been granted to them accordingly: Finds that the object of the present action is to transfer against the defenders an action which was in dependence in this Court at the date of his death, against the deceased; therefore decerns in terms of the conclusions of the summons," &c.

The defenders reclaimed.

Fraser and Clark for reclaimers.

Young and Shand for respondent.

At advising—

Lord President—This reclaiming note raises questions of very considerable importance, and I regret that the Lord Ordinary has not more fully explained the grounds on which he has arrived at the result of sustaining the jurisdiction of the Court, for, after the fullest consideration, I am unable to arrive at the same conclusion.

The original action was raised by the pursuer of this transference against Henry Dundas Drummond, a gentleman then residing in Scotland, and in that action he obtained a verdict, on 22d July 1867, for £300. But before that verdict could be applied, that is, before the next session of the Court, the defender died, and he is represented by Mrs Sophia Jane Drummond, his widow, and Mr Thomas Dempster Gordon, a gentleman who is resident and domiciled in England, as Mrs Drummond also is; but Gordon is owner of a landed estate in Scotland, on which however he is not resident, though he occasionally visits it. In these circumstances, it is proposed to transfer the original action *in statu quo* against these two persons as executors of the deceased defender in the original action, the effect of which would be to enable the pursuer to go on and obtain decree for the sum in the verdict, and to enforce it against the executors and the executry estate. The question is, whether this Court has jurisdiction against the two defenders called in the transference? It is said, in the first place, that there must be jurisdiction, because one of the two, Mr Gordon, has a heritable estate in Scotland. There can be no doubt that if this action was directed against him for an individual debt, the possession of that heritable estate would be sufficient to found jurisdiction. But it is not said that Mrs Drummond has any heritable estate in Scotland, or that she is subject to the jurisdiction of the Court in any ordinary way. The question on this first point is, whether the possession of a heritable estate in Scotland by one of two foreign executors on his own account, is sufficient to give this Court jurisdiction against the executors? I am humbly of opinion that it is not, and that on principle there is no foundation for such jurisdiction at all. If decree were obtained against the defenders, that decree could not be enforced against that heritable estate, and that probably is a conclusive test of the matter.

But then, it is said farther, that there is a pecu-

liarity here, from this being an action of transference; and that, in consequence of the defender in his original action having been subject to the jurisdiction of this Court, and the action having gone on against him to the extent of a verdict being returned against him for a sum of money, and by reason of that alone his representatives, though not subject personally to the jurisdiction, are so in their representative capacity. That is a question of very great importance, and if I thought it an open question I should deal with it very seriously, and I should have desired more argument than we have had; but I am satisfied that it is not an open question, but has been decided by two judgments of this Court. I am not sure that I agree with the views of some of the judges in the cases I refer to as to the import of *Dundas* (13 December 1743, M. 2038). My impression is, that *Dundas*, if uncontradicted by later decisions, would be an authority the other way. But that is not of much consequence, for the later decisions settle the point so far as raised in the case before us.

The first is the case of *Reoch* v. *Robb* (14th May 1831, 9 S. 588), in which a foreigner, cited in an action of transference as the representative of a deceased defender, was held not liable to the jurisdiction of the Court. The point is stated in the rubric as quite purely raised, but it is important to observe that a question might have been raised whether there was or was not litiscontestation in the original action. That is not clear, but, whether or not, the judgment did not depend on any such question. The doctrine, as announced in the rubric, is clearly stated by Lord Gillies, who says,—"It is said that an action of transference is different from an original action against a foreigner; and that if the original action was raised against a deceased relative, it may be transferred against his representatives, though domiciled abroad. But this is erroneous. An action of transference cannot effectually proceed against any defenders who are not amenable to the jurisdiction of this Court." Now the other Judges, though not expressing themselves in quite such clear terms on the abstract question, appear to me to proceed on the same ground. Then, in the later case of *Cameron* v. *Chapman* (9th March 1838, 16 S. 907), an action had been raised against an Englishman here, jurisdiction being founded on arrestment, and there were also arrestments on the dependence. The defender, who was edictally cited, died before expiry of the *inducice*, and the action was called while his decease was still unknown; thereafter, without a new arrestment having been used, an action of transference was brought, and decree taken in absence, against his widow, also domiciled in England, alleged to be his executrix, but who had not confirmed or taken any steps to connect herself with the effects arrested. The first question was, whether, seeing the original defender had died after citation, but before expiry of the *inducice*, the process was a depending process capable of being transferred; and second, if capable of being transferred, whether the Court had jurisdiction to decern in the transference against the widow who was domiciled in England? On this second point the opinion of seven of the consulted judges is to this effect:—"The ground on which the defenders chiefly rely is, that representation alone produces this effect, that is, that because the action has been correctly brought against the predecessor, his obligation to appear and defend necessarily transmits against his successor. This argument is plainly unsound. Even in the case of an action brought against a native, resident in this country, and therefore answerable to our courts *ratione domicilii*, which is the primary ground of jurisdiction and the most effectual of all, a foreigner admitted to represent him is not answerable on that account. This was expressly decided in *Reoch* v. *Robb*." Now these two cases standing together, it is impossible to dispute the general proposition, that when an action has been brought against a party subject to the jurisdiction of the Court, and he dies before judgment is obtained, that action cannot be transferred against his representatives, unless they themselves are subject to the jurisdiction.

But it is contended, with some plausibility, that these two cases are distinguishable from the present, because it does not appear that in the former there was litiscontestation, and it is clear in the latter there was not. In the present case, however, there is certainly that, and something more; and it is said that the contract of litiscontestation creates an obligation separate from and additional to the original obligation on the defender, and which the original action was brought to enforce. That is quite sound, and I should be sorry to impugn the doctrine of litiscontestation as established in our law. But suppose there is an additional contract created by litiscontestation, and that that will transfer against the representatives of the deceased, still the matter lies on *obligatio tantum*, and if you seek to enforce against a foreigner you are still liable to this objection, that he is not subject to the jurisdiction of the Court. Therefore that argument adds nothing of strength to the pursuer's case, and does not detract from the authority of the cases I have mentioned, which proceed on the broad ground that, whether there is litiscontestation or not, a transference will not lie against a foreign executor who is not otherwise subject to the jurisdiction.

Therefore, I think the Lord Ordinary's interlocutor must be altered, and that we must sustain the objection to the jurisdiction.

Lord Curriehill concurred.

Lord Deas—There may be considerable hardship on the pursuer here. He brought his action against the defender, and got his verdict, and nothing remained to be done but to pronounce decree, unless there were a motion for a new trial. Then the defender died. Certainly it would be very expedient if the action could go on to a conclusion against the representatives of the defender. But I am disposed to think that we have no jurisdiction. If this had been an action against the defender Gordon individually, there is no doubt that he would have been subject to the jurisdiction of the Court, and there is no doubt that if he had held this estate for himself and the other executor, *qua* executors, then there would be jurisdiction. It is not necessary to inquire whether, when a sole executor has a heritable estate in Scotland belonging to himself, that founds jurisdiction over him *qua* executor, for here there are two executors, and the executry estate is all vested in these two jointly. Suppose we held that if they both had heritable estates in Scotland there would be jurisdiction,—though on that I offer no opinion—that would not solve the case where one of them is not subject to the jurisdiction at all. So far as we see, Gordon cannot touch the executry estate without his co-executor's concurrence. If Gordon had realised the estate,

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