

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 feuair, 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 infert 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 after-mentioned, 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 infertment to follow on this feu-contract, but may not be necessary to be engrossed in the subsequent dispositions, infertments, 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 infertment 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 infert 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

the respondents to desist from these operations, and to conform to the express conditions of their said feu-right, but the respondents have refused to do so, and persist in the same."

The respondents averred—“(3) The property was purchased by the respondents to be used as a branch of their bank. With that view, the front wall of the building has been taken down to the base, and they have re-erected it to the height of three square storeys. They have taken down the third storey fronting Renfield Street, and the old offices and building adjoining, and they have re-erected the whole building fronting Renfield Street to a uniform height of three square storeys. Plans of the proposed operations were submitted to the conterminous proprietors, and to the superintendent of streets and buildings of the city, and they have been approved of and sanctioned by the Dean of Guild Court. These operations are now completed. The new building is handsomer and more valuable, and yields a higher rental than the previous building. The feu-duty payable from the steading is consequently better secured.

“(4) The complainer is the superior of the lands of Blythwood, on which West George Street, St Vincent Street, Regent Street, and Bath Street, are chiefly formed. These streets run parallel from east to west. They are intersected at right angles by Renfield Street and other streets, also on the complainer's lands. When these streets were, early in the present century, laid off, the building stances therein were acquired by the feuars for the purpose of building dwelling-houses of a superior description. Certain regulations, professing to be for the utility and ornament of the streets, are engrossed in all the feu-rights. The lands of Blythwood were then beyond the municipal boundaries of the city, and were not subject to its police, and therefore these regulations were drawn up, embracing police provisions relating to the cleansing of the streets, sweeping of the pavements, lighting, draining, &c. These were solely intended for, and were conceived in the interests of the feuars.

“(5) Among these regulations, is the provision with regard to the height of the buildings to be erected by the feuars which is set forth and founded on by the complainer. The same regulations, including this provision, are in all the feu-contracts in terms of which building stances in the above streets have been feued out for the Blythwood estate. They are, and have always been dealt with by the superior as being for the benefit of the feuars, and have not heretofore been enforced by him contrary to their wishes. The feu-contracts provide that these regulations shall be engrossed in the infetment to follow thereon, but that it shall not be necessary that they be engrossed in the subsequent transmissions of the feu; while there are other stipulations in the feu-rights which are declared to be real burdens and servitudes affecting the subjects, and these are required to be engrossed in all future transmissions, under a penalty of nullity of the same. The explanation in answer is denied.

“(6) The demand for counting-houses and shops to the west of Buchanan Street having greatly increased during the last twenty years, many of the houses in the streets abovementioned have been converted into shops and counting-houses. In some instances the buildings have been altered, and in other instances the buildings have been entirely taken down and re-built. A large proportion of the houses which have been thus altered or re-built

exceed the height of two square storeys and sunk storey specified in the title deeds. The restriction has, in some cases, been abandoned by a formal deed entered into by the feuars themselves, and in many instances the restriction has been disregarded without any deed whatever.

“(7) West George Street, so far as it is formed on the lands of Blythwood, consists of six compartments, and is built from end to end. In every one of these compartments houses have been erected in excess of the height specified in the title-deeds. Renfield Street consists of seven compartments, and is also built from end to end. There are now only two buildings in that street that do not exceed two square storeys and sunk storey, many of the houses being as high as four square storeys. These buildings were erected with the complainer's full knowledge, and without objection on his part. In these streets, and in others which have been all feued off, the complainer has never before interfered to prevent the feuars from building as high as they thought best.

“(8) By minute of agreement, dated 3d July 1858 and subsequent dates, entered into by all the then proprietors of the north side of the compartment in West George Street, of which the respondents' feu forms part, it is agreed that the clauses creating the restrictions contained in the respective title deeds, respecting the height of the buildings shall be held *pro non scriptis*, and that the houses in the said compartment may thenceforth be built or raised by any proprietor to such height to the front as he may think proper, not exceeding four square storeys above the sunk storey. The said minute was recorded in the Particular Register of Sasines on 2d February 1859, and in the Books of Council and Session on the 6th day of May of that year. It is referred to.

“(9) The north side of the said compartment consists of seven steadings. Subsequent to the date of the said minute, five or six of these steadings changed hands, and an additional storey has since been added to one of them. The buildings on two of the remaining steadings which immediately adjoin the respondents' tenement have been entirely taken down, and in their stead a large handsome building of three square storeys and sunk storey has been erected. The south side of the same compartment consists of nine tenements. The height of four of these tenements has been increased from two square storeys and sunk storey to three square storeys and sunk storey. These operations were carried out several years ago. The complainer objected to none of them, and induced the public to believe that he acquiesced in the abandonment of the restriction, and, accordingly, the respondents purchased the subject in the belief that the restriction was abandoned, and paid for it on that footing.

“(10) The height to which the respondents have raised their building is precisely the same as that to which the buildings on three of the steadings on the same side of the compartment, and the buildings on four of the steadings on the opposite side, have already been erected. It consists of the same number of storeys fronting Renfield Street as a great part of it did before, and does not exceed the height of any other tenement in that street that has been erected within the last thirty years. Instead of doing injury to the utility and ornament of the streets, both will be materially enhanced by the building, and the restriction which the complainer seeks to impose is quite incompatible with the extension of the city.

“(11) The complainer does not set forth any injury which he or the feuars will sustain by the proposed operations, and this action is not raised with the object of securing against such injury. In point of fact, no such injury can result from the said operations, nor has the complainer ever alleged to the respondents the risk of any injury to the utility or beauty of these streets as his reason for insisting in imposing this restriction, nor indeed any reason whatever.

“(12) All the property in the streets above-mentioned, belonging to the complainer, has long been feued out to full value. He does not now possess any ground in any of the streets before mentioned.”

The complainers plead—“(1) The operations complained of, being in contravention of express conditions which form real liens and burdens upon the feu-right in virtue of which the respondents hold the subjects specified, the complainer, as the immediate lawful superior of these subjects, is entitled to have the said operations suspended, and to have interdict granted against the respondents as craved; (2) The operations complained of should be interdicted in respect the same interfere with and injuriously affect the utility and ornament of the streets called George Street and Renfield Street.”

The respondents plead—“(1) The respondents, as proprietors of the said subjects, are entitled to make the alterations and additions proposed to be made as above set forth; (2) The complainer has no right, title, or interest to insist in this application for interdict; (3) The complainer is not entitled, after such a lapse of time and change of circumstances, to impose an arbitrary and extreme restriction, such as that contained in the feu-charter, to the injury of the feuars and the obstruction of the natural advance of the town; (4) The contract founded on by the complainer having been abandoned, or, at least, intentionally disregarded and departed from, and that with the knowledge and consent of the complainer, its provisions are now inoperative, and cannot be enforced; (5) The complainer is barred from objecting to the proposed alterations and additions, regard being had to the manner in which he has acquiesced in and consented to the repeated violation of the said contract by other feuars in West George Street, and in Renfield Street, and the neighbouring streets; (6) The complainer having, by his acquiescence, as above set forth, induced the public to believe that the contract he now founds upon was inoperative, and the respondents having purchased the said subjects in that belief, the interdict should be refused, with expenses.”

The statements and pleas of parties are substantially repeated in the action of declarator, in which, *inter alia*, there is the following conclusion:—“And it ought and should be found and declared, by decree foresaid, that under and in virtue of said feu-contract and instrument of sasine, and said charters, dispositions, infestments, transmissions, writs, instruments, and titles, and the conditions, provisions, restrictions, prohibitions, clauses irritant and resolutive, and others therein contained and engrossed or referred to, and specially and without prejudice to said generality, the condition, provision, restriction, prohibition, and declaration above particularly specified, the defenders, as the assignees or successors of the said Thomas Brown in the said feu, are validly and effectually prohibited from building or erecting any house, building, or erection on the area or piece of ground above described, exceeding

two square storeys in height, besides a sunk storey in front, to either of the said streets called George Street and Renfield Street, and from making dormer windows or windows in what are called the uprights of French roofs on the roof of said house, building, or erection, either to George Street or Renfield Street, without prejudice to their opening skylights or hatch windows: And it ought and should be found and declared, by decree foresaid, that the defenders have erected, and are erecting, a house, building, or other erection of not less than three square storeys in height above the sunk storey on the front to George Street, and on the front to Renfield Street, contrary to and in contravention of the said conditions, provisions, restrictions, prohibitions, clauses irritant, resolutive, and others: And the defenders ought and should be decreed and ordained to pull down and remove said house, building, or other erection, in so far as it exceeds two square storeys in height above the sunk storey in front to either George Street or Renfield Street, and to complete said house, building, or other erection in conformity with the said feu-contract, so that the same shall not exceed two square storeys in height above the sunk storey in front to either of said streets, and shall be covered with a slated roof, but shall not have dormer windows or windows in what are called the uprights of French roofs in the roof of said house, building, or other erection, either to George Street or Renfield Street, without prejudice to opening skylights or hatch windows.”

The Lord Ordinary (JERVISWOOD) pronounced the following interlocutor:—

“The Lord Ordinary having heard counsel, and considered the closed records, in the conjoined actions, with the proof adduced, minute of admissions for the complainer, No. 30 of process, minute of admissions for the defenders, No. 27 of process, productions, and whole process: Finds, as matter of fact, that, under the original feu-contract, entered into in the year 1825, between the Parliamentary trustees upon the lands and estate of Blythswood, on the one part, and Thomas Brown, physician in Glasgow, on the other part, there was disposed in feu to the said Thomas Brown, his heirs and assignees, the area or piece of ground since acquired by the defenders, the Clydesdale Bank, and now possessed by them, which is situated upon the north side of George Street and west side of Renfield Street, Glasgow, as referred to in the record; and that, under the said feu-contract and subsequent progress of titles, the said defenders hold the said area or piece of ground, subject to the condition and declaration, *inter alia*, 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:” And finds that the defenders were, at the date of the present suspension and interdict, in the course of erecting, and have since erected, upon the said area or piece of ground, a house or building fronting in part towards George Street, and in part towards Renfield Street aforesaid, which exceeds two square storeys in height, besides a sunk storey; and finds that the defenders have failed to prove that the pursuer has abandoned his right to object to the said building; and finds, as matter of law, with reference to the preceding findings, that the titles under which the defenders hold the subjects in question are so framed as to operate, in law, an

effectual prohibition, enforceable at the instance of the pursuer against violation or infringement of the condition and declaration aforesaid; and, with reference to the preceding findings in the suspension, suspends and interdicts as craved, and decerns; and in the declarator, finds, decerns, and declares in terms of the conclusions of the summons; Finds the pursuer entitled to expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report."

"*Note.*—This case is of serious importance, more especially to the defenders, and it has undergone full investigation and discussion before the Lord Ordinary. It is not without reluctance that the Lord Ordinary has come to the conclusion that the pursuer is here entitled to obtain judgment in his favour, as it seems abundantly obvious that considerable laxity had, at one time at least, prevailed in the enforcement of the obligations imposed by the terms of the feu-contracts connected with his property. But, nevertheless, the terms of these obligations are sufficiently specific, and the Lord Ordinary has been unable to see grounds on which to deny effect to them in a question with the present defenders. How other parties have been allowed to erect buildings in George Street or elsewhere, in face of their titles, or on what conditions they did so, seems scarcely to be relevant for inquiry here. The question for decision is, Are the defenders entitled to plead laxity on the part of the pursuer, in the case of others, as a defence against his assertion of his right here? The Lord Ordinary cannot answer this in the affirmative, and must therefore give effect to the action.

The respondents reclaimed.

YOUNG, CLARK, and LANCASTER for them.

SOLICITOR-GENERAL and JOHN MARSHALL for complainer.

At advising—

LORD COWAN—The interlocutor under review disposes of an important question affecting the relative rights and position of superior and vassal. The Clydesdale Bank, who are the respondents and defenders, contemplating the erection of a building to serve as a branch bank, became purchasers of property in West George Street, and having fronting also to Renfield Street, held in feu from the complainer and pursuer. The original feu-contract was granted in 1825, and contained certain stipulations in reference to the style and character of the buildings to be erected, which were repeated in the several transmissions of the property, and were engrossed in the title of the defenders on their acquisition of the subject in 1866. The question is, Whether, in the changed state of circumstances since 1825 affecting the locality, the superior is now entitled to enforce the special condition of the contract set forth in the records in the conjoined actions?

West George Street is composed of compartments, and is entirely covered with buildings; and this also is the case with Renfield Street. The compartment in West George Street on which the defenders' building is situated contains six feus on the north side, and three feus on the south side. All the feu-contracts of the feus in that compartment contain the same restrictions as to the height of the buildings to be erected. The purpose of that restriction is stated to be to secure "the utility and ornament of the streets, both George Street and Renfield Street," to both of which the defenders' building, being at the corner of the compartment, has frontage; and the declaration is "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." And it is subsequently provided that the disponees of the original feuars are to be expressly taken bound to observe the conditions of the original contract, and, "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."

From the proof which has been led in the case, it appears, (1) that in 1854 an agreement was entered into among the proprietors (purporting to be with consent and concurrence of the superior) on the south side of West George Street, consenting and agreeing to pass from the condition in their respective feus with regard to the height of their houses to the front of West George Street, and which agreement was recorded in the Register of Sasines in May 1854. (2) That in the year 1858 a similar agreement among the proprietors of subjects on the north side of the street, including the proprietors at the time of the subjects now belonging to the Clydesdale Bank, was entered into, consenting that the buildings to be erected on the several feus might be raised to such height in front as the proprietors might choose, not exceeding four square storeys above the sunk storey, and renounced all objections competent to them, and obliged themselves and their successors to abide by the agreement, and at no time to quarrel or impugn the same—which agreement was recorded in the Register of Sasines on 2d February 1859. (3) That of the seven steadings composing the north side of the said compartment, one of them has had an additional storey added to its former height, and two others, immediately adjoining the property of the defenders, have been entirely taken down and a building of three square storeys and sunk storey has been erected in their stead; while on the south side of the said compartment the height of four of the nine tenements of which it consists has been increased from two to three square storeys and sunk storey. (4) That these operations were carried out several years ago, without any objection by the complainer or those acting for him in the management of his property. And (5) that, while the pursuer personally is not shown to have been cognisant of the change thus effected in the character of West George Street, his commissioner and agent, the late Mr Jonathan Ranken, was communicated with on the subject, and verbally intimated that if the other feuars did not object to this increased height of the erections in West George Street, he would not interfere.

The purchase of the subject now belonging to the defenders was made in this state of matters; and in the belief that the restriction would no longer be attempted to be enforced, but had been passed from, and was virtually abrogated. They accordingly procured a plan of a suitable and handsome building of a height exceeding that specified in the feu-contract, and proceeded with its erection until it attained about two storeys in height, when they were served with the suspension and interdict craving that the respondents might be interdicted from erecting any building exceeding in height two square storeys, besides a sunk storey, and that they should be ordained to remove any erection in so far as the same has been erected in excess of the foresaid height in front. Thereafter

the conjoined action of declarator was instituted, concluding to have it declared that the defenders have erected a building exceeding the height allowed by the feu-contract, and that they should be ordained to pull down and remove the said erection in so far, as it is in excess of the height permitted by the feu-contract.

That the defence stated to these actions may be fully appreciated, it is necessary to keep in view the following considerations:—

In the first place, that the restriction inserted in the feu-contracts is expressly declared to be the securing of the "utility and ornament" of the streets, according to the views which the superior entertained of the way in which these objects could be best attained.

In the second place, that with this view all the feuars in the compartment on both sides were taken bound to comply with this restriction, and the obligation to that effect imposed on any one of them is bound up with, and in express terms made part of, the common obligation imposed upon all.

And, in the third place, that this restriction had not in view any personal object or interest of the superior, but was stipulated for in order to the benefit of his feuars, to the utility of their possession of the subjects, and to the ornament of the street in which their buildings were situated.

Now, the whole feuars are at one in holding it to be for their interest to depart from this restriction,—in repudiating it as neither conducing to their utility nor to the ornament of their several possessions. And it is of importance to observe, as to this last matter, that while the superior averred in the record (art. 7) that "the operations complained of interfere with and injuriously affect the utility and ornament of George Street and Renfield Street," he has led no proof whatever of that averment, which is, on the contrary, disproved by the defenders in the course of the proof, one of the witnesses being the pursuer's master of works.

The title of the suspender to bring this action is under the feu-contract, and the question is, Has he an interest, and can he persevere in enforcing the regulations of the contract? Before entering upon this, I must take the opportunity of saying that the distinction taken at the Bar,—that this is a case raising purely equitable principles, and though decided in favour of the defender, would not limit an action of damages at the instance of the complainer,—is one to which I cannot assent. As a Court combining equity and law, the pursuer raised the only issue that was competent to him by trying the question in a suspension and interdict, and afterwards bringing a declarator. No doubt cases come up which require the peculiar application of equitable principles, and others which require a stringent application of legal ones, but the great mass of cases are those in which we take equitable considerations into view in judging of legal rights, and legal considerations in judging of equitable claims. If, having brought the action of declarator, he followed up that by a petitory demand, which would be the proper course, he could raise no question of damages if he failed in the declarator; it might be different if he succeeded. But in disposing of the case as we must do, let us consider what are the principles applicable to its decision. I think there is a distinction between conditions inserted into the contract for the benefit of the superior, and conditions for the benefit of the co-feuars. I think that this is a condition which we

must keep in view here. His Lordship proceeded to apply the distinction to the present case, pointing out that the condition must be held to be of the latter class; and, after saying that Mr Campbell had no interest to enforce the condition, proceeded—But I think that, apart from the question of interest, Mr Campbell is bound by the tolerance or consent of Mr Ranken. Then there is the consideration that four of seven of the feuars have *de facto* been allowed to erect buildings in the manner which is here challenged. No attempt seems to have been made to get them to reduce these erections to the standard height. And, therefore, this is an attempt by the complainer to enforce against one feuar a condition in which he has no interest, and the violation of which he has tolerated in others. I think the complainer ought to satisfy the Court that he has the power to call upon all the feuars who have disregarded the condition of their feu-contract to act upon it, and to enforce it. We cannot take it off his hands that he will be able to do that if he gets a judgment now. He must bring his action for that purpose; and we are not to assume that he would succeed. I see no room, therefore, for pronouncing judgment against the defender.

LORD BENHOLME concurred.

LORD NEAVES rested his judgment mainly on the consideration that the complainer, having tolerated the violation of the condition by the other feuars, was barred from pleading it against the defender.

The LORD JUSTICE-CLERK delivered no opinion, having been absent from the discussion.

Agents for Complainer—H. & H. G. Gibson, W.S.

Agents for Respondents—Ronald & Ritchie, S.S.C.

Tuesday, June 23.

## FIRST DIVISION.

JENKINS *v.* ROBERTSON AND OTHERS.

(*Ante*, iii, 374.)

*Expenses—House of Lords—Res judicata—Preliminary plea—Prescription—Competency.* In a declarator of right of way the defenders pleaded *res judicata* in respect of proceedings in a previous action. The House of Lords, reversing the judgment of the Court of Session, repelled the plea, but made no mention of expenses. The pursuer moving for expenses of discussing the preliminary plea, the Court held that they could competently dispose of the question, but, on the merits, *refused* the motion.

In 1863 Jenkins and other parties brought an action of declarator of public right of way for foot passengers along the right bank of the river Lossie, over the properties of North College and Blackfriars' Haugh. The defenders, Robertson and others, proprietors of the ground, pleaded *res judicata* in respect of a decree of absolvitor obtained by them in a previous action of the same kind brought by the Magistrates of Elgin. It appeared that in 1860 the same question of right of way was tried between the magistrates and the present defenders, and a verdict was returned for the pursuers; but that verdict was subsequently set aside as against evidence. After sundry negotiations the action was settled, the defenders being assolizied, and the pursuers paying a certain sum of expenses. In respect of these proceedings in the former action,