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

April the Sheriff-Substitute (BARCLAY) pronounced an interlocutor disposing of the case, containing special findings referring to the various items in the account, and bringing out a balance due to the pursuer as the true balance on the account sued for. In this interlocutor the Sheriff-Substitute had, by a clerical error, written the word "repel" instead of the word "sustain." The error was palpably a clerical one upon the face of the interlocutor, and it did not affect the final and substantial finding of the amount due to the pursuer.

The defender appealed to the First Division of the Court of Session.

SCOTT, for him, objected that the action was incompetent under the Debts Recovery Act, inasmuch as, though apparently only concluding for a sum under £50 in amount, it yet brought really into dispute the whole items of a large and complicated account, a result which it was intended by the Legislature to exclude. He farther objected that the debt sued for did not come within the category of cases mentioned in the second section of the Debts Recovery Act; that that Act only applied to such cases as came under the Triennial Prescription; and that this was not one of them.

LORD PRESIDENT—The words of the Act 1579, c. 21, "That are not founded upon written obligations," are omitted in the Debts Recovery Act. That forms the distinction between the two.

STRACHAN for the respondent.

Before disposing of the case, the Court instructed the Clerk to write to Sheriff Barclay and ascertain whether or not there was a clerical error in his interlocutor, as this was disputed by the defender and appellant. Sheriff Barclay replied that there was a clerical error, as observed by their Lordships.

At advising—

LORD PRESIDENT—This action was brought in the Sheriff-court under the Debts Recovery Act, and looking simply to the conclusions of the summons as it was taken out by the pursuer, I do not think that there were any objections to its competency, for it merely concluded for "the sum of £47, 2s. 11d., being balance of account annexed." Now I am not prepared to say that a party cannot sue under the forms introduced by that Act for the balance of any account which comes under the category of accounts mentioned in the Act, but he does so under the express condition that he "shall in all cases be held to have passed from and abandoned any remaining portion of such debt beyond the sum actually concluded for in any such action." And then a party having once brought a Debts Recovery action can never sue for a shilling more under the same ground of debt or account.

It is the nature of the defences pleaded in this action which seem to me to raise the difficulty. The account annexed to the summons begins with the amount of an estimate or contract price as its first item, about which there is, and indeed could be, no dispute. The remainder of the account, to the amount of £72 odds, consists of items of extra work done and charged for over and above the estimate. The defender challenges every one of these items, and so his defence raises a question concerning a sum exceeding £50, the limit authorised to be sued for under this Act. The difficulty and objection to the competency is therefore raised by the nature of the defence putting in dispute a larger sum than that concluded for in the summons. Whether the objection now raised by the defender is a good one or not, I do not need to decide, and therefore I give no opinion. Even if it be a good objection, it is not one that arises *in initio litis;* when it does become possible, on proponing defences, the defender does not raise it; on the contrary, he joins issue and goes to proof. Now I am of opinion that such an objection may be waived, and has been waived in the Court below, and that the defender cannot now be allowed to raise it here.

As to the merits of the case there is little room for doubt. There are some expressions, certainly, in the Sheriff's interlocutor of the 21st April 1870 which are not very intelligible, and the interlocutor itself winds up by repelling the pursuer's objection to the second branch of the inspector's report. On the face of it this is inconsistent wlth the former part of the interlocutor, and on reading the interlocutor carefully, it is quite clear that the Sheriff meant to "sustain," and not "repel." There is therefore manifestly a clerical error, but it does not affect the figures of the final and substantial finding.

The other Judges concurred.

The Court therefore dismissed the appeal.

Agent for the Appellant—John Galletly, S.S.C.

Agent for the Respondent—David Milne, S.S.C.

Friday, December 16.

LOVE AND OTHERS *v.* MARSHALLS.

Issue — Alternative Issue — Fraud—Fear — Reduction. In the reduction of a *mortis causa* deed, executed by a very old man, where it was averred by the pursuers that he had become weak and facile of mind, and that he had lived latterly under the complete influence and control of the defenders, and that they had impetrated the deed under reduction from him by fraud and circumvention, taking advantage of his weakness and facility, and had prevailed upon him to sign it by threats of ill-usage and otherwise:—

Held (*diss.* Lord Deas), that the following was a good issue to try the cause. Whether, at the date in question, the said person "was in a weak and facile state of mind?" and whether the defenders, "taking advantage of his said weakness and facility, did, *by fraud or circumvention and intimidation,* impetrate and obtain" the said deed, &c.

Held (*diss* Lord Deas), that there was no proper alternative under the circumstances introduced by the word "intimidation" in conjunction with "fraud or circumvention." This would not have been the case even if the issue had been "*or* intimidation," instead of "*and* intimidation." But observed by Lords Ardmillan and Kinloch, and assented to by the Lord President, that "and" was preferable to "or."

Per the Lord President—It has not been the practice to admit proof of such intimidation as is here averred under the ordinary issue of weakness and facility and fraud or circumvention.

Per the Lord President — An alternative issue is objectionable where the alternative is a proper alternative, so as to make it doubtful upon what branch of the issue the jury go;