lands of Hawkhill, concluding for £150 of damages for wrongous ejectment. The pursuer alleged that by a lease, dated the 2d day of March 1868, the defender let to James Kinloch certain portions of the lands of Hawkhill belonging to him, for a period of ten years from and after the term of Candlemas 1868. By the said lease assignees and sub-tenants were excluded, but it was arranged and agreed to between the parties that Mr Kinloch was to be allowed to subset to the pursuer any part of the ground let. It was further stipulated in said lease that the defender could at any time resume possession of said ground for feuing purposes, he being bound to give the tenant three months' notice for removal of crops. After Mr Kinloch's entry under the said lease he sublet to the pursuer a portion of ground leased to him by the defender. It was agreed that the sub-lease should extend to the same period as the lease in favour of Mr Kinloch, the pursuer being bound to give up possession in the event of the ground being required by the defender for feuing purposes, on getting the same notice as Mr Kinloch.

The defender feued the ground, and the pursuer alleged that the understanding and agreement between them was that the pursuer was to continue possession of the ground until it should be required by Mr Dougall, the feuar. The pursuer alleged that he had prepared and manured the ground for the summer's crop, and the same was all planted prior to 3d May 1870. On or about that date the defender, without any previous notice or intimation, or applying for or obtaining any judicial authority, illegally and unwarrantably took possession of the said ground and crop thereon, and violently ejected the pursuer from the possession thereof *brevi manu.*

The Lord Ordinary (ORMIDALE) approved of the following issue:—

"Whether, on or about the third May, Eighteen hundred and seventy, the defender wrongfully ejected the pursuer from a portion of the lands of Hawkhill, then occupied by the pursuer as a market-garden, and took possession of the crop thereon belonging to the pursuer, to the loss, injury, and damage of the pursuer.

"Damages laid at £150."

The defender reclaimed.

ROBERTSON, for him, contended that in an action of damages for wrongous ejection it was necessary that a title of possession should be set forth by the pursuer (*Macdonald* v. *Chisholm*, 22 D. 1075), and that here there was no relevant averment of a title on which the pursuer could have maintained himself in possession. A verbal lease was not good against a singular successor even for a year, and a verbal arrangement with the defender's author, whom the defender did not represent, was the only title stated. The defender was entitled to take possession of the ground of which he was proprietor, and the price of any crop of the pursuer he might have injured by so doing could not be recovered in an action of damages.

STRACHAN was not heard in reply.

At advising—

The LORD JUSTICE-CLERK—The pursuer alleges that the defender agreed that he should remain until he got three months' notice. He cropped the ground in the meantime. The allegation that he was in lawful possession of the ground, and did not get sufficient notice, is enough to make us send the issue to a jury. I do not say at present what notice is required.

The other Judges concurred.

Agents for the Pursuer—J. B. Douglas & Smith, W.S.

Agent for the Defender—James Somerville, S.S.C.

Tuesday, February 28.

FIRST DIVISION.

MACKINTOSH AND OTHERS *v.* MOIR.

Road—Right of Way—Unenclosed Ground—Evidence, Legal Sufficiency of. Where (1) the right of way claimed passed over an unenclosed piece of ground, unrestricted use of which was allowed by the tolerance of the proprietors to the public, not only for passing to and fro, but also for other purposes, while it remained unenclosed, and where (2) no objections had been made to the obstruction of the alleged right of way for twenty years after the ground was enclosed and planted; and where (3) the evidence failed to show that the use of the public was confined to any definite track, and was in the assertion of a right, and not in the mere enjoyment of tolerance—*Held* that the evidence was not sufficient in a legal point of view to establish a right of way.

Observed, that a right of way may be established by prescriptive use over an unenclosed piece of land, provided that the use has been confined to a definite track.

This was an action of declarator of right of way, and of interdict, brought by Mackintosh and others, inhabitants of Dunoon, against Mr John M'Arthur Moir of Milton, seeking to have it declared that there existed a public road or right of way for horses, carts, and other conveyances, whether with or without wheels, and also for foot passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyll Street of Dunoon; and to have the defender interdicted from shutting up this public road or right of way, and obstructing the pursuers and others in the peaceable enjoyment of it.

The right of way thus claimed was alleged to have run from Hillfoot Street, which was one point upon the high road from Toward to Strachar, across an unenclosed piece of ground called the Gallowhill, and to have again formed the said high road at Argyll Street. This unenclosed ground on the Gallowhill was part of the Milton property, and in the year 1838 the proprietor of Milton had begun to enclose and plant it, which operation was completed about the year 1844. At that time no objection was raised to the shutting up of the alleged right of way, and no use of it was averred subsequent to that date. The pursuers founded upon the use and enjoyment of the public for forty years, or for time immemorial prior to 1844.

The evidence upon which the pursuers rested consisted, firstly, of certain old titles and plans of the properties adjoining the Gallowhill, in which there were supposed to be allusions to, and traces of, the road claimed; and secondly, of the parole evidence of inhabitants of Dunoon, who had resided there during the period previous to 1844. The nature and effect of both these kinds of evidence, sufficiently appear from the opinions of their Lordships.

The case was tried by Lord Gifford and a jury, and a verdict was brought in for the pursuers.

The defender moved for a new trial, upon the ground that the verdict was contrary to evidence.

SOLICITOR GENERAL (A. R. CLARK) and J. A. CRICHTON for him.

FRASER and W. F. HUNTER, for the pursuers, were heard in support of the verdict.

At advising—

LORD PRESIDENT—The issue which was sent to the jury in this case was, "Whether, for forty years, or for time immemorial prior to 1844, there existed a public road or right of way for horses, carts, and other conveyances, and also for foot-passengers, or for any and which of these purposes, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyll Street of Dunoon, in or near the direction shown by the red line on the plan No. 6 of process." The verdict returned by the jury was in favour of the pursuers, and was precisely in terms of this issue, with this exception, that the alternative "or for any and which of these purposes," was properly omitted in the verdict. The question is whether this verdict is now to be set aside and a new trial granted; and the ground upon which the new trial has been sought is that the verdict is against the evidence. Now the evidence consists of two branches. One of these is a collection of ancient plans and titles, which were laid before the jury for the purpose of showing the existence of a highway in the line or direction of the road now claimed by the pursuers; and showing that that highway had existed from a very early period, so far back as the seventeenth century. This part of the case is of a somewhat unusual kind, and if the pursuers' contention had been well founded as regards the import and effect of these titles, it would have been a very strong confirmation indeed of their case. But a careful examination of these titles necessarily, I think, leads one to the conclusion that, as evidence in this case, they are at least worthless, if not also misleading. There is no sort of identity of place between the highway referred to in these titles and the road claimed in this action. The mere reading of such titles to a jury, and the constant repetition of this description of highway going down the Gallowhill, and so forth, was calculated to make a strong, although false, impression that these titles proved a highway existing in this direction, which, as I have already said, they are very far indeed from doing. This of itself leads me to doubt very much the soundness of the present verdict, because I cannot but have the apprehension that this sort of evidence contributed a good deal to the verdict. The rest of the evidence is parole, and it may very easily be generally described. Down to the year 1844, or somewhere thereabouts, the Gallowhill, across which this road is claimed, was entirely open and unenclosed; and of course there was no possibility of preventing—and I presume no desire to prevent—the inhabitants of Dunoon and its neighbourhood from straying over this open unenclosed ground, especially considering that it was not only unenclosed, but almost entirely uncultivated, except in some patches here and there. But it is impossible to ascribe importance to that sort of straying over unenclosed ground, which is the sort of occupation alleged to have been had by the public, almost by the whole of the witnesses, certainly by the most intelligent and trustworthy of them. Mr Orr Ewing and a number of other persons of the same description say that the Gallowhill, in their recollection, upwards of thirty years ago, was looked upon as a common, and everybody went where they chose. Now, certainly such indiscriminate use of the Gallowhill as a means of arriving across the hill at one point, starting from another, is not a kind of use of a line of road which is sufficient in law, by forty years' continuance, to create a right on the part of the public. That evidence, therefore, appears to me to be inconclusive. I am very far from saying a right may not be acquired of public use of a road either for carriages or for foot-passengers across unenclosed ground. I have no doubt that a road may be so made, but I think it must be in some definite and ascertained track. When that road is acquired by constant use for forty years and upwards, and if the right is acquired in a definite track from one point to another, it will be found, I should suppose, as an inevitable consequence that when in process of time the ground comes to be enclosed, either the road will be voluntarily left open by the proprietor, or the public will insist upon its being so. In the absence of either the one or the other of these things, there arises the strongest possible presumption against there having been any such right of use. Now, in the present case, when this ground was enclosed, somewhere about 1843 or 1844, for the first time, no road was left by the proprietor, and no road was claimed by the public; so little were the public alive to the necessity of protecting their interests, or so little were they alive to the existence of any interests on their part, that from 1843 or 1844 down to the institution of this action, a year ago, there seems to have been no movement made whatever to assert the right which is the subject of this action. I really think that such parole evidence as has been adduced here is not evidence good in law to support the claim to a public road. It follows, therefore, that the verdict cannot stand, for the simple reason that the evidence is not legally sufficient to warrant the verdict. I do not go merely upon the consideration that the evidence is not sufficient to support the verdict, considering merely the weight of the evidence in itself; but it appears to me that it is legally insufficient—that it is not evidence of a kind sufficient to support this claim to a public right of way. I therefore think that a new trial should be granted.

LORD DEAS—I agree with your Lordship that the question here comes to be whether the evidence was legally sufficient to establish a right of public road. That is a question of general importance, for it requires us to consider what evidence it is that in law is sufficient to establish a right of public road. I cannot entertain any doubt that the mere fact of people going for more than forty years in a certain direction did not necessarily infer the right of public road. I refer more particularly to the right of foot-road. As to the right of cart-road here, it is out of the question altogether. There is no evidence, in point of fact, of a cart road in that line. Some little evidence was given of a sort of sledges—carts without wheels—going this way with peats. But this may be accounted for by the fact that peats were taken from this hill by the proprietor in his own right, and though some other carts of the same description might have passed with peats, there was nothing to call attention or distinguish them from the sledges or carts of the proprietor. It would be a waste of time to dwell upon this, because there was nothing like evidence of a sufficient character. It does not follow that, because people have gone in one way for

forty years, that therefore they have a right of public road. It is more difficult, indeed, to ascribe a cart road to tolerance, but in respect to the right of foot road there are two things of great importance to be noticed. In the first place, if the foot passengers had been in use to pass along a road or path used by the proprietor himself—used for the purpose of his own property—the fact that he did not prevent people passing along the same route goes but little way indeed to infer a right of public road, so long as there is no challenge. It makes the greatest possible difference if the proprietor has attempted to stop people and has not succeeded. If the proprietor never prevented anybody at all, there could be no question that there was mere tolerance, and tolerance itself would not make a public road, however long it might endure. Most lucky it was for the public, because if the case were otherwise they would not be allowed to go anywhere unless where there was a properly recognised road. The question then, of course, is, was it by tolerance? Now that appears to be the case here beyond all doubt, for in so far as this open space had been used by numbers of the public, there was not a trace of challenge by any proprietor. The proprietors saw all that took place and never objected, and most unreasonable it would have been, because it would be doing no injury to them. Then take along with that the fact that the place was a waste, for the Gallowhill was used for an important purpose in old times, and used for nothing else, and was not even pastured by the proprietors, for though there are traces of the villagers pasturing their cattle there, I do not think there is any evidence of their paying for the privilege, nor of their paying for the stones and peats which they were allowed to take from different parts. In short, the place was looked upon, as Mr Ewing tells us, just as a common, and by many was thought to belong to the Crown. In fact, there was no more matter of right attached to the road or path than to any of the other privileges of bleaching, quarrying, and driving peats, which were assumed and tolerated over this waste. I agree with your Lordship that a right of way over waste land is a right which it is possible for the public to acquire, but you must have something in the use and possession had by the public showing that it was a right of way, and not a mere piece of tolerance. We have nothing of that sort here. Moreover, as your Lordship has remarked, when the place was shut up in 1844, so satisfied were the public that it was mere tolerance, and that they had no right to it, that there was not the slightest attempt to assert any right to a road. The conclusion I have come to is the same as that arrived at by your Lordship, that the evidence was totally insufficient in a legal point of view; and however much more there had been of the same character, it would have made no difference. This is, of course, on the assumption that your Lordship is right in deciding that there are no arguments to be drawn from the old plans and titles in favour of the pursuers. I think that there is none. That there was a road either across or along some parts of the Gallowhill, which was called the royal highway, appears clearly enough, but as to where it existed, and when it existed, there is no proof at all.

Lord Ardmillan concurred.

Lord Kinloch—I am of opinion that this verdict should be set aside, and a new trial granted. I not only think the verdict a bad one—I conceive it could not have been pronounced without an entire misconstruction of the effect of the evidence in regard to points of essential importance, and touching on general principles.

A leading object with the pursuers was to establish that the road now claimed was identical with one specified in title-deeds so ancient as 1667, under the name of "the Highgate descending from the Gallowhill." This alleged identification depended to a considerable extent on a consideration of written instruments, and presented, therefore, a point peculiarly fitted for the guidance of the jury by the Court. I think there has been an entire failure on the part of the pursuers to identify this ancient road. Its description in the old titles does not tally with the characteristics of the road now claimed. Its precise locality has not been discovered by any reasonable approximation. No aid, therefore, can be derived from the written titles to the case of the pursuers. Yet it is matter of reasonable belief that the jury rested their verdict, in considerable part, on a supposed identification of the road now claimed with the Highgate descending from the Gallowhill two centuries ago.

The true foundation of the pursuers' case lay in the alleged parole proof that for forty years, or for time immemorial prior to 1844, there had been a use of the road in question "for horses, carts, and other conveyances, and also for foot passengers." The case of the pursuers essentially comprised a claim for a cart and horse road. Unless this was made out, the verdict is unmaintainable. The issue is cumulative, and the verdict is cumulative also.

I am of opinion that there is not only a deficiency of evidence to support the claim for a cart and horse road, but that the jury proceeded, and could only proceed, on evidence intrinsically insufficient for this purpose. The ground over which the road is alleged to run is part of what was open and unenclosed ground. It is not pretended that there was ever here a made or metalled road. Nor is the alleged road one of plain and unequivocal usefulness. It is alleged to have run off a regular public road at a particular point, and, after traversing a portion of this open and unenclosed ground, to re-enter the same regular public road at another point, having all the roughness of an unmade road, and with no necessary saving of distance; on the contrary, rather an extension of the way in going to particular localities. The evidence as to the use of the road is anything but consentaneous, but all that, at the utmost, is proved is, that carts and horses did more or less traverse this ground, the greater number of instances, however, being of carts connected with the property of the defender, or going to the farm or slate quarry on the hill, or otherwise exhibiting an exceptional peculiarity. Beyond such exceptional cases there was little attempted to be proved. Certainly, there was nothing established more than what might happen on any unenclosed property through the indulgence or carelessness of the proprietor, without any thought of a public right or assertion of any such right. There is, in my apprehension, a total want of proof of that regular public traffic with carts and horses from point to point, carried on in the presumed exercise of a public right, which alone, I think, would be sufficient to make out a public road "for carts and other conveyances."

I by no means intend to say that it is impos-

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 grand-daughter 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