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,

SOLICITOR-GENERAL (A. R. CLARK) and KEIR for the respondents.

At advising—

LORD PRESIDENT—I think that the Sheriff is right in sustaining this plea. The fact alleged in the summons in support of the action is that the trustees took this ground in excess of their powers—took it unlawfully. That is the foundation of the action, and without that I do not see that there could be any relevant case. No doubt, the pursuer goes on to say, that having unlawfully and without legal notice taken they have retained possession of the land ever since. But that does not alter the character of the action, or take it out of the operation of the 118th section of the General Road Act of 1831. The plea (above quoted) maintained for the pursuer, explains most accurately the nature of the case, which is simply an action for compensation or damages. Now, the 118th section of 1 and 2 Will. IV., c. 43, provides that "all civil causes, petitions, complaints, and processes whatsoever, and prosecutions for expenses . . . and fines imposed by this Act or any local Turnpike Act, or for any damages incurred or any wrongs done or injuries suffered in any matter thereto relating, or for anything done in pursuance of any of the powers by this or any such Act given and granted, shall be commenced within six calendar months after . . . the damage shall have been incurred, or wrong done, or injury suffered, or fact committed, and not afterwards." Now, when was the wrong alleged here done? It was done apparently before 1844, when the pursuer succeeded to the estate. Mr Campbell very ingeniously contended that it has been continuously committed year by year ever since; but I am afraid that such an interpretation of the facts of the case is impossible. Of course such a wrong continues always in operation and effect until redressed, but this does not prevent the date of the perpetration of the wrong being fixed at a definite point of time. I am therefore clearly of opinion that the 118th section of the Act applies, and that the action when it was raised was incompetent.

LORD DEAS—I am of opinion that, looking to the framework of the summons, nothing can be given the pursuer except for wrong done. If that be so, it is plain that the action is barred by the 118th section of the General Road Act.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for the Pursuer and Appellant—Maitland & Lyon, W.S.

Agents for the Defenders and Respondents—H. & A. Inglis, W.S.

Thursday, March 2.

SECOND DIVISION.

SOMNER *v.* ANDERSON (SOMNER'S TRUSTEE).

Conjugal Rights Act 1861, § 16—*Provision to Wife.*

A wife concurred in a deed, whereby in consideration of a sum of money her share of the residue of her father's estate was conveyed to the lenders, under reversion of the balance to her husband. Her husband thereafter conveyed this reversion to his crediters. *Held* that section 16 of the above Act applied, and that provision must be made to the wife out of the fund.

Mrs Somner brought this action against the trustee under a voluntary trust-deed executed by her husband for behoof of his creditors, and also against the executors of her father, the late John Clay, for their interest, concluding to have it found and declared that the defender, as trustee foresaid, was not entitled to uplift or receive the share of residue provided and bequeathed to the pursuer under the settlements of her said father, except upon condition of making therefrom a reasonable provision for the support and maintenance of the pursuer, under the 16th section of the Conjugal Rights Act. The said section, *inter alia*, provides "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim be made therefor on her behalf, and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session, according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*."

It appeared from the statement of the pursuer that her father died on 26th June 1866, and her mother, who liferented his whole moveable estate, on 18th June 1870. On 10th April 1867 Mr Somner, the husband of the pursuer, borrowed the sum of £500, and for this sum granted a bond, in which the pursuer concurred, assigning her share of the residue of her father's estate in security of the said loan, and providing that if the creditors, in virtue of the said assignation, should receive payment of the whole of said share, they should be bound, after satisfying their own claims, to pay over the balance to Mr Somner, the husband. On 4th June 1869 his affairs became embarrassed, and he executed the trust-deed in favour of the defender, specially assigning the said share of residue under burden of the prior assignation. On 5th July 1870, a few days after the death of the liferentrix, the pursuer made a claim under the Act. The defender pleaded—"(1) The pursuer's share of the residue of her father's estate having vested absolutely in her husband, the said John Usher Somner, *jure mariti*, and the said John Usher Somner having assigned the same to the defender for behoof of his creditors, and the said assignation having been duly intimated, all before any claim on the said share was made by the pursuer, the defender has obtained complete and lawful possession of the said share, to the exclusion of the pursuer's claim under 'The Conjugal Rights (Scotland) Amendment Act, 1861;' and he is therefore entitled to decree of absolvitor, with expenses. (2) The pursuer having concurred with her husband, the said John Usher Somner, in a prior assignation of the said share, must be held to have waived any right which she may have had to claim a provision therefrom." He further pleaded that, in any view, the sum claimed by the pursuer (£1250) was in excess of a reasonable provision for her support and maintenance."

A proof was led before the Lord Ordinary (JERVISWOODE) who pronounced the following interlocutor:—