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,

trust expenses, and the legacies of £2000 to Robert William Moir, £1000 to Miss Anne Tower Moir, and £100 to the Royal Infirmary, or any and which of the said legacies?"

HORN and WATSON, for the trustees.

The Solicitor-General (CLARK) and LANCASTER, for Miss Moir's curator.

LORD COWAN—The questions to be answered in this Special Case relate exclusively to the estate of Mr Moir; and the deeds to be particularly attended to are—(1) The contract of marriage 1830; (2) the trust-disposition and settlement of 1865; and (3) the codicil thereto of September 1870.

By the contract Mr Moir, in contemplation of the marriage, 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, the whole estate and effects then belonging, or which might at the period of his death belong to him,—with power at any time of his life to divide among the children the whole property conveyed, in such proportions, and with and under such conditions, as he might appoint, and failing such appointment the children to take equally.

By the trust-disposition and settlement this power of division was exercised by Mr Moir; and, there being four children of the marriage, he directed his trustees to divide the whole free residue of his estate into four equal shares, each child to have one share, subject to the conditions therein stated.

By the third deed, executed in 1870, an alteration was effected upon the provision contained in the deed of 1865 in relation to his daughter Mary Elizabeth, whose state of health and mental condition were such as to render her unable to manage her affairs and property. In the deed of 1865, the fourth share of the residue given to her was appointed to be retained by the trustees, and to be managed by them for her behoof,—the whole or such part of the income arising from her share of the estate as should be sufficient to provide for her every possible comfort being devoted to that purpose; and the surplus income, if any, of the principal sum being directed to be accumulated, if she continued in the same state, and upon her death to be paid to his other then surviving children in equal shares; but in the event of her recovering her mental health and power of managing her affairs, the trustees were directed to pay over her share of residue to herself absolutely. This provision was altered by the codicil of 1870, and the direction to his trustees revoked and recalled; and "in lieu thereof I direct and appoint my trustees to purchase for her" an annuity of £300 per annum, which, it is said, would procure for her every comfort, "and enable the trustees to wind-up my affairs at once."

There can be no doubt of the intention of Mr Moir to substitute this direction for that contained in the deed of 1865 relative to the share of the estate provided to his daughter Mary Elizabeth, and to appoint such portion only of his means and estate to be employed for her behoof as should be necessary to purchase the prescribed annuity. This, and no more, was to be her share of the succession provided to the children of the marriage by the antenuptial contract; and under the power of division I can have no doubt that Mr Moir was entitled so to limit his daughter's interest in the succession. To meet such an emergency, and to control the *quasi jus crediti* conferred by the contract, the expressions employed are peculiarly appropriate. Without entering on the question how far at common law this could have been effected, it is beyond doubt, I apprehend, that under this contract such power was in the father; and in the situation in which the young lady unfortunately was, and is, it was in every way a suitable and proper act to appoint the share allotted to her to be converted into an annuity. The power reserved by the contract expressly provided that the estate might be apportioned among the children "in such proportions and under such conditions" as might be appointed by Mr Moir. And had the deed of 1865 contained, as regards this daughter, the appointment for her behoof of an annuity to the effect contained in the codicil of 1870, and the rest of the estate been expressly provided to the other three children in equal shares, there could not have been any doubt as to the competency of such an arrangement. But the same result must, I think, be held to be the legal effect of the testamentary writings as they stand.

There can be no question of the testator's intention to divide the whole residue of his estate among his four children; and had Mary Elizabeth predeceased her father the appointment in the deed of 1865, although expressed to the effect of giving one-fourth to each of the four children, must have carried the whole succession to them, and the shares of the three survivors would have been enlarged by accretion. They are truly *conjuncti in re*,—the whole succession of the deceased being given to them in equal shares. And when one of a number of disponees so situated predeceases, the shares of the others become enlarged *jure accrescendi*. That is the rule unless a contrary intention is indicated by the testator. I do not know any better explanation of the principle on which this legal result is based than that contained in the report of *Robertson* v. *Robertson*, 10th December 1819, Hume 273. The distinction between the position of special legatees and parties taking the whole estate under a general settlement was fully recognised by the Court; and it was held that the whole estate of the testator being conveyed its division must be among those of the disponees who survive. Nor has it been held to impair the application of the principle that specific shares are given to parties thus conjoined in the bequest of the general estate. This was expressly found by Lord Wood, whose judgment was acquiesced in, in the case of *Bannerman*, reported in a note on p. 1173, 6 Dunlop, under date 20th June 1844, where the estate was declared to be divisible into twenty-four shares, but from failure of certain of the disponees before the succession opened, the shares of each of the others was by accretion held to be a twenty-first share instead of a twenty-fourth or twenty-second share.

Applying this principle to the present case, such a capital sum as the purchase of the annuity of £300 will fall to be taken out of the funds of the estate, and each of the three surviving children will be entitled to have one-third of the whole residue. And this result is not only consistent with the obligation under which the testator lay, but is in accordance also with his evident intention, indicated throughout his whole settlements, and in particular by the concluding words in the codicil 1870.

I am therefore of opinion that the first question in the Special Case should be answered in the affirmative; and this at once supersedes the necessity of any answer to the second and third ques-

tions, and leads to the fourth question being answered in the negative.

The other Judges concurred.

Agents for the Trustees—T. & R. B. Ranken, W.S.

Agents for the Curator—Mackenzie & Kermack, W.S.

Friday, June 16.

FIRST DIVISION.

COCHRANE (INSPECTOR OF POOR FOR THE PARISH OF LIBERTON) *v.* KYD AND GUNN (INSPECTORS OF POOR FOR THE PARISHES OF BARRY AND CRAMOND).

Poor — Settlement — Parochial Relief — Poor Law Amendment Act, § 76. Where a man, whose birth settlement was in the parish of B., had acquired a residential settlement in the parish of C., and had left that parish in 1862, with his wife and family, and never returned to it again, but between 30th August 1864 and 4th January 1865, had received relief from the parish of N. L. (the relief given upon the 4th Jan. being "for the ensuing fortnight"), which relief the parish of C. repaid, on the ground that he still retained his residential settlement in it. And where, after supporting his wife and family for some time, he thereafter deserted them, and they were ultimately relieved upon 18th January 1869 by the parish of L.—

Held (1) that relief given upon the 4th January for the ensuing fortnight included the 4th itself, the day on which relief was given, and expired at midnight of the 17th.

And (2), without either impugning or maintaining the soundness of the decision in the case of *Johnston* v. *Black* (21 D. 1293), that four years had expired between midnight of the 17th January 1865 and the administration of relief on 18th January 1869, so as to render the retention of the residential settlement in the parish of C. impossible, and therefore B. the parish of birth, and not C., the parish of the former residential settlement, was liable to relieve the parish of L.

This was an action of relief brought by the parish of Liberton against the parishes of Barry and Cramond, to recover the amount of relief given to the wife and family of Peter Low.

Low was born in the parish of Barry, near Carnoustie, in Forfarshire, but early removed to the parish of Cramond, where he resided for some years, and acquired a residential settlement by five years' industrial residence prior to the year 1862. In 1862 he left Cramond with his wife and family, and removed to North Leith. Here he remained from 1862 to 1864, and in the spring of 1864 he left his wife and family there, and went to Egypt to work on the Suez Canal. He returned from Egypt in bad health in August of the same year, and came back to North Leith, where his family had remained. From August 30th 1864 to January 4th 1865 he received relief from North Leith in consequence of continued ill health, which relief that parish recovered from Cramond as the parish of his then residential settlement. The last relief received at this time was on 4th January 1865, and was given for "the ensuing fortnight." In May 1865 he removed to Cockpen, and thence in 1866 to Lasswade. Here he left his wife and family and returned himself to work at Granton, living in St Cuthberts and elsewhere, but not returning to Cramond. From September 1866 he practically deserted his wife, and towards the end of 1868 went off to Glasgow. His wife supported herself for some time, but on 4th January 1869 applied for and received temporary relief from Lasswade, consisting of three or four shillings and some coals. She then removed to Liberton, and applied for and received relief from that parish on 18th January 1869, which has been continued since that date.

The parish of Liberton accordingly raised this action, concluding alternatively against the parish of Barry, that of the husband's birth, and the parish of Cramond, that of his last residential settlement.

These two parishes, without taking sufficient steps to ascertain the residence and circumstances of Low himself, in order to avoid expense put in a minute whereby they admitted that the parish of Liberton was entitled to obtain decree against one or other of them in terms of the conclusions of the summons.

After a proof was led, in which the circumstances above narrated were established, the Lord Ordinary (MACKENZIE) pronounced an interlocutor, finding that Peter Low had not resided since 1862, or since 18th January 1865, in the parish of Cramond, during every subsequent period of five years, continuously for at least one year, and that neither he nor his wife and children, to whom the relief in question was given, can be held to have retained a settlement in the parish of Cramond. That Peter Low had not acquired a settlement by residence in any other parish, and that the settlement of the said Peter Low, and of his said wife and children, was on 18th January 1869, and still is, in the parish of Barry, where he was born. And accordingly decerned against David Kyd as inspector of poor of the parish of Barry, in terms of the conclusion of the summons.

Against this interlocutor the parish of Barry reclaimed.

FRASER and HALL, for the parish of Barry, argued that the case of *Johnston* v. *Black*, 13 July 1859, 21 D. 1293, really decided this, that a new period of five years in terms of the statute began to run on 18th January 1865, and that, consequently, upon 18th January 1869 it was still possible for the Lows to reside a whole year in Cramond, or, which was equivalent, to receive parochial relief at its expense.

WATSON and BURNET, for the parish of Cramond, also referred to the case of *Johnston* v. *Black*, which laid down the rule that relief administered during the four years following upon removal from a parish of residential settlement prevented the loss of that settlement, and gave a new point of departure from which to calculate a new period of five years, during which, as required by the 76th section of the Act, one year's residence in the parish would preserve the residential settlement. They contended that this decision stood alone in the books, and was contrary to principle. They farther contended that, even assuming its correctness, the relief given upon the 4th January 1865 for the ensuing fortnight expired on the 17th January, and that between 17th January 1865 and 18th January 1869 more than four years had elapsed; and therefore the settlement acquired in 1862, and assumed to have been retained in 1865, was lost in 1869.