

under which they were supplied, or to pay the price of them. If the insects that came from these palliasses caused loss to the defender he may recover in an action of damages.

To my mind these considerations furnish a satisfactory ground for deciding the case against the defender, but I would further wish to say that in my opinion even if the defender had the right to reject the furniture, he did not exercise his right *tempestive*.

LORD JUSTICE-CLERK—I have come to be of the same opinion, although apparently with more difficulty than your Lordships have had. The main ground on which I put my judgment is, that the length of time which elapsed between the reception of the furniture and the date of rejection is quite unexampled in a case of this kind. The goods were sent to the hotel in June, the damage was discovered shortly afterwards, but they were not sent back till the beginning of the following year. No doubt the ground of the rejection was to some degree occult—that is to say, it did not at once appear where these mites had come from, whether from the palliasses or whether they were generated in the furniture. But it is clear that when these animalculæ did appear upon the furniture, the course the defender took, although a most sensible one in the circumstances, goes far to show that this case should be decided against him. For he entered into an agreement with the pursuer that he should clear the furniture of these creatures, and that substantially meant this, that the goods should not be returned if the pursuer did what he could to prevent the infection from spreading. I think that the long delay I have referred to indicates that the return of the goods was not in accordance with the agreement of parties. As to whether an action of damages would lie at the instance of the defender against the pursuer in such circumstance as these, I do not think it necessary to say anything.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Graham Murray—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for the Defender and Respondent—D.-F. Mackintosh—W. Campbell. Agents—J. & A. F. Adam, W.S.

Friday, November 18.

FIRST DIVISION.

GRANT AND OTHERS (COWE'S EXECUTORS)
v. COWE.

Succession—Legacy—Conditional or Unconditional.

A testator left a holograph will divided into clauses, by clause D of which it was provided that in the event of his surviving his mother certain legacies therein specified were to be paid. By a subsequent codicil he left a legacy, "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." The testator predeceased his mother, and the bequests in clause D therefore lapsed. *Held* that the bequest in the codicil was unconditional, and that the reference to clause D had reference merely to the time of payment.

Henry Cowe died on 30th March 1881 leaving a holograph will with two codicils. The will was divided by the testator into clauses distinguished by letters and numbers.

By clause A he left the liferent of his whole property to his mother, except certain articles mentioned in clause B, which he bequeathed to special legatees.

By clause C he made certain provisions in the event of his predeceasing his mother, and by clause D he directed what was to be done in the event of his surviving his mother.

By the codicils annexed to his will the testator made various alterations upon its provisions. The second codicil revoked the special legacies in clause B. It contained the following bequest—"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."

The testator predeceased his mother, and the liferent of his estate was paid to her till her death.

By the testator's predecease of his mother the provisions contained in clause D lapsed.

A question having arisen whether, as the legacies in D had lapsed, this legacy to Peter Cowe did not lapse also, the present special case was presented to have the question determined. The parties of the first part were the executors-nominate acting under Henry Cowe's will; the party of the second part was Peter Cowe.

The question for the determination of the Court was—Whether the parties of the first part were bound to make payment of the said legacy of £500 as a valid and subsisting legacy?

Argued for the first parties—The legacies and provisions in clause D were expressly made conditional upon Henry Cowe surviving the mother, and as that event did not happen, all these legacies and provisions lapsed. This legacy was expressly declared to be payable at the same time as the legacies in clause D, and as they could not be paid neither could it, and must be held to have lapsed.

Replied for second party—The reference in the codicil to the legacies mentioned in clause D was merely to fix the term of payment of the legacy now in question; the gift was unconditional, and should receive effect.

At advising—

LORD PRESIDENT—This curious settlement of the late Henry Cowe is divided into four parts, distinguished by the letters A, B, C, and D. A, which is a conveyance to his mother of the liferent of his whole property, stands unrecalled, but division B has been entirely recalled; therefore the will consists of A, C, and D, which two latter are alternative wills. C is to take effect

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-