Tuesday, June 13.

SECOND DIVISION.

GROZIER AND OTHERS *v.* DOWNIE.

Property— Landlord and Tenant—Removing—Title to Sue—Negotiorum gestor—*Judicial Factor.* One of several co-proprietors of a house went abroad, and had not been heard of for years; and another of the co-proprietors, acting for the whole, let the house on lease, and died during the currency of the lease. After his death another of the co-proprietors drew the rents, and at the end of the lease, along with some of the co-proprietors, presented a petition to the Sheriff, praying for removal of the tenant —*Held* that it was a good objection to the title of these parties to sue the removing, that the heirs of the co-proprietor who had granted the lease were not represented; but that the absence of the co-proprietor who had gone abroad was not a good objection, as the co-proprietor who acted during the remainder of the lease had as good a title of *negotiorum gestor* for the absent co-proprietor as he who granted the lease, and the lessee could not object to the title of his lessor.

Opinions on the propriety of the appointment of judicial factors on small estates.

This was a petition presented to the Sheriff of Dumbarton and Bute by Agnes Martin or Grozier, wife of and residing with George Grozier, labourer, Kirkintilloch, with consent of the said George Grozier, as administrator and curator at law for the said Agnes Martin or Grozier his wife, and for himself and his own interest; and Allan M'Lean, church-officer, residing at Old Monkland, in the county of Lanark; against George Downie, coal-agent in Kirkintilloch. The petitioners stated that they are proprietors, along with John Martin, "presently in Dunedin, New Zealand, or elsewhere abroad, of a tenement of dwelling-houses, offices, and grounds attached, in Eastside, Kirkintilloch: That the respondent, sometime before the term of Whitsunday 1864, took in lease from the petitioners, or others representing them, a dwelling-house, consisting of a room and kitchen, milk-house and byre, and a piece of garden ground, extending to one acre and one-half acre or thereby, forming a portion of the foresaid tenement, offices, and ground, and situated in Eastside, Kirkintilloch, for five years from and after said term of Whitsunday 1864, and, under the said female petitioner and her husband, occupied said premises under said set until Whitsunday 1869: That the respondent was on the 13th day of February 1869 duly and lawfully warned to flit and remove himself, 'his wife, bairns, dependents, and others, and his goods and gear, furth and from the said dwelling-house and pertinents thereof, let to him as aforesaid, conform to execution of warning under the hands of Henry Crossley, officer of Court, dated said 13th February 1869, herewith produced;' but notwithstanding thereof, and of his said lease or set having expired on the 28th day of May 1869, the respondent illegally retains possession, and refuses to remove therefrom." The prayer of the petition was for removal of the respondent.

The respondent pleaded—The petitioners not being the sole proprietors of the subjects in question, and having no right or title from the other interested proprietors to sue this action, and the property being still undivided among those beneficially interested, the same is incompetent.

The Sheriff-Substitute (STEELE), after a proof, pronounced an interlocutor in the following terms: —"Finds that the warning given to the defender is sufficient to support the present action, and therefore repels the defence stated to the action on that ground: Finds that the pursuers stand in the position of *pro indiviso* proprietors of the subjects in question, as appears from the title produced by them, and that another party who has a share of said property does not appear as a pursuer: Finds that a *pro indiviso* proprietor is not entitled to pursue an action of removing unless he have the concurrence of the other parties interested in the property; *Bruce* v. *Hunter and Leisk*, 16th November 1808, F.C.: Finds that the defender's lease is supported and confirmed by the evidence of several witnesses adduced by him: Finds that the defender has a valid title of possession of the subjects in question; while, on the other hand, the pursuers have established no right to interfere with that possession under the present action: Therefore sustains the defences, and assoilzies the defender from the conclusions of the action; finds the pursuers liable in expenses," &c.

The Sheriff (HUNTER) affirmed this judgment and added the following note:—"This case has been well argued by both parties, and by the pursuers with considerable ingenuity; but the Sheriff has seen no reason to disturb the interlocutor of the Sheriff-Substitute.

"The process is one of ejection and removing from certain subjects belonging to *pro indiviso* proprietors, all of whom are confessedly not parties to the suit. Throughout the pleadings and the evidence it is admitted that John Martin, one of the *pro indiviso* proprietors, is not a party. This is obvious from the petition itself, and it pervades the other pleadings and the evidence. In the petition it is said that certain of the pursuers are proprietors along with John Martin, presently in Otago, New Zealand, or elsewhere abroad. In the condescendence it is set forth that certain of the pursuers are proprietors along with John Martin, presently in Otago, New Zealand, or elsewhere abroad. In the defences it is stated that John Martin went abroad about 26 years ago, and of him nothing has been heard for many years. In the evidence it is said that John went abroad many years ago, 'and is still alive for anything I know,' and, in another part of the evidence, there is a similar statement. Throughout the pleadings and the evidence there is no statement or indication that John is dead, or reported or believed to be dead. John's interest in the property is material, both as one of the original disponees, and as having succeeded to the share of his deceased sister Margaret. The property is confessedly held *in cumulo* by the *pro indiviso* proprietors, there having been no division of it.

"Now, the rule of law is fixed to be that a *pro indiviso* proprietor cannot, as long as the land or other subject is undervalued (undivided), remove or eject without the consent of all the other proprietors. This is deemed to have been conclusively settled by the decision in the case of *Bruce* v. *Hunter and Leask*, 16th November 1808. The soundness of the rule thus established has never been doubted, and the pursuers admit that such is the law.

"But, while thus admitting the rule of law, they endeavour to take their case out of its operation. In this attempt they have been unsuccessful.

Throughout the argument in the reclaiming petition the absence of John Martin is mentioned repeatedly and prominently. It is obvious that the pursuers are constrained to recognise the decisive effect of John being no party to the suit. Although not so said, it is easy to see that they desire the allegation of his continued absence should be dealt with as equivalent to proof of his death. But it is matter of legal notoriety that the presumption of law is in favour of life, and that, although a person has been for many years absent and not heard of, it is to be held that he is still in life, unless there be a proof of such facts and circumstances as, by creating an irresistible conviction of his death, rebuts the presumption that he is alive. Here, as already stated, there is no proof of John's death, nor even an allegation of it. There exists a long series of decisions that the absence of a person, and ignorance of him for space of time longer than that which is here presented, is insufficient to elide the presumption of life. In no case could the mere allegation of absence and ignorance be even dealt with by a court of law as eliding the presumption. There must be proof, creating at least a high probability that he has ceased to exist. Thus it must be held here that John Martin is still alive, and, therefore that, he not being a party to the suit, there is no valid instance.

"The case of *Johnston and Others* v. *Crauford*, 3rd July 1855, relied on by the pursuers, is not in point. It was not an action of ejection or removing, or to any effect as between landlord and tenant. It was an action of declarator at the instance of a *pro indiviso* proprietor for having his right declared, and for removal of certain erections constructed upon his property by certain parties who had formerly acknowledged him as their landlord, but now declined to do so. The Lord President said that the rule established by the cases cited, those of *Bruce* and others, is not applicable, because this is not an action of removing in the sense of any of those cases. It is more of the nature of a declaratory action, and that he could not understand why a party should not be entitled to protect his own property, and, in this doctrine enforced by details, the other judges concurred.

"As the Sheriff deems that the *ratio* that, by John Martin being no party, there is no valid instance, he holds it to be surplusage to discuss the minor points relied on by the pursuer, and that the only effect of such a discussion would be to obscure the true *gist* of the case. Whether, if the question were raised in a proper action, and before the proper court, the lease would be held to be valid or invalid, expired or existing, it is obvious that such questions are incompetent here, where the *gist* necessarily consists in there being or not being a valid instance."

The petitioner appealed.

GUTHRIE SMITH and LANG for them.

MACDONALD for the respondent.

The Court adhered to these judgments, but on a somewhat different ground. They held that Robert Martin, in granting the lease, might be considered as a *negotiorum gestor* for all the parties interested, and if all the parties for whom he acted in granting the lease were represented in the present process of removing, the respondent would have no right to object to their title. A lessee can in no case quarrel the title of the party from whom he holds his lease unless something has emerged since he accepted the lease. But Robert Martin being now dead, his children have succeeded to his rights, and are not represented in this process.

LORD COWAN indicated an opinion that the proper course would have been to have applied to the Court for the appointment of a judicial factor to act for all concerned.

The LORD JUSTICE-CLERK differed from Lord Cowan in thinking that the proper course was to obtain the appointment of a judicial factor. The parties had taken a much more sensible course in allowing one of their number to manage this small property. There could be no doubt that the respondent knew that Robert Martin died six months after the granting of the lease, and he had paid the rent since then to the petitioner Downie for behoof of the other proprietors. Robert Martin acted upon an implied mandate from the other co-proprietors, and if Grozier had the same mandate he would have the same power. Upon the proof, it seemed doubtful whether he was empowered to act for the children of Robert Martin.

Agents for Petitioners—Muir & Fleming, S.S.C.
Agents for Respondent—Tawse & Bonar, W.S.

Wednesday June 14.

FIRST DIVISION.

LEES AND OTHERS *v.* DUNCANS.

(*Ante*, p. 218.)

Road—Public Right of Way—Terminus—Jury—New Trial. The Court *refused* to set aside the verdict of a jury, which assumed that a small natural creek or harbour occasionally though rarely resorted to by boats, was a public place in such a sense that it could form the terminus of a public right of way.

The Court having granted a new trial in this case, two issues were sent to the jury, which differed only in stating different points upon the road from St Andrews to Crail as the point of departure of the alleged public footpath. The first issue was—"Whether for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for passengers in the direction of the red line on the plan No. of process, leading from a point of the turnpike road from St Andrews to Crail (marked A on the plan) by the margin of the East Sands, thence along the lands of Brownhills, and thence along the lands of Kinkell to Kinkell Harbour?"

In accordance with the views indicated by the Court when the new trial was granted, the evidence was mainly directed to the point, whether or not Kinkell Harbour was a public place in the sense necessary to constitute a legitimate terminus of a public right of way.

For the pursuers evidence was led to show that in former times Kinkell Harbour had been a place of considerable resort for fishing boats, and that it was still used occasionally by fishing boats and by pleasure boats.

For the defenders evidence was led to show that Kinkell Harbour was not a harbour at all in the proper sense—that it was a mere natural creek exposed to the sea, and incapable of being used by fishing boats of the modern construction.

The jury, by a majority of nine to three, found for the pursuers on both issues.

The defenders again moved for a rule on the