sible to constitute a public road for carts over unenclosed ground. But the very circumstance that such ground is naturally open to a tolerated and indefinite use makes it necessary that a very clear and strong case should be made out of regular public traffic, from point to point, along a defined line. I think the jury have altogether misapprehended the general principle applicable to this case, and have assumed as evidence of regular public traffic on a conceived public thoroughfare the mere circumstance of carts being occasionally found traversing a piece of unenclosed private property. The error was the less excusable, that the jury had before them the strong piece of evidence lying in the fact that from 1844, when the ground was enclosed, downwards, there had neither been any use of this track as a public road, nor any judicial claim for it advanced. The present action was not raised till 19th October 1870, after about twenty-six years of cessation of all use of the alleged road. This very important consideration, as well as the others material in principle to the determination of such a question, the jury appears to me to have altogether overlooked.

I do not enter into any detailed consideration of the alleged evidence of the use of the way for foot passengers. The same general observation is here applicable, that a public right of way, even for foot passengers, over open unenclosed ground, where every body is allowed by tolerance to walk in every direction, can only be made out by very stringent evidence of regular and definite use from point to point, in the apparently understood exercise of a public right. But I do not require to go farther to support the conclusion that there ought to be a new trial. I think that justice will not be done between the parties without the points which, I think, have been misapprehended on this trial, being submitted to another jury.

LORD GIFFORD—The great central fact in the case, about which there can be no dispute, seems to be this, that during the whole period of forty years, during which the use founded on by the pursuers was enjoyed, the Gallowhill was absolutely and entirely unenclosed and open ground. Now that is a very unfavourable case for establishing a right of way over such open ground, and one would require very precise evidence to establish a right of way in such circumstances. I think the pursuers have entirely failed in the purpose for which they put in the old titles of the defender; and as to the parole evidence, when we keep in view the common character of this hill, and the fact that it was a part of the large estate of Milton, large deductions must be made from that evidence before we can make it evidence such as a jury could look at. All the use of the tenants of Milton estate must be left out; then, that of people carrying peats from the Milton estate, and carrying stones from the quarry upon the hill itself—as people were allowed to do apparently gratis—and then all the traffic to and from Dunloskinbeg; and when these deductions are made, very little evidence remains to establish the right of way in question. I have come to the conclusion, without any difficulty, that the evidence was not, in law, sufficient to support the road here claimed. There is always a delicacy in speaking of insufficient evidence, because that question is the province of the jury, but in a case of this kind, where the thing is not pure fact, but fact with a legal aspect, there is less difficulty in the Court interfering. The question of pure fact was not put to the jury, whether people went that line of road for forty years, but whether, for forty years before the date mentioned in the issue, there was a right of way. So it was not the mere fact of the going, but the legal aspect and character of the going, that was put to the jury, and that is a case of the kind where a jury is more apt to go wrong than where it is matter of pure unqualified fact that is put to them. I am therefore of opinion that the evidence was clearly insufficient to support the verdict.

The rule made absolute, and a new trial granted, reserving in the meantime the question of expenses.

Agents for the Pursuers—W. F. Skene & Peacock, W.S.

Agents for the Defenders—Duncan, Dewar, & Black, W.S.

Tuesday, February 28.

SECOND DIVISION.

MRS GRIEVE OR DINGWALL *v.* ISABELLA BURNS AND OTHERS.

Decree — Minor — Curator ad litem — *Reduction.* In an action of reduction at the instance of a lady, who attained majority in 1844, of certain decrees of constitution and adjudication obtained against her in 1827—she not having a *curator ad litem* appointed to protect her interest—*Held* (1) That said decrees must be considered as having been pronounced in absence, and were voidable; but (2) that the *onus* lay on the pursuer to show that they were erroneous on their merits; and (3) that she had not done so; and defenders assoilzied.

This action was at the instance of Mrs Dingwall, daughter of George Grieve, and grand-daughter of James Grieve, Ballomill, Fifeshire, against Miss Burns, daughter of James Burns, and granddaughter of James Burns senior, tenant in Peterhead; D. M. Makgill Crichton of Rankeillor, a pupil; and William Wood, accountant, his factor *loco tutoris*; and James Nisbet, residing in Ballomill. The object of the action was to reduce and set aside certain decrees obtained in 1827 following on bills and accounts alleged to have been owing by George Grieve to James Burns senior, in all amounting to £250, by which the small holding of Ballomill, with £50 per annum, was, in 1828, adjudged from the pursuer as heiress of her father and grandfather, and became the property of James Burns senior, by whom part was sold in 1839 to the defender Crichton's grandfather, and the remainder in 1847 to the defender Nisbet.

The pursuer stated that the property in question belonged to her grandfather, James Grieve, who died in 1819 or 1820, and was succeeded by his son, her father, George Grieve, who possessed it for about three years, and died in 1822, without having ever made up his title. She also stated that she was born in 1821, and was a pupil when the decrees in the actions of constitution and adjudication were pronounced against her, and that she had no tutor or other guardian, and that no steps were taken to protect her interests. It was further alleged that the bills were forgeries, and, to the extent of £140, prescribed, and that the other debts

were fictitious. Defences were put in for Mr Crichton and Mr Nisbet, in which they stated that the property had been bought by them or their authors in *bona fide*, and for onerous considerations, and had been since possessed by them; and they pleaded, *inter alia*, that, the decrees having been unchallenged for upwards of forty years, could only be set aside on the head of fraud or falsehood.

The case originally depended before Lord Manor, but after his death a judgment was pronounced by Lord Ormidale, finding that the decrees against the pursuer were decrees in absence, and were pronounced against her when in pupilarity, and that her interests were unprotected. His Lordship also found that the bills were, to the extent of £140, prescribed at the time when the proceedings were taken in 1827; that the pursuer had failed to prove that they were forgeries, or that the sums contained in them were not resting owing; and that the decrees were not absolutely void, but fell to be dealt with as decrees in absence. His Lordship subsequently pronounced a judgment in favour of the defenders, repelling the whole reasons of reduction, and finding them entitled to expenses, but reserving power to modify the same. In a note to this latter judgment, his Lordship explained that the first question raised was whether (the decrees being now held to be decrees in absence) the defenders were bound to establish that they were well founded on their merits, or whether the pursuers were bound to prove that they were not so. His Lordship adopted the latter view. On the merits of the case, his Lordship had previously disposed of the allegation of forgery, and the remaining objection to the bills was that they were prescribed in 1827, and therefore the decrees could be of no force. As it was shown, however, that at that date the whole amounts contained in the bills and accounts were embraced in Sheriff-court decrees, which were valid at that date (though they were decrees in absence), his Lordship was of opinion that the whole sum in respect of which the decrees of constitution and adjudication against the pursuer and the property had followed, was, at the date of those decrees, due and resting owing by the pursuer as representing her father. It was further objected by the pursuer that no proof was adduced in the proceedings in 1827 that George Grieve, her father, was for three years in possession of the property as heir of his father, which was necessary to make his debts a charge against the land. But his Lordship held that the pursuer had not proved this allegation by the only competent means—namely, production of the proceedings in the actions in 1827; and he further observed that in the present action the pursuer admits that her father was three years in possession.

The pursuer reclaimed.

M'Laren for him.

The Solicitor-General and Blackburn in answer.

At advising—

Lord Cowan—Some questions of nicety and importance have been argued in this case, and have been so far disposed of by the Lord Ordinary's interlocutors of 28th March and 25th Oct. 1870. The grounds on which his Lordship has proceeded in assoilzying the defender are fully explained in his notes; and as I concur generally in the views therein stated, I shall advert only to the questions that were more particularly pressed at the recent discussion.

The action at the pursuer's instance is for reduction of certain decrees of constitution and of adjudication obtained against her in absence in July 1827 and 15th February 1828, when she was a pupil, for certain debts alleged to have been due by her father. Upon these decrees and relative charges, and charter of adjudication and infeftment following thereon, possession of the lands adjudged, which belonged to the pursuer's grandfather, has been held and enjoyed for upwards of forty years by the defenders and their authors. The pursuer became of age in August 1844; but it was only in March 1868 that this summons of reduction was brought, on the grounds set forth in the record.

The chief objection contended for is, that the decree of constitution, having been obtained against a pupil in absence, it is altogether null, and not merely to be opened up with the view of ascertaining whether, on the merits, it ought to have been pronounced. So far as appears from the terms of the extract decree, the decree bears to be directed against the pupil as representing her father and grandfather, without mention of tutors and curators. But from the examination of the summons and productions, it is certain, not only that the former was directed against the pupil and her tutors and curators, if she any had, but that there was edictal citation of the summons to the like effect. The decree afterwards obtained, therefore, was not open to the irregularity alleged. On the contrary, it must be held that the action was duly raised against her and her tutors and curators. No doubt decree was taken without the appointment of a curator *ad litem*, and it was consequently in absence. But the effect of this is not to nullify the whole procedure. It is simply to render the decree liable to be opened up, that its merits may be investigated. It appears to me that the Lord Ordinary has rightly stated the law on this point. By the decisions of *Sinclair* v. *Stark*, 15th January 1828, and *Calderhead* v. *Fife*, 26th May 1832, it has been fixed that no appointment of a tutor *ad litem* should take place until appearance has been entered for the pupil, the decree being held to be, in all respects like an ordinary decree in absence. The case of *Craven* v. *Elibank's Trs.*, 9th March 1854, on which much stress was laid by the counsel for the pursuer, was peculiar in this respect, that there were tutors and curators who had accepted the office, and who were at the same time trustees under the father's settlement; and yet, in the action, while appearance was entered for the pupil and for those parties as trustees, no appearance was made for them as tutors and curators for the pupil; and hence it was held that the pupil was entitled to be reponed against the decree pronounced in the action *in integrum*. These decrees were *in foro*, and could be treated only as such in the subsequent challenge of their validity. I do not think that this decision, therefore, can be held to affect the principle which, as I think, is applicable to the present case.

Dealing with the decree of constitution, however, on the footing of its being held as in absence and to be examinable, there is no good ground on which its validity has been shown to be challengeable. There is no *ex facie* objection to it as was alleged, and the plea that the bills were prescribed, judging from their dates and the date of the summons of constitution, is effectually met by the precepts on the Sheriff's decree, to which the Lord Ordinary refers—were it necessary for the defenders at this distance of time to support the decree on its merits,

I concur, however, in thinking that the *onus* of impugning it *post tantum temporis* lies with the pursuer. And the decree of constitution being unexceptionable, the other procedure taken with the view of having the grandfather's estate attached for the debt thus constituted were quite regular. By the general charge representation as heir of her grandfather was fixed upon her, and the subsequent letters of special and general special charge enabled the creditor to proceed against the lands, and adjudge them for the debt of the pursuer's father, thus constituted against her as his representative. No objection was taken to the regularity of these steps at the recent debate, assuming always the decree of constitution to be unchallengeable.

Something was indicated in the course of the discussion to the effect that it might be competent for the pursuer, even after so long a period, and her continued silence for upwards of twenty years since she came of age, to exercise her power of renunciation. To this there is a good answer, not less in the delay to exercise the privilege, than in the unjust consequences which must result from any such proceeding upon the defender's rights. This is not a case where a decree of constitution is attempted to be founded upon, to the effect of doing diligence on it against the person and effects of the pursuer. The only interest which the defenders have in maintaining the decree is, to uphold the real right by adjudication to the lands which they have so long possessed on their completed title. A renunciation of the succession by the heir when called in the action of constitution does not prevent the creditor from attaching the real estate. It has the effect only of altering the mode of procedure. The decree *cognitionis causa tantum*, which would have followed on the renunciation, would have enabled the creditor to have adjudged the real estate of the father, if any; although the grandfather's heritable property, whose heir the pursuer was as much as she was her father's heir, might not have been adjudgable so long as the pursuer remained unentered. But, in any view, I am clearly of opinion that, supposing it were judicially made (which it has not yet been), renunciation in the circumstances is inadmissible, and not supported by authority or precedent.

The defender has been allowed to put upon record an objection to the right and title of the pursuer to insist in these proceedings for reduction of his completed feudal title in the lands. The plea to that effect, had it been stated at the outset of the litigation, might, I think, have been sustained, and this would have prevented much of the expensive procedure which has followed. Even at this late stage of the process, the Court cannot reject the plea, however unnecessary for the success of the defender upon the pleadings as they stand. For the objection to the effect of voiding the feudal title is good, and can be met only by serving heir to the grandfather; and this again would subject the pursuer to the passive title of the Act 1695, the possession of the intermediate heir for three years being proved. The result is, that the pursuer has neither title nor right to obtain the decree of reduction concluded for in the summons.

The other Judges concurred.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agent for Defenders—James S. Tytler, W.S.

Wednesday, March 1.

FIRST DIVISION.

STEUART *v.* THE BANFF COUNTY ROAD TRUSTEES.

General Turnpike Act, 1 *and* 2 *Will. IV. c.* 43, § 118 —*Occupation of Land by Road Trustees—Damages.* Circumstances in which it was *held* that an action against Road Trustees, though purporting to be for value of land, and damages for compulsory purchase and severance, was really founded upon wrong done, and was truly for reparation or damages, and that consequently it was incompetent after the lapse of the six months specified in 1 and 2 Will. IV., c. 43, § 118.

This was an appeal from the Sheriff-court of Banffshire, in an action at the instance of Steuart of Auchlunkart, brought originally against the trustees for the Keith Turnpike Road, and Charles Green, banker in Keith, clerk to the said trustees, and as representing them. Against the action thus laid it was pleaded that the defenders were not properly brought into Court, because the turnpike road sought to be designated being only a district road, and the defenders being only a district committee of the general body of Road Trustees, and Charles Green merely clerk to the said committee, it was not competent to sue them as a body in the person of their clerk.

The Sheriff (BELL), altering the interlocutor of his Substitute (GORDON), repelled this plea, relying upon § 16 of the General Road Act (1 and 2 Will. IV., c. 43), and upon the cases of *Creighton* v. *Rankin*, 1 Rob. Ap. Cases, p. 99; and *Revey* v. *Murdoch*, 3 D. 888. Since calling of the summons, however, the Banffshire Road Act of 1866 had come into operation, and accordingly the Sheriff recommended that the new trustees appointed under it should be made parties to the action. They were accordingly sisted as defenders.

The summons concluded for a certain sum as the value of a piece of land belonging to the pursuer, "calculated at forty-five years' purchase, being thirty years' purchase for the land and fifteen years' purchase for damages on compulsory purchase and severance, and other injury . . . which land was, during the pursuer's father's lifetime, illegally taken, and has since been occupied by the defenders for the purpose of their trust." The pursuer claimed this sum as payable at Martinmas 1863, with interest since that date; but he also claimed a farther sum for compulsory occupation of the ground from 1844, when he succeeded to the estate, down to Martinmas 1863.

He pleaded—The defenders in the summons having wrongfully, without legal notice to the pursuer, and without making payment to him of the purchase price, taken and retained possession of the ground mentioned in the libel, they were, and the Banff County Road Trustees are, liable to the pursuer in compensation for the past, and a fair rate of purchase for the future.

The defenders pleaded *inter alia*—"The action is excluded by 1 and 2 Will. IV., c. 43, § 118."

This plea was sustained in the Sheriff-court, and the action dismissed.

The pursuer appealed to the First Division of the Court of Session.

R. V. CAMPBELL for him,