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

pursuer, to show cause why a new trial should not be granted, in respect that the verdict of the jury was against evidence. A rule having been granted, parties were heard on the motion.

SOLICITOR-GENERAL, BALFOUR, and ROBERTSON, for the pursuers.

SHAND and STRACHAN for the defenders.

At advising—

LORD PRESIDENT—The case has been tried under issues. The pursuers claimed a public right of way (1) from a point near St Andrews, on the turnpike road to Crail, along the coast to the "Rock and Spindle" and "Kinkell Harbour;" and (2) from thence along the coast to the village of Boarhills. Upon that trial the jury returned a verdict for the pursuers as regards the first part of the footpath, viz., from St Andrews to the "Rock and Spindle" and "Kinkell Harbour;" and a verdict for the defenders as regards the last part of the path between "Kinkell Harbour" and Boarhills. We refused to disturb the latter part of the verdict, and it now stands as decided that there is no public footpath between "Kinkell Harbour" and Boarhills. We granted a new trial as regards the first part of the verdict. The considerations by which we were led to this were these—There was a difficulty in seeing any sufficient evidence to justify the jury in holding that this public footpath stopped either at the "Rock and Spindle" or at "Kinkell Harbour." The "Rock and Spindle" was clearly not a public place, and there was no satisfactory evidence to show that "Kinkell Harbour" was so. It was not difficult to see the cause of this. The pursuers had directed their attention to prove a public foothpath all the way to Boarhill, which is unquestionably a public place. They consequently failed to see the importance of proving that "Kinkell Harbour" was a public place, in the event of their not succeeding in proving the latter part of their contention. A new trial has accordingly taken place. The issue was whether there existed a public footpath from a certain point on the turnpike road to Kinkell Harbour. There is no doubt that the main point in the second trial was, whether "Kinkell Harbour" was in a proper sense a public place. The first trial showed that there had been considerable use by the public of the footpath from St Andrews for upwards of forty years. The ground on which we are asked to set aside this second verdict, is that it is against evidence in so far as it assumes that "Kinkell Harbour" is a public place. The evidence is narrow. I may say that "Kinkell Harbour" is certainly not a *very* public place. At the same time, to make a good terminus of a public right of way it is not necessary to prove that the place is one of much resort. Any place where the public resort for some definite and intelligible purpose will be sufficient. It has been shown, in the first place, that for a very long period the place has been called "Kinkell Harbour," indicating a certain use of the creek which exists there. The name is found in maps of some authority which go back to between 1820 and 1830. It appears from reports of the local Admiralty Court, that as far back as the end of the seventeenth century, persons designed as "Skippers of Kinkell" were summoned to appear at Anstruther Easter for the purpose of considering the interests of skippers and fishermen on that part of the coast. This is an indication that from an early period the place had been resorted to by fishing boats. Although there is much evidence on the part of the defenders that no boats of the present construction can use the creek, it does not follow that the old-fashioned boats, which we know were much smaller, could not use it. When we connect this evidence with the testimony of the pursuers' witnesses, I am not able to say that no evidence exists to show that "Kinkell Harbour" is a place of public resort. Certainly boats go there occasionally. It may be admitted that the greater number are pleasure boats. But I do not discount the pleasure boats. Where the public resort to a particular place on the coast for pleasure and recreation, that may be enough to constitute that particular place a sufficient terminus for a public right of way. But the use of the creek has not been confined to pleasure boats. While I am of opinion that the evidence is narrow enough to instruct that "Kinkell Harbour" is a public place in the sense to make it a legitimate terminus of a right of way, I am not prepared to disturb the verdict of the jury.

The other Judges concurred, and on the same grounds.

Rule discharged, and new trial refused.

Agent for Pursuers—D. Todd Lees, S.S.C.
Agent for Defenders—A. Beveridge, S.S.C.

Thursday, June 15.

SECOND DIVISION.

SPECIAL CASE—MOIR ETC.

Marriage-Contract—Testament—Husband and Wife—Provision to Children. By antenuptial marriage-contract a husband conveyed to himself and his intended wife, in conjunct fee and liferent for her liferent use allenarly, and to the child or children of the marriage in fee, his whole means and estate, reserving to himself power to divide his means and effects among the children. One of the children having become insane, he by trust-disposition and settlement directed his trustees to purchase an annuity for her from an insurance company.—*Held* that he had power to do so.

This case was presented to the Court by the trustees of the late Mr Moir, and the curator of Miss M. E. Moir, in order to settle questions as to Mr Moir's settlement. The facts and documents are sufficiently set out in Lord Cowan's opinion.

The questions which the Court decided were the 1st and 4th, and were the following:—

"1. Whether, under and in virtue of the said antenuptial marriage-contract of the said George Moir and Mrs Flora Moir, and of the other deeds and writings above-mentioned, the right and interest of their daughter, the said Mary Elizabeth Moir, in the estate of the said George Moir, was validly limited to such a sum as will be sufficient for the purchase of an annuity upon her life for £300 per annum, under and in terms of the said codicil of 10th September 1870, and the whole remainder of the said estate falls to be divided and paid to and among the parties of the second part, in terms of the said trust-disposition and settlement of 12th October 1865, and codicils thereto?"

"4. Is the said Miss Mary Elizabeth Moir entitled to one equal fourth part of the trust-estate, after deduction of the debts of the truster,