July 1869 the Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed Record and whole process, Finds that, according to the true construction of the obligation libelled on, contained in the mutual disposition and settlement executed by the defender and his deceased wife, Jane Stott or Greenoak, the defender was not bound, on entering into a second marriage, and is not now bound, to make any special disposition or investment of one-half of his means and estate: Finds that the pursuer and defender have mutually agreed to hold the sum of £10,000 as the one-half of the defender's means and estate at the date of his second marriage: Appoints the defender, by the second box-day in the present vacation, to lodge in process a probative deed executed by him, declaring the said sum of £10,000 to have been at least the one-half of his whole means and estate, and that he thereby, in implement of the said obligation in said mutual disposition and settlement, sets aside the same to be divided equally among the whole children of his marriage with the said Jane Stott or Greenoak after his decease, subject to his claim to deduct from the pursuer's share thereof the sum of £331, and interest thereon, in terms of the deed of acknowledgment and declaration by the pursuer in favour of the defender, No. 16 of process, said deed to contain a clause of registration for preservation: And, in the meantime, reserves farther consideration of the cause and the question of expenses.

Note.—The obligation in the mutual disposition and settlement by the defender and his first wife, which constitutes the ground of action, is far from being clearly expressed. But the Lord Ordinary cannot read it as meaning that the defender, on entering into a second marriage, was to limit his right and interest in the one-half of his estate to a liferent, or was to make any special investment or trust of that portion of his property. In the event, which has happened, of the defender surviving his first wife, he took the whole of his wife's property as disponee, and thereafter the whole estate of both spouses was his absolute property, subject only to the testamentary disposal of it, after his death, in trust for the children of the marriage, and failing them other beneficiaries, and with power to him to revoke the settlement so far as regarded his own share. That power is, however, limited in the event of his entering into a second marriage by the obligation now in question, to set aside in a conscientious manner at least the one-half of his whole means and estate to be divided equally among the children of the first marriage. This is clearly the half of the entire estate of both spouses, which is now the property of the defender. The Lord Ordinary does not think it is a probable or permissible construction of the obligation that it was intended to limit the defender to a mere liferent of one-half of the estate which was previously his unlimited property. It appears to him that the intention was to have the amount of the half fixed, and to limit the defender's power of revoking the subsisting settlement to the other half, so that he should have the means of providing for the wife and family of a second marriage without unduly infringing on the interests of the first family. The Lord Ordinary thinks that this will be sufficiently accomplished, in accordance with the obligation in question, by the execution and registration of a deed in the terms which are generally specified in the preceding interlocutor. He does not think there can be any difficulty in preparing such a deed: but if, when lodged, it shall not prove to be satisfactory, it can be withdrawn, and a deed prepared at the sight of the Court."

The pursuer reclaimed.

GIFFORD for him.

SOLICITOR-GENERAL and M'LAREN in answer.

At advising—

LORD PRESIDENT—The clause which we are called upon to construe is expressed in a peculiar way. And the substance and effect of it are peculiar too. It occurs in a mutual agreement which is of the nature of a postnuptial contract. But it is something more than that; it is of the nature of a testamentary deed also. It is to be valid and effectual so far as not innovated, revoked, or cancelled by the parties jointly, or by the survivor in regard to his half. But after this occurs the proviso that has a great deal to do with the revocable or irrevocable character of the deed. It would remain revocable if the husband did not enter into a second marriage. But if he enters into a second marriage, not only is his power of revocation limited, but also his power of apportionment. The children of the first marriage are to take at least a half of his whole means and estate on the purification of two conditions—(1) the predecease of the wife, and (2) the contracting of a second marriage by the husband. This, it is clear, is succession to him. The husband is to set aside one-half of his estate to be divided equally amongst his children. Such an obligation, even in a marriage-contract, would amount to this—that it would be an onerous obligation obliging the husband so to settle his affairs *mortis causa* as to give the children their stipulated provision. It may be necessary on the contracting of the second marriage to ascertain what is one-half of his estate. That may be very proper in order to prevent disputes afterwards. But I do not think "set aside" can mean more than this—that he is to leave or bequeath a half to the children of the first marriage. I would not have been prepared to order the deed mentioned in the Lord Ordinary's interlocutor to be executed, But as the Lord Ordinary has found it ought to be done, and the respondent is content to let the finding remain, I think we should just adhere to the Lord Ordinary's interlocutor.

LORD DEAS was absent.

The other Judges concurred.

Agents for Pursuer—Wotherspoon & Mack, S.S.C.

Agents for Defender—Fyfe, Miller & Fyfe, S.S.C.

Wednesday, January 12.

SECOND DIVISION.

KNOX *v.* HEWAT.

Poor—Relief—Proper object. Held that a girl aged 17, and suffering from disease of a permanent character, was, though not forisfamiliated, a proper object of parochial relief.

Parish—Boundary. Held, on proof, that a burn which divided two parishes had been altered in its course upwards of 70 years ago, and that the old course of it was the boundary betwixt the parishes.

This was an appeal from the Steward-court of Kirkcudbright.

Knox, the inspector of the parish of Buittle, sued Hewat, the inspector of the parish of Kelton, for repayment of certain sums advanced by him "to Mary Johnston, daughter of and presently residing with William Johnston at Douganhill in the said parish of Buittle, who from age and infirmity is unable to support her, and the said Mary Johnston being from bad health a proper object for parochial relief," and for relief from all future advances on account of the said pauper.

Kelton pleaded non-liability, in respect that (1) the said Mary Johnston was still living in family with her father, who was an able-bodied man, and neither she nor her father was a proper object of parochial relief; and (2) the house in which it was said a residential settlement had been acquired was situated in Buittle, and not in Kelton.

A proof was allowed to the parties, and the following facts were ascertained:—Mary Johnston was in 1867 aged 17; she had never been forisfamiliated; for some time she had been labouring under scrofula, which rendered her quite helpless; and her disease was of a permanent character. (It was mentioned that since this appeal was brought she had died.) The father was 67 years of age, and had been troubled with attacks of pleurisy occasionally for the last eight years. He could not work in wet weather, but when he did work he earned 20d. a day; for the last three years he had been able to earn on an average, 7s. a week, and he had not been a month altogether off work from sickness during that period. He had a wife and three other children living with him, and he had five other children from whom he got some assistance. But the state of his daughter Mary's health rendered it necessary that she should receive cordials and other things, the expense of which he was unable to defray.

On the other point, the proof showed that the parishes of Kelton and Buittle were divided by the Doach burn, and that that burn had since 1800 flowed on the Kelton side of the house in which the pauper lived; but there was also some evidence to prove that, betwixt 1795 and 1800, the course of the burn had been altered, and that previous to the alteration it had flowed on the Buittle side of the said house, or rather of the ground on which it has since been built. It farther appeared that, from 1843 to 1862 there had been a voluntary assessment, and since 1862 a legal assessment, for the poor in Buittle; and that, since 1838 there had been a legal assessment for the poor in Kelton; but these rates, as well as county and other rates, were all levied and paid on the footing that the subjects were in Buittle, and not in Kelton. The valuation roll was made up in the same way. It farther appeared that from 1822, when the house was built, until 1845, all births, deaths, and marriages taking place in it were registered as in Buittle, but since 1845, when some doubt was thrown upon the boundary by the publication of the Ordnance Survey, where it was described as "undefined," some of these were registered in one parish and some in another.

The Steward-substitute found Kelton liable. He found, as matter of fact, "that the pauper Mary Johnston referred to in the record was, on 27th March 1867, in respect of the state of her health, a proper object of parochial relief in her own right, and has continued so ever since." He also found that the pauper's house was in Kelton.

The Steward adhered.

The defender appealed.

Millar, Q.C., and Burnet, for the appellant, argued—(1) The proof shews that William Johnston, the father, was able to support himself; he was, therefore, an able-bodied man (*Jack* v. *Thom*, 23 D. 173); (2) It is a *presumptio juris et de jure* that an able-bodied man is able to support his unforisfamiliated children (*M'Kay* v. *Baillie*, 15 D. 974; *Hay* v. *Thomson*, 18 D. 532; *Hay* v. *Paterson*, 19 D. 339, per Lord Deas); (3) The child of an able-bodied man is not entitled to parochial relief (*Lindsay* v. *M'Tier*, 1 Macq. 155); (4) Even assuming that William Johnston is not able-bodied, it is he and not his daughter who is the pauper; (5) The cases of *Hay* v. *Paterson*, 19 D. 332, and *Beattie* v. *Adamson*, 5 Macph. 47, relied on by the Steward-substitute, do not warrant his findings, because in both of these cases the parties expressly admitted that the child was itself a proper object of relief, and there is no such admission here. In the one case the child was in a lunatic asylum, and in the other it had been deserted; (6) On the other question, there is no proof that what has existed and been recognised as the boundary for more than 40 years was ever anything else.

Scott and Keir, for the pursuer, replied—(1) Whatever may be the law as to a pupil child, it is not the law of Scotland that a child above puberty, and in a state of helplessness from bodily disease, cannot become an object of relief in its own right until forisfamiliation takes place. They founded on Lord Ivory's opinion in *Hay* v. *Paterson*. (2) The proof shews that the course of the Doach burn was altered betwixt 1795 and 1800.

At advising—

Lord Justice-Clerk—There are two questions brought before us by this appeal. The first is in what parish the pauper's residence is situated; and I would have been glad if I could have seen my way to decide the case upon the possession which has existed for some years. There is no doubt that poor rates and other taxes have been levied by Buittle upon the houses at Burnside, but on considering the whole matter carefully I am satisfied that this state of possession has not existed long enough to exclude consideration of the proof which has been led in this case as to the boundary. That proof shows, in my opinion, that previous to 1800 there was a change effected in the course of the Doach burn, and that before that change the ground on which the Burnside houses have since been built was in Kelton parish. The other question raised has given rise to a very large discussion of some very recondite points of poor law. My idea is that questions of Poor Law are not matters of strict law. The rules of that law must be reasonably interpreted, and effect must be given to the spirit as well as the letter of it. I reserve my opinion on the general question, whether, in the case of an able-bodied man, his child above the age of puberty, who has been stricken down with incurable disease, is in its own right an object of parochial relief. If it is to be held that a father who is able to maintain himself must maintain also his bedridden child at an expense beyond his means, or, in order to keep it in life, throw himself as a pauper on the parish, I think a great hardship is inflicted on the father. The law can never contemplate taking him from a position of respectability and making him a pauper against his will. But that is not the question here. I think it is proved that the father is not able-bodied. He could not probably have demanded relief for himself, but when the question

arises in regard to his daughter, I think it cannot be said that she is the child of an able-bodied man in the legal sense of these words. I am therefore for affirming the interlocutors of the Court below.

Lord Cowan—If it had been quite clear that there had been for the last seventy years or for forty years a general understanding, which had been acted on, that this house was locally situated in Buittle, I would have thought that a sufficient ground on which to sustain this appeal. But I don't think that that is so. The poor rates have not been levied for so long, and the practice as to registration of births and deaths has not been uniform. In regard to the second question, it must be kept in view that we are not dealing here with a demand by a pauper. It is a question betwixt two parishes, one of which has already made advances, of which it seeks repayment. We must also keep in view the special circumstances of the case. The girl is seventeen years of age, and although living with her father she is quite helpless. That is a very special case, and though not prepared at present to go so far as Lord Ivory seems to have done in the case of *Hay* v. *Paterson*, yet I think that when a case becomes so exceptional there is no reason either in humanity or law for holding that the father must be himself pauperised before you can hold the child a proper object of parochial relief.

Lord Benholme—I hold it to be clear that when a parish boundary is once fixed it cannot be altered by an accidental deviation or an artificial change in the course of a stream which forms the boundary. I cannot adopt the view as to possession which has been referred to by Lord Cowan. Any possession must necessarily be limited in its nature; but I agree that the attempt to prove such long possession has failed, and I am satisfied on the proof that the course of the burn was changed before 1800, and that this ground was then in the parish of Kelton. On the other point, if I thought that by dismissing this appeal we were sanctioning the doctrine that Lord Ivory's opinion in *Hay* v. *Paterson* was the law of Scotland, I would be slow to do so. In the case of a pupil child there is no such principle as he speaks of. But what induces me to concur with your Lordships is, that as I read the evidence the father in this case was not an able-bodied man. I think it cannot be said that if he had himself made the application it could have been refused. His position depended not only on the extent of his means but on the weight of his burdens. The true question here is, was the relief given not proper in the circumstances, or was it granted improperly? If it was right I don't think the defender can maintain that it was asked in a wrong way in point of form—that the application should have come from the father and not from the child.

The following interlocutor was pronounced:—"The Lords having heard counsel on the appeal, Find that the pursuer, on dates libelled, advanced to the alleged pauper Mary Johnston the sums sued for: Find that the said Mary Johnston was at that time seventeen years of age, living in her father's house, and suffering under severe and permanent disease, which entirely disabled her from earning her livelihood: Find that the father of the said Mary Johnston was not an able-bodied man, and that, although he was able to work in good weather and was in receipt of wages, he was entirely unable to afford to his daughter the pauper the necessary support which she required: Find that the said Mary Johnston was at the date of the said advances a proper object of parochial relief: Find that the said Mary Johnston resided in the parish of Kelton, and that the said parish is liable to repay the said advances to the respondent. therefore dismiss the appeal and adhere to the judgment appealed against, and decern: Find the respondent entitled to expenses in this Court, and also in the Court below, and remit to the auditor to tax and report.

Agent for Appellant—W. S. Stuart, S.S.C.
Agent for Respondent—H. Milroy, S.S.C.

Wednesday, January 12.

BANK OF SCOTLAND *v.* ROBERTSON.

Deposit-Receipt — Joint Adventure — Presumption.
Two brothers, engaged in a joint adventure, deposited the proceeds thereof in bank, and took a receipt therefor in the following terms:—"Received from Mr Peter Robertson and Mr George Robertson, Newport, to be drawn by either of them or by the survivor, £250, which is placed to their credit on deposit-receipt." *Held*, in the absence of proof to the contrary, that there was a presumption arising from the terms of the deposit-receipt and the ascertained origin of the fund, that it belonged in equal shares to the brothers.

This was an action of multiplepoinding raised by the Bank of Scotland in regard to a sum of £250 lying in their bank on a deposit-receipt in the following terms:—"Bank of Scotland, Dundee, 4 November 1867.—250 stg. Received from Mr Peter Robertson and Mr George Robertson, Newport, to be drawn by either of them, or by the survivor, Two hundred and fifty pounds sterling, which is placed to their credit on deposit-receipt.—For the Governor and Company of the Bank of Scotland. (signed) W. Freeland, *p.* agent. Entered, 21,600." Endorsed on back—George Robertson.

The parties claiming the fund were—1st, Geo. Robertson, shipmaster, Newburgh; 2d, Mrs Eliza Welsh or Robertson, wife of Peter Robertson, lately shipmaster at Newburgh; and 3dly, David Smith, accountant in Edinburgh, as trustee on the sequestrated estate of Peter Robertson. The £250 deposited in bank consisted of profits of a vessel called the "Tay," of Perth, of which Peter Robertson and his brother, the said George Robertson, had become joint-owners in March 1861, and the grounds upon which George Robertson claimed to be preferred to the entire fund *in medio* were that, on a balance having been struck in July 1867 by Peter Robertson, who had managed the vessel and taken charge of its profits, it appeared that the share of profits due to his brother George amounted to £260, 1s. 1d., and that therefore the entire sum in the deposit-receipt belonged to him as his share of the profits, the said deposit-receipt having, in November 1867, been handed over by Peter Robertson to his mother Mrs Robertson, residing in Newburgh, to be given by her to George Robertson. Mrs Peter Robertson's claim was founded upon this, that on the 20th February 1868 she had raised an action of separation and aliment against her husband. On the dependence of that