which the church is needed, while yet he seems to escape the liability, and in the same way could claim no share of the area.

As to the plea that these valuations are bad, as being in absence or behind the back of the heritor, and not binding on him, that is not the ground taken by the pursuers in this action, the conclusions of which seem to be clearly contrary to statute, both as to rent and value. But further, such a plea would imply that all valuations under this Act are null and void in so far as affecting heritors who have granted leases of more than twenty-one years, —that all taxations that have taken place under the Act as to such heritors are null and void— and that all such valuations must be set aside judicially. I do not think the basis of this argument is well founded. But in any view the Act is express; the valuation is highly privileged; and I cannot bring myself to stultify the Legislature to such an extent, and nullify an Act intended to lead to such a different result, and to form so general and important a facility in the ascertainment of valuation.

LORDS DEAS and BENEHOLME agreed with LORDS COWAN and NEAVES, while the LORD PRESIDENT and LORD ARDMILLAN concurred with the LORD JUSTICE-CLERK.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Pursuers—T. & R. B. Ranken, W.S.
Agent for Defenders—Stewart Neilson, W.S.

Wednesday, December 14.

FIRST DIVISION.

LEES AND OTHERS *v.* DUNCANS.

Road— Public Right of Way—Terminus—Jury— New Trial. Circumstances in which, though the public had been in the habit of using, for the requisite period, a certain path, leading from a point on the high road near a town, along the edge of the beach, and then along the top of the cliffs to two places on the shore, at one of which there existed merely a natural curiosity, and at the other of which there was alleged to be a boat harbour, it was *held* that the former place could not be, and that there was an insufficiency of evidence to show that the latter place was, a public place in such sense that it could form the terminus of a public right of way. A new trial was therefore granted.

The pursuers in this matter were inhabitants of St Andrews, and as members of the public they sought to establish a public right of way from the east end of the town of St Andrews, along a path which led from the East Sands along the top of the cliffs, to a place called the Rock and Spindle, and to Kinkell Harbour, and thence to the harbour and village of Boarhills. They accordingly brought two actions of declarator, one against David Duncan, tenant of and residing at Brownhills, in the parish of St Andrews; and the other against Thomas Duncan, the proprietor of Kinkell. These cases were tried before Lord Mure and a jury upon identical issues, which differed only in stating two different points upon the road from St Andrews to Crail as the point of departure of the alleged public right of way at the St Andrews' end.

The first of these issues was as follows:— "Whether, for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers, in the direction of the red line on the plan, No. 17 of process, leading from a point of the turnpike road from St Andrews to Crail, marked 'A' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle' and to Kinkell Harbour, and thence leading by a line near the seashore, along the said lands of Kinkell and the lands of Kingask and other lands, to the harbour and village of Boarhills, or to or between any, and which, of the said points or places?"

The second issue only differed from this in that it assumed another point, marked "B" upon the plan, on the road from St Andrews to Crail as the point of departure of the said alleged right of way at the St Andrews end. In fact, two different means of access from the Crail road to the East Sands were claimed, and from the East Sands onward there was but one path claimed under both issues as a public right of way.

The jury's verdict in both cases was as follows: —"Find for the pursuers under the first issue— That for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers in the direction of the red line on the plan, No. 17 of process, leading from a point of the turnpike road from St Andrews to Crail, marked 'A' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle,' and to 'Kinkell Harbour:' And find for the defender under the said issue for the rest of the way—viz., from 'Kinkell Harbour' to 'Boarhills Harbour:' And further find for the pursuers under the second issue, That for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers in the direction of the red line on the plan, No. 17 of process, from a point of the turnpike road from St Andrews to Crail, marked 'B' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle,' and to 'Kinkell Harbour:' And find for the defender under the said second issue for the rest of the way—viz., from 'Kinkell Harbour' to 'Boarhills Harbour.'"

Both the pursuers and the defenders moved for a rule, to show cause why a new trial should not be granted, in respect that the jury's verdict, so far as against them respectively, was contrary to evidence. A rule was allowed in both cases.

It is unnecessary to go much into the evidence, in respect that the question as to a new trial depended not so much upon the public use of the path, of which there was little doubt, but on this farther question, whether the terminus of the right of way, as found by the jury, was a public place in the sense which is required by the law on this subject. There was no doubt that the harbour and village of Boarhills, the termini of the more extensive right of way attempted to be established, were such public places; but there was much doubt

whether the evidence adduced was sufficient to establish that either the Rock and Spindle or Kinkell Harbour, the termini of the path as restricted by the jury, were such public places—the one being a mere natural curiosity, and the other being of very doubtful use as a harbour, even for boats.

The nature of the whole case will sufficiently appear from the following arguments of counsel.

The SOLICITOR-GENERAL (A. R. CLARK), for the pursuers, in support of the verdict so far as it was in favour of the pursuers, and to show cause why a new trial should not be granted so far as that part was concerned, argued—In the first place, the evidence establishes that there was a very general belief in the district that, between St Andrews and Kinkell Harbour, a public right of way did exist. This, I admit, does not carry very much weight, but at the same time cannot be thrown out of view. In the next place, I shall submit to your Lordships that between these two places there has been from time immemorial a sufficiently well defined footpath. There is no suggestion that that footpath was required, or existed, for the use of the farms through which it ran, and there is evidence that where dykes or palings have crossed this path there was always accommodation made for the public by means of steps, wicket gates, and stepping stones, and this under circumstances where they were not needed for the use of the farm servants. In the first view, therefore, of the case, we have clearly the existence of a footpath not required for any private use, and evidently made by the use of the public, for there is no other account of its formation. We must now consider the character of the place to which this path leads, and the uses to which it has been put. Kinkell Harbour is a public place, at least to this extent, that it is part of the sea shore. This, indeed, is not enough for my case, and I must show in addition that the public were in use of resorting there for some definite and legitimate purpose, but I am not obliged to show that that purpose was a purpose of profit. Now, throwing aside all idea of Kinkell Harbour as a harbour, still the public have been in use of resorting thither for definite objects—namely, visiting the Spindle Rock, and taking their pleasure in various ways in its neighbourhood. The late case of *Darrie* v. *Drummond*, 3 Macph., 496, supports the sufficiency of this object. Is not this use of Kinkell Harbour just as good in the eye of the law as the existing public use of Portobello Sands, so often referred to. But, on the other hand, I do not entirely admit that Kinkell Harbour wants the essential characteristics of a harbour. In conclusion, I submit that you have a footpath established to Kinkell, that the public have used it, and used it as a matter of right for the requisite length of time. I admit that the public in their use may have strayed off it, and done things that they had no business to do, and may have been tolerated in doing so; but the question of the public right does not depend upon this, and was one for the jury; and in deciding as they have done they have not gone contrary to the evidence, and it is not for your Lordships to disturb their verdict. He then reverted very shortly to the second question, in which the jury had found against his clients—viz., whether a public right of way did not lead from St Andrews by Kinkell to Boarhills Harbour? There was no doubt, he said, in this question that Boarhills Harbour was a public place, and he submitted that though there was no well defined path after passing the "Spindle Rock," there was still sufficient evidence to establish a right of way as concluded for.

The LORD ADVOCATE (YOUNG) for the defenders —In support of the motion for a new trial, gave, first, a general view of the character of the evidence led for the pursuers in support of the right of way. He then endeavoured to show that the nature of the use by the public, avowed and proved, was not that kind of use which the law recognises as establishing a public right of way. There was evidence, he said, that people made use of the path frequently upon Sundays to saunter along for mere purposes of pleasure and exercise; that fisher women were in the habit of using it to bring home their loads of whelks from the rocks beneath when the state of the tide rendered it a more convenient road for them; that on occasions during or after a storm, the fishermen took the path at the top of the rocks, that they might keep a look out for missing boats, or for their drifted lobster pots and other gear; that the crew of the lifeboat had on one occasion been known to use it, and that the men of the Ordnance Survey had been in use to do so. But the most formidable allegation of use, he contended, was the one which attempted to establish a public right of picnicing at the Spindle Rock, and consequently a public right of way to go there and picnic, and to gather flowers and roots, or to geologise on the way. All this occasional use, he said, he was ready to admit, without in the least damaging his case. It was use which any good-natured and kindly-dispositioned tenant would at any time allow, provided there were no abuse. The tenant would have right to stop it, but would never think of doing so, unless he had cause of complaint, as in the present case. There is, however, no evidence of such use as can establish a public right of way. That use must be of such a character that you cannot reasonably suppose its being submitted to, unless it is in the exercise of an undoubted right. He then went on to show that Kinkell Harbour is not a proper terminus for such a right of way, and showed wherein it wanted the essential qualities of such a terminus. He therefore submitted that the jury had gone against the evidence, and that his clients should be allowed a new trial, as to that part of the right of way, which the jury had found established, viz., between St Andrews and Kinkell Harbour. On the other part of the issue laid before them, he submitted that the jury were right in finding that there was no evidence of a public right of way from Kinkell on to Boarhills, and therefore this part of their verdict should stand.

At advising—

LORD PRESIDENT—In this case there were two issues, each containing two branches, the first branch referring to the road or right of way as far as Kinkell Harbour; the other to that part of the road or right of way claimed which lay between Kinkell and Boarhills. The jury have returned a verdict for the pursuers upon the first branch of each issue, and for the defenders on the second branch; that is to say, they have affirmed the right of way as far as Kinkell, but negatived it from Kinkell to Boarhills. Both parties have moved for a rule to show cause why a new trial should not be granted. The pursuers complain that a portion of the road they claim has not been found a public road or right of way. The defenders complain that the jury have found the existence of any public

road at all. Now, as to the rule obtained by the pursuers, I think there is little doubt that it ought to be discharged. There was hardly a particle of evidence on which to go to the jury and maintain that there existed a public right of way from Kinkell on to Boarhills. The jury had no alternative; had they found otherwise their verdict must have been set aside as contrary to evidence. But as to the rule obtained by the defenders, there is greater difficulty. The road claimed by them is described as leading from a point on the turnpike road from St Andrews to Crail to the east sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the Maiden Rock, and thence along the said lands and the lands of Kinkell to the Rock and Spindle, and to Kinkell Harbour, and thence leading by a line near the sea shore to the harbour and village of Boarhills, or to or between any of the said parts or places. Now, when the road comes to be limited to the first part as far as Kinkell Harbour, and when the remainder is found to have no existence, the question comes to depend almost entirely upon whether the Rock and Spindle and Kinkell Harbour can be held to be public places, for these are the only termini at this end that are left. If these are both or either of them public places, there seems no doubt to be a good deal of public resort to them, at least to the first named of them, along the right of way claimed. But no amount of visitation by persons for mere curiosity will create a right of way to a place which is not in law a public place. First, then, as regards the Spindle Rock: I am quite sure that this cannot be held a public place. It is situated on the shore, between high and low water mark, its base being covered at full tide, but not its summit. The only attraction which this rock has is that it is a natural curiosity of general interest, both to the sightseer and to the geologist, but this can never be held to constitute this place a public place, except so far as the sea shore itself is a public place. If, then, there were nothing more here, I would not hold the right of way proved for want of a public place as a terminus. But there is also a place called Kinkell Harbour. Now, if there exists a harbour, however small a one it may be, still it constitutes the place a public place. In fact, any part of the sea shore commonly used by the public for landing, &c., is a public place. Now Kinkell Harbour has certainly the dignity of being marked on the Ordnance map, but when we come to look at the evidence on the subject, I am not at all satisfied that it is sufficient to support its claim to be considered a public place. We find the use of it as a landing place exceedingly small and very ambiguous, and I must say that, upon minute consideration, I am far from convinced that the jury had enough evidence before them to warrant the decision which they came to. And, as I am of opinion that the rule for the defenders comes to depend entirely upon the question, whether Kinkell is such a harbour as can be called a public place, I think that that rule must be made absolute, and a new trial allowed. I am far from saying that it may not be possible to prove Kinkell Harbour a public place. I only think that enough evidence has not yet been laid before a jury to establish this point, and on this ground I rest my opinion.

Lord Deas—I am of the same opinion as your Lordship. The whole question before us turns upon this, whether the Rock and Spindle, or Kinkell Harbour, is a public place in such sense as to satisfy the requirements of the law on the subject. Now I am quite satisfied that the Rock and Spindle, at any rate, is no such public place. It is, so far as I can see, part of the private property of the adjoining proprietor. The only other terminus at this end of the alleged right of way is the creek called Kinkell Harbour. Now, undoubtedly, if this is a harbour, it is a public place; but unless we have more evidence than is at present before us, I do not see how we can call it a public place. Whether it is so or not is to some extent a question of law, and I cannot extract enough data from the evidence to enable me to say that it is such a harbour as can be held a public place. That being so, I cannot see how this part of the verdict can be supported. I see that Mr Robert Chambers says that the path along to the Rock and Spindle seemed to him, when he used it, to be well defined and to have been much used, though the cases of use which he himself mentions are only those of scientific men taking a ramble along it to see the scientific wonders of the shore. There is also a good deal of other evidence of people going there for pleasure, and a good many witnesses seemed to think that there was a public right of picnicing and such like. I am far from saying that these are not matters which should receive consideration, and have a material bearing upon the case, were there otherwise in existence the other requisites of a public right of way. No doubt, if a public right of way exists, these are things which the public will do, and may be entitled to do, and their doing them is, to a certain extent, proof of possession of the right of way; but they are of no avail without those other requisites of a public right of way. No doubt this path has been and would be very useful for enabling the public to take recreation, but for all that we cannot say that a public right exists where the law does not authorise us to do so.

Lord Ardmillan—I think with your Lordships that there is no doubt as to the propriety of our refusing the rule for the pursuers. But on the question raised by the defenders' motion there is more difficulty. This question divides itself into two branches,—1st, Is there a public right of way to the Rock and Spindle? and 2d, Is there one to the Harbour of Kinkell. Both these places are certainly upon the sea-shore, and the public as certainly have a certain right in the sea-shore. But I do not think that there is any law laid down that any and every road leading to the sea-shore is necessarily a public road or right of way. When we come to look, then, at these two places, I think that there can be no doubt that the Rock and Spindle, at any rate, is not a public place. The description of its characteristics does not fulfil the requirements of law on the subject; and there is no law which gives the public a right of sauntering or picnicing, or going along a path to look at a view, or at some natural curiosity, and going back again. The other place mentioned is Kinkell Harbour, and there is a little more difficulty in dealing with it; and I think it is quite possible that in another trial there might come out evidence of quite a different character with regard to this from what we have at present. As the case now stands, I cannot see that we have any evidence of its being a harbour, not even of its being a boat harbour in the ordinary sense of the term. Though it has long by custom been called so, I do not see that there has been any evidence produced

which warrants its being considered so. I am therefore of opinion that the jury have gone wrong, and that though no amount of additional evidence can make the Rock and Spindle a public place, still that Kinkell Harbour is in a different position, and, so far as it is concerned, the case is open. We must therefore allow a new trial upon this point.

Lord Kinloch—In so far as the verdict negatives the claim of a public footpath from St Andrews to Boarhills, I think the verdict right, and not to be disturbed. There remains the question whether it is well founded so far as it affirms the shorter footpath to what is called Kinkell Harbour. If this question depended for its solution on a mere consideration of matter of fact, I would say the case was one of conflicting evidence, on which the jury was exclusively to judge. But the case involves a question of law as well as a question of fact,—the question, to wit, whether what is called Kinkell Harbour is, or is not, in a legal sense a public place; for it is only on the footing of its being so that a right of public way to that point can be supported. I have formed a clear opinion on the evidence that this is not a public place in the sense of law. It was laid down by the Court in the case of *Darrie* v. *Drummond*, 10th February 1865, that merely to terminate on the sea-shore will not establish a public road, and that some additional element of public use was necessary to this result. I am of opinion that none such is to be found in the present case. I cannot consider this place as a harbour in a legal sense. It is no more so than is any creek on the coast, at which fisher-boats may occasionally land, when the fishermen find it more convenient to walk to St Andrews than to face a strong headwind. This by itself will never give to the place the legal character of a harbour. That people occasionally come here to gather shellfish on the rocks gives no mark of distinction from the whole remainder of the coast. Finally, it will not give to the path the character of a public way that it was used by pleasure parties going to look at the Rock and Spindle, or to have a pic-nic on the adjoining ground. Such a mere employment for recreation will not suffice to make a public way, whose legal object is transit, not amusement. On this legal ground, although I must confess not without a measure of regret, I come to the conclusion that the verdict establishing this path must be set aside.

Lord Mure—I concur with all your Lordships that the turning-point of this case is whether either of the eastern termini of the alleged right of way is a public place. Now with regard to the first-named, the Rock and Spindle, I think that a principal part of the evidence went to shew that people merely went there to look at it and come back again; and I hold that, according to the decision in the case of *Jenkins* v. *Murray*, 4 Macph. 1046, the jury were not entitled to find that that was sufficient to establish a public right of way. Then, as to Kinkell Harbour, I was of opinion at the trial that there was enough evidence to let the jury apply their mind to the question. There were several fishermen examined, and the other evidence was of people who had landed there from pleasure-boats, and I left it to the jury to say whether, especially with reference to the fishermen's evidence, there was enough to enable them to consider this a public harbour. I then thought it a very narrow case. But I thought that there was enough evidence to go to the jury. I am now, however, satisfied that there was not enough to enable them to decide as they did.

The Court accordingly discharged the rule granted to the pursuers, and made absolute the rule granted to the defenders, but required a modification of the issues to suit the altered case which was to go to the jury.

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

Wednesday, December 14.

ROBERTSON *v.* M'KENDRICK.

Process—Debts Recovery Act 1867—*Competency—Objection not arising* in initio litis. Where, under the Debts Recovery Act, A sued B in the Sheriff-court for the balance of a large account, which itself was much in excess of £50, though the balance sued for was only £47 odds; and where B in his defences took objection to all the items in the whole account, so as to bring into dispute a sum considerably in excess of £50, though he did not object to the competency of the action, but, on the contrary, joined issue and went to proof—*Held*, on appeal, that there was no incompetency in the summons as laid, on the ground that it concluded for the balance merely of an account which exceeded £50, the balance itself being under that sum. That it was not necessary to decide upon the merits of the objection, for if there was any objection to the competency at all, it was not *in initio litis*, but was introduced by the defender in stating his defences. That such an objection was capable of being waived by the defender; and as it had not been taken at the proper time, it must be held now to have been waived.

Per Lord President—The words "which are not founded on written obligations" distinguish the class of cases included under the Triennial Prescription Act from those under the Debts Recovery Act.

This was an appeal from the Sheriff-court of Perthshire in a case brought under the Debts Recovery Act of 1867. M'Kendrick, the pursuer, a joiner in Perth, had contracted to perform certain work for the defender at a contract price of £569. He had, during the execution of the work contracted for, been required to do extra work beyond the estimate, for which he charged the sum of £72, 14s. 4½d. in all. He had received payments to account amounting to £580; he admitted that the defender was entitled to keep back the sum of £10 until the work was finished; and he also admitted deductions to the amount of £4, 11s., leaving a balance on the whole account of £47, 2s. 10½d., the sum sued for in the Debts Recovery Court, as balance due "on account annexed."

The extra work charged for in the account annexed, amounting to £72 odds, consisted of about thirty different items. To every one of these the defender objected in his defences, and also pleaded that the work was disconform to the plans and specifications. The amount charged as contract price was not disputed. The parties went to proof; a remit was made to a person of skill to inspect the work done and report; and upon 21st