

in the event of his predeceasing his mother, while D is only to come into operation if he dies after her.

The testator predeceased his mother, so D does not receive effect. Division C therefore regulates the succession, except in so far as it is controlled by the terms of the codicils which the testator annexed to his settlement. What we have to do in the present case is to construe a bequest contained in the last codicil, to Peter Cowe, a relative of the testator. It is in these terms—"In addition to any legacy mentioned in this will by which he may be left any property of whatsoever kind to Peter Cowe, or his next-of-kind (as designated in a previous clause of this codicil), I leave the sum of Five hundred pounds sterling (£500), which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over."

Now, taking the words of the legacy by themselves they raise no difficulty. It is an unconditional bequest to Peter Cowe of £500, but then it is followed by these words—"To be handed over along with or at such time as legacies mentioned in clause D." Now, the legacies in clause D can never be handed over to anybody, for the reason I have already mentioned.

What does the testator mean then by a reference to the "legacies mentioned in clause D"? I cannot tell, but nevertheless I cannot spell out of this direction anything like a condition adjoined to the legacy of £500. There is here a simple direction to the trustees to hand over this bequest along with the "legacies mentioned in clause D." These words have little meaning, and one can only gather from them the testator's desire that the bequest should be paid over at the same time as the legacies in D. A direction as to the time of payment is not subversive of the bequest, provided the words of bequest are clear. Therefore I do not see how the circumstance that the legacies in D are not to be paid can operate to destroy this bequest.

I am for authorising the trustees to pay.

LORD MURE concurred.

LORD ADAM—I am of the same opinion. This gift of £500 is clear and unconditional. The words in the codicil are simply a direction to the trustees, and do not in any way destroy the gift.

LORD SHAND was absent from illness.

The Court answered the question in the affirmative.

Counsel for the First Parties—Goudy. Agents—Adam & Sang, W.S.

Counsel for the Second Party—G. W. Burnet. Agent—R. Bruce Cowan, W.S.

Wednesday, November 23.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

MAGISTRATES OF TAIN v. MURRAY.

Fishings—Salmon-Fishings—Division of, where ex adverso of Neighbouring but Discontiguous Properties—Property—Marches.

In an action between the proprietors of lands, which were separated by the inlet of an open bay, to determine the mutual boundary between their salmon-fishings *ex adverso* of these lands, the pursuers maintained that the boundary was the *medium filum* of a small burn whose channel traversed the bay, and was visible at low water. There were no boundaries in the title, and no evidence of possession. A remit was made to a civil engineer, who reported that the course of this burn was subject to alteration, owing to the action of wind and tide; that the general outline of the coast was represented by a line which was a segment of a circle, from the centre of which he drew a line to the western boundary of the eastmost property, which he proposed as the boundary of the fishings.

Held that as the channel of the burn did not supply a natural boundary of a permanent kind, the march should be determined according to the method adopted in the case of *M. Taggart v. M. Douall*, March 6, 1867, 5 Macph. 534, and that although the reporter had deviated from this method to some extent, the pursuers had no interest to object to the boundary proposed.

This was an action of declarator at the instance of the Provost, Magistrates, and Town Council of the Royal Burgh of Tain, proprietors of the lands of Morrichmore, which extend along the south shore of the Dornoch Firth, against W. H. E. Murray, Esq. of Geanies, proprietor of the lands of Arboll, which are also situated on the same shore, although they are discontiguous from the lands of Morrichmore, being separated from them by the Inver channel or bay, the conclusions of which were to have it found and declared "that the legal boundary or march between the salmon-fishings belonging to the pursuers in the estuary or sea adjacent to all and whole the lands of Morrichmore, in the county of Ross, also belonging to the pursuers, on the one part, and the salmon-fishings belonging to or claimed by the defender in the estuary or sea adjacent to all and whole the lands of Arboll, or part thereof, also belonging to or claimed by the defender, on the other part, is the *medium filum* of the Fendom Burn and Inver channel at low water, as delineated with a red line laid down on the copy Ordnance map produced herewith, or such other line as shall be found to be the legal boundary or march between the said respective salmon-fishings in the course of the proceedings to follow hereon."

The titles of the pursuers and of the defender respectively contained grants of salmon-fishing *ex adverso* of their lands, but prescribed no boundaries within which the respective rights were to be exercised, and there was no evidence of possession of the fishings.

The pursuers averred—"The lands of Morrich-

more consist of a large low-lying piece of ground, bounded on the north-west by the Dornoch Firth, on the north-east by the open sea, and on the south-east at low water by the Fendom Burn and Inver channel, which at high water form an estuary called Inver Bay. The foreshore of the Morrichmore is called the Whiteness Sands, and extends several miles in length, with an average breadth of about one mile from high to low water-mark on the north-west side, and about 250 yards on the north-east side. . . . The defender's lands lie to the south-east of the pursuers' lands of Morrichmore, and are separated therefrom at low water by the Fendom Burn and Inver channel, which at high water form an estuary called Inver Bay. The Fendom Burn is a large stream formed by the confluence of a considerable number of burns. In ordinary spring tides the sea runs up it for $3\frac{1}{4}$ miles above the western march of the defender's lands (the march nearest to the Morrichmore). At low water the channel of the Fendom Burn at the said march is 246 feet in width, and too deep to be forded. In order to cross from the defender's lands to the Morrichmore at low water it is necessary to take a boat out by sea, or, passing entirely off defender's lands on to those of others, to proceed up the stream to a ford situated at fully half a-mile's distance from the nearest march of defender's lands, and to travel back from that ford upwards of a mile on the lands of Morrichmore or the foreshore in order to reach the fishing-ground and the nets. This ford is available only at low water, the depth at high water being from 8 to 10 feet, according to the state of the tides. At no state of the tide is it possible to pass by land or ford from the defender's lands to the Morrichmore or the Whiteness Sands, except by passing through the lands of other proprietors, and when the ford above mentioned is not available on account of the state of the tide this involves a detour of several miles."

The defender's statement in answer was as follows:—"Denied that the Fendom Burn is properly speaking a fresh-water stream at all, but explained that it is a water-course by which the superfluous water from the Morrichmore and the adjoining lands drain in ordinary weather into the head of the Inver channel or bay, and that in drought it is totally dry. Under no conditions is it practicable for the ascent of fish of the salmon kind, nor have they ever been found there. The said Inver channel is therefore merely an indentation of the coast (a large part of it being on the foreshore *ex adverso* of the defender's lands), in which the water is entirely salt at all states of the tide. The retention of water in the said channel being assisted by a sand-bar at the mouth thereof, and the bed of the bay being composed of soft sand, the course of the channel at low water is constantly changing. After very high tides the channel has been noticed to alter its course by several hundred yards, and its configuration now is entirely different from what it was when the plan produced by the pursuers was made by the Ordnance Survey in 1872." The defender stated that as the course of the Fendom Burn was to the east, the result as fixing as the boundary the line contended for by the pursuers, would be to deprive him of the greater part of the salmon-fishings *ex adverso* of his lands.

The Lord Ordinary (TRAYNER) on 20th July 1886, before answer, remitted to Mr George M. Cunningham, C.E., who reported as follows:—" . . . That the defender's lands of Arbol lie to the south-east of the pursuers' lands of Morrichmore, and are separated therefrom at high water by Inver Bay, and at low water by the channel of that bay.

"The Fendom Burn is a very small stream running into the head of Inver Bay, the head of the bay being about a mile and a-half from the western march of the defender's lands. A short distance further up at South Pitnellies the burn is little else than a mere ditch; it does not appear to the reporter to be in any sense of the word a salmon river.

"The Fendom Burn from its source to where it enters the bay is about four miles in length following the sinuosities of the stream, and of this length it is tidal for about a mile and a-half.

"At low water the width of Inver channel, opposite the western march of the defender's lands, is about 246 feet, but whether it can be forded depends on the state of the tide. On the 18th of August last the depth of water in the channel opposite the defender's march was at low water 2 feet 6 inches.

"I have prepared a plan extending from the village of Inver to where Inver Bay joins the Dornoch Firth, showing the position of the channel on the 18th of August last, and the depth of water at various points along it, marked in feet and inches as it was at low water on that day.

"It will be seen that at the bar, or where it joins the Dornoch Firth, the water was just six inches deep, and for a distance of 400 yards up the channel it did not exceed at any place 1 foot in depth. Further up it got deeper, varying from 1 to 8 and 9 feet. I may mention that the tide on 18th August was said to be an exceptionally low one, and the depth of water at low water of spring-tides may therefore sometimes be a foot or so more than marked.

"The range of the tide on the above date was 11 feet 5 inches. By the Admiralty chart the range of ordinary spring-tides is 11 feet.

"The depth of water at the bar is at low water almost the same as at the village of Inver, and the practicability of fording the channel at either place depends entirely on the state of the tide. When Inver Bay cannot be forded at any point, no doubt a long detour would be necessary to get from the lands of the defender to those of the pursuers, unless by using a boat to cross Inver Bay.

"At the request of the pursuers I have marked on the Ordnance map in blue and lettered A B the ford referred to by them as 'a ford situated at fully half a mile's distance from the nearest march of defender's lands.'

"No doubt this ford would be generally used by anyone coming down the road leading directly to it from the main road on the south? it is, of course, only available at or about low water. But the channel can be forded equally well at other points between that and the Dornoch Firth, and the reporter himself forded it in a cart on 7th August last at two places below the village of Inver.

"I have at the request of parties laid down in blue on the Ordnance 6 inch map the course of the Inver channel as on the 18th of August last. It

will be seen that it has changed very considerably since the date of the Ordnance Survey in 1872; but there is nothing remarkable in that, as the whole bay being of sand the action of wind and tide must bring about frequent changes.

“I was asked by the pursuers to define ‘the *medium flum* of the channel of the Fendom Burn and Inver Bay at low water.’ I have accordingly drawn a dotted blue line down the centre of the Inver channel as it was on 18th August last. I do not consider that channel to be the Fendom Burn, because in my opinion the Fendom Burn terminates where it enters Inver Bay, about a mile and a quarter above the village of Inver. . .

“I have also laid down on the Ordnance map a dotted red line, indicating what I think very fairly represents the general outline of the coast along a considerable portion of the Dornoch Firth at the place in question. I find that the line so laid down is a segment of a circle having a radius of 2½ miles, and I have drawn from the centre of that circle a strong red line to the west boundary of the lands of Arboll, and therefore a line at right angles to the direction of the circumference of the circle at that point? and if I am right in the conclusion which I have formed regarding the matters dealt with in this report, I would respectfully submit that the line so drawn should form the western boundary of the fishings of Arboll.”

On 10th June 1887 the Lord Ordinary found and declared that the legal boundary or march between the salmon-fishings belonging to the pursuers in the sea adjacent to the lands of Morrichmore and the salmon-fishings belonging to the defender in the sea adjacent to the lands of Arboll, was the line laid down by the reporter.

“*Opinion.*—The pursuers conclude for decree finding and declaring that the legal boundary between the salmon-fishings and those of the defender Mr Murray is the ‘*medium flum* of the Fendom Burn and Inver channel at low water,’ or such other line as the Court may fix. . .

“The pursuers’ contention that the *medium flum* of the Fendom Burn and Inver channel should be adopted as the boundary line, proceeded upon the averment that the Fendom Burn and Inver channel (at all times practically the same in line and direction) afforded a natural boundary between the properties of the parties respectively, and should therefore be accepted where it reaches the sea, as the point from which the boundary line of their respective fishings should be drawn seaward. The ascertained facts, however, do not coincide with the pursuers’ statements.

“From the report of Mr Cunningham it appears that the Fendom Burn is not at all of the character alleged by the pursuers; that it terminates where it flows into the Inver channel at a considerable distance from the sea, and does not there form any boundary between the properties of the parties; while the Inver channel cannot be regarded as a boundary at all, its character and line being subject to great and frequent changes through the effects of sea and wind.

“There being therefore no natural boundary which can be appealed to in aid of the solution of the present question, and no possession on the part of the pursuers proved or offered to be

proved which could throw light upon the rights of parties, it appeared to me that the only mode which could be adopted to fix the boundary line which the pursuers desire to have fixed was that which was followed in *M’Taggart v. M’Douall*, 5 Macph. 534. I called the reporter’s attention to that case, and desired him to lay down a boundary line between the fishings of the parties on the principle there adopted and since approved—*Keith v. Smyth*, 12 R. 66. Mr Cunningham did not find it possible to follow exactly the mode adopted in *M’Taggart’s* case on account of the difficulty (arising from the natural contour of the coast-line) in obtaining any straight line which would represent the average line of coast. But he suggests a line of boundary which appears to be as favourable for the pursuers as any they could get, unless it were a perpendicular line dropped seaward from the mouth of the Inver channel. This line (from the mouth of Inver channel) is, in my view, for several reasons, a line to which the pursuers are not entitled. I adopt therefore the line suggested by Mr Cunningham, and find that to be the boundary between the fishings of the parties.”

The pursuers reclaimed, and argued—The question here was whether an artificial line laid down by the reporter, or whether the natural boundary should be taken as the legal boundary. The fishings were at all times separated by a permanent watercourse; this was the material averment of the pursuers and the report established it. The method followed by the reporter in ascertaining the average line of the coast was entirely new—*M’Taggart v. M’Douall*, March 6, 1867, 5 Macph. 534, per Lord Justice-Clerk 545; *Keith v. Smyth*, November 7, 1884, 12 R. 66; *Laird v. Reid*, March 14, 1871, 9 Macph. 699; *Stewart Gray v. Fleming and Richardson*, January 9, 1885, 12 R. 530. There was between the properties a boundary, consisting of a combination of river and sea. “Inver” meant the mouth of a river. The bar at the mouth showed its character. It was a clear physical boundary. The pursuers were therefore entitled to the fishings up to the *medium flum* of the channel.

The defender argued—The pursuers’ case was that there was here a natural boundary, and that there was no need of an artificial line. But the report showed that there was no proper natural boundary, and the reporter was therefore bound to follow the rule of *M’Taggart’s* case, and, as far as was possible in the circumstances, he had given effect to it.

At advising—

LORD PRESIDENT—The pursuers, and the defender Mr Murray of Geanies, possess lands on the south shore of the Dornoch Firth, and also grants of salmon fishings in connection with their lands and *ex adverso* of them. There are no boundaries of the fishings specified in the titles, and there has been no possession which can fix and determine the boundaries of the fishings. The question here therefore is, whether the line claimed by the pursuers in the summons as the boundary of the two fishings is consistent with the grants of the parties to the action?

The claim of the pursuers is that the boundary between the fishings is the *medium flum* of the

Fendom Burn and the Inver channel at low water. Now, we have the various facts and circumstances necessary for the determination of the case stated sufficiently in Mr Cunningham's report, and these are comparatively few in number.

The Fendom Burn enters Inver Bay, which is an indentation on the southern shore of the Dornoch Firth, and is almost dry at low water. The nature of the Fendom Burn is thus described by the reporter—"The Fendom Burn is a very small stream running into the head of Inver Bay, the head of the bay being about a mile and a half from the western march of the defender's lands. A short distance further up at South Pitnellies the burn is little else than a mere ditch; it does not appear to the reporter to be in any sense of the word a salmon river. The Fendom Burn from its source to where it enters the bay is about four miles in length following the sinuosities of the stream, and of this length it is tidal for about a mile and a half." It also appears that before it enters Inver Bay, the Fendom Burn does not form the boundary between the lands of the pursuers and the defender. The lands of the defender do not go up that length; between his lands and those of the pursuers there intervene certain lands belonging to Mr M'Leod of Cadboll, and therefore until we come down to Inver Bay the Fendom Burn is no boundary between the lands of the parties.

But it is said that the Fendom Burn after it enters Inver Bay, either it or the channel of the bay itself, however we may call it, is the boundary between the lands and the salmon-fishings of the two parties. In considering this contention we must see what would be the effect of sustaining the declaratory conclusions of the summons, and that effect would be to cut off from the fishings of the defender a large portion of the foreshore which, according to the ordinary meaning of language, lies *ex adverso* of his lands.

The general line of the Fendom Burn and the channel of Inver Bay in its upper part is from south to north, but in the course of its passage through the channel of Inver Bay, through which the Fendom Burn flows and where the water is very largely salt, the channel takes a sudden turn, and instead of going from south to north it goes to the east, and so interposes itself between the lands of the defender and the water of the Dornoch Firth. It is said that the *medium filum* of that course must be the boundary. But to give effect to this would be to cut off a portion of the shore and fishings belonging to the defender, and that is a startling result to begin with. But when we come to consider what sort of boundary would thus be fixed down as far as the Firth, it is apparent that it would not be one of a permanent character. It is a matter of very recent experience that the course of the Inver channel has changed very considerably, and to take it as sufficient for the present purpose would be to adopt what would likely turn out to be a shifting boundary. We cannot say whether in the course of time the course of the channel will not have changed in such a way that the stream may find its way by a straight line to the Dornoch Firth. Now, it seems to me that this channel instead of supplying a natural boundary, as the pursuers contend for, would only give a shifting boundary, and one inadequate to fix the rights of parties.

I therefore agree with the conclusion at which

the Lord Ordinary has arrived on the report in this case, and I cannot accept the line proposed by the pursuers as a boundary of a satisfying or permanent kind. In this case we must follow the ordinary course, and proceed to fix the boundary on the same principle as in the case of *M'Taggart v. M'Douall*, 5 Macph. 534. It is true that the reporter has not precisely followed the rule laid down in *M'Taggart's* case, because he has not laid down a straight line as the average line of the shore? On the contrary, he has laid down a segment of a circle, and has drawn from the centre of that circle a line to the west boundary of the lands of Arboll, which he submits should form the western boundary of the fishings of Arboll. If there had been any interest on the part of the pursuers to challenge that method, I should have been inclined to remit back to the reporter to rectify the line to correspond with the rules already fixed by decision. But the pursuers have really no such interest in the matter. Their interest is to have the line fixed a great deal further to the east, but if they cannot have that, the line as it is will be more favourable to them, and less so to the defender, than one drawn in terms of the more precise rule. The defender does not press this point, and it does not appear to be very material to him to do so. There is nothing in the so-called artificial boundary which the reporter has adopted to interfere with the general rule of law.

The important point here is, that there is nothing in the so-called natural boundary to disturb the application of the general rule which must be followed where there are no boundaries in the titles, and no possession to mark the boundaries.

LORD MURE concurred.

LORD ADAM—Both parties here have grants of land with the fishings *ex adverso*, and as I understand it, their lands are on the shore of the Dornoch Firth, but are nowhere contiguous to each other. The inlet of Inver Bay is between the lands of both. It is a *prima facie* case for supposing that as the right of fishing is one *ex adverso*, the boundary line to be drawn is a perpendicular to a straight line that may be fixed as the average line of the shore, and it is not disputed that in this case to some extent that method has been given effect to. It is not disputed by the pursuers that if there is no natural boundary the foreshore is, partly at least, *ex adverso* of the defender's lands, and if that be so, it cannot be *ex adverso* of the pursuers' lands at the same time. It cannot be *ex adverso* of both. But the pursuers maintained that the march should be taken to be the course of the channel which was a natural boundary. I do not say that the ordinary rule may not bend to the physical features of particular cases. That may quite well be. All I say is that here we have no physical features to prevent the application of the ordinary rule which has been fixed in the case of *M'Taggart*. The burn on which the argument for the pursuers entirely depends is no more than a ditch about 4 feet across, and its course through the sand is nothing but a shifting channel incapable of supplying the desirable element of permanency.

LORD SHAND was absent from illness.

The Court adhered.

Counsel for the Pursuers—Balfour, Q. C.—Sir C. Pearson—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Defender—D.-F. Mackintosh—J. P. Grant. Agent—T. M. Murray, W.S.

REGISTRATION APPEAL COURT.

Wednesday, November 23.

(Before Lord Mure, Lord Craighill, and Lord Kinnear.)

[Sheriff-Substitute of Lanarkshire.]

M'GILL v. GAY.

Election Law—Representation of the People (Scotland) Act 1884 (48 Vict. c. 3), sec. 3—Inhabitant-occupier—Service Franchise—Soldier in Barracks.

Held that a soldier who has lived in separate apartments in barracks for the qualifying time is entitled to the franchise under the 3d section of the Representation of the People Act 1884.

The Representation of the People (Scotland) Act 1884 (48 Vict. c. 3), sec. 3, provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed, for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant-occupier of such dwelling house as a tenant.

At the Registration Court for the Partick Division of the county of Lanark, held at Maryhill, on 8th October 1887, John Gay, sergeant-major, Maryhill Barracks, claimed to have his name inserted in the roll of persons entitled to vote in the election of a member of Parliament for the said division as tenant of a house in Maryhill Barracks in virtue of service.

Mr James W. Purvis, writer, Glasgow, as agent for Mr Thomas M'Gill, rubber-cutter, 4 Kingston Place, Maryhill, a voter on the roll for said division, objected to the said John Gay being entered on the said roll on the ground that he was not tenant of the premises founded on in the manner required by the statute, but simply the occupier in respect of his service as a soldier in the British army, and therefore he was not entitled to the franchise.

The following facts were admitted—That John Gay in respect of his position in the British army had occupied exclusively separate apartments by himself and family in Maryhill Barracks for more than a year prior to the 31st July 1887, and was still in the occupancy thereof—it being the rule to provide the married men whose families were allowed to reside with them in barracks with rooms for their exclusive use.

The Sheriff-Substitute (SPENS) rejected the claim, holding that the occupation of premises in barracks by a soldier on duty could not be re-

garded as tenancy in the sense of the Act of Parliament.

The said John Gay requested a special case for the Court of Appeal, and in compliance therewith the Sheriff-Substitute granted this case.

The question of law for the decision of the Court of Appeal was—"Whether a soldier who has lived in separate apartments in barracks for the qualifying period is entitled to be put upon the roll as tenant of a house in virtue of the Representation of the People Acts?"

The Sheriff-Substitute added that should his decision be reversed, other 51 names, which depended upon the same question of law, would require to be added to the roll. He also stated that other claims had been rejected by him on the same ground of judgment, but that in these cases the circumstances were as follows—The claimants were four commissioned officers, who each had the exclusive occupancy of one bedroom, but who took their meals in a mess-room to which they had each a common right.

Argued for the claimants—The conditions as to time had been complied with. The only question was whether occupancy by virtue of service in the army was occupancy as tenant "by virtue of any service" in the sense of the Reform Act 1884, sec. 3. The claimants maintained it was. They kept the keys of their respective rooms, and had the exclusive use of them, subject only to officers' visits for the purposes of discipline and of sanitary inspection. The matter had been settled in England in the recent case of *Atkinson v. Collard*, November 5, 1885, 16 Q.B.D. 254.

There was no appearance for the respondent.

At advising—

LORD MURE—The question raised in this case is a short and simple one, founded on the 3rd section of the Reform Act of 1884, which provides—[reads section]. Now, in virtue of that clause these parties, who are some forty or fifty non-commissioned officers residing in Maryhill Barracks, claim to be enrolled on the register of voters for the Partick division of the county of Lanark, and they claim on the ground that by virtue of their service in the army they had rooms in the barracks, which they occupied as tenants in the sense of the statute. The facts as stated by the Sheriff are these—[narrates facts above stated]. Now, that is the position of the claimant. He is in the employment of the Queen, he occupied exclusively separate apartments by himself and his family during the necessary period, and he still occupies them. That being so, I am quite unable to see how it can be held that he is not entitled to be put upon the roll, and I think his claim should be admitted. The Sheriff says he disallowed it because he is a soldier. Well, the Act does not use the word soldier, but it says whoever is in employment, and by virtue of that employment inhabits a dwelling-house, shall be deemed, for the purposes of the Act, to be an inhabitant-occupier of such house as tenant. If it be said that in some of the cases here it was only a room, that is met by the words of the interpretation clause of the 1868 Act, which says—"dwelling-house shall include any part of a house occupied as a separate dwelling," and by our judgment in the *Crieff* case last year (*Ballingal v. Menzies*, Nov. 26, 1886, 14 R. 127). I am therefore for altering