

causes consummation was impracticable—*G v. G*, 1871, L.R., 2 P. & D. 287; *H v. P*, 1873, L.R., 3 P. & D. 126; *F v. P*, 1897, 7 L.T. 193. In this case the defender had refused to submit to a medical examination. It was impossible to say therefore whether any physical impediment existed. The refusal to admit of intercourse might arise from a knowledge of such defect, or from moral causes beyond her control, or, on the other hand, might be wilful and obstinate. But the evidence all pointed to the second—moral inability—and in any event *in dubio*, and in the absence of any power to order a medical examination, the pursuer was entitled to the most favourable inference.

LORD LOW — I am satisfied that I may grant decree as concluded for. I proceed upon the authority of the English cases which have been cited. These cases satisfy me that it is not necessary that there should be physical incapacity, either structural or functional, in order to warrant a decree of nullity on the ground of inability to consummate marriage. It is sufficient that from causes, whether physical or moral, which are beyond the control of the parties, consummation is impracticable. In the present case I should have had difficulty in proceeding upon the uncorroborated evidence of the husband in regard to the marital relations of the parties. But I find that the defender, whilst refusing to submit to a medical examination, has written a letter to her husband in which she in effect admits the non-consummation of the marriage, and, whilst professing her regret, maintains that the obstacle is insuperable. I think that this letter sufficiently corroborates the evidence of the pursuer that the marriage has not been consummated, and that the non-consummation arises from incapacity on the part of the defender, and not from any wilful refusal to fulfil her marital duties. I therefore pronounce decree of nullity.

The Lord Ordinary granted decree of declarator of nullity of the marriage.

Counsel for the Pursuer — C. N. Johnston. Agents—Russell & Dunlop, W.S.

Friday, July 20, 1900.

OUTER HOUSE.

[Lord Kyllachy.]

GILMOUR v. SUTHERLAND.

Salmon - Fishings — Glebe — Possession — Decennialis et Triennialis Possessio — Church.

A, the proprietor of an estate situated on the north side of a sea loch and a river, held titles capable of covering the whole fishings on both sides of the loch and river *ex adverso* of his land, but neither he nor his authors had had such possession of the fishing on the south side as could construe his title as cover-

ing the fishings from the south side. On the south side of the loch and river, opposite A's estate, was situated the glebe of the minister of the parish. There was no trace of a formal designation of the glebe, and the minister had no feudal title to salmon-fishings; but the minister and his predecessors had, as part of the benefice, possessed from time immemorial the salmon-fishing from the south side of the loch and river *ex adverso* of the glebe. The Crown made no claim to the salmon-fishing on either side.

Held, in an action of declarator and interdict by A against the minister, (1) that A had the sole right of salmon-fishing in the loch and river from the north side of the said loch and river *ex adverso* of the glebe, and *interdict* granted against the minister fishing for salmon from said north side; and (2) that while the minister did not, apart from his position as a churchman, appear to be entitled to dispute A's right to fish from the south side, yet, as a churchman who had possessed the salmon-fishings in the loch and river from the south side *ex adverso* of the glebe for the requisite period as part of the benefice, he was entitled to the benefit of the rule *decennialis et triennialis possessor non tenetur docere de titulo*, and therefore must be presumed to have a valid title to fish for salmon in the loch and river from the south side *ex adverso* of the glebe, and *interdict* against his so doing *refused*.

William Ewing Gilmour, proprietor of the estate of Inverlael, in the county of Ross and Cromarty, brought an action against the Rev. William Sutherland, minister of the parish of Lochbroom in said county, and against the Lord Advocate, as acting for the Crown and the Commissioners of H.M. Woods and Forests for any interest he might have. The action was brought to have it declared that the pursuer had the only title to the salmon-fishings in the river Broom and in Loch Broom *ex adverso* of the glebe of Lochbroom, and that he had the sole and exclusive right of fishing for salmon in the said river and loch *ex adverso* of said glebe, and that the defender had no right of salmon-fishing in said river and loch *ex adverso* of said glebe, and should be interdicted from fishing for salmon therein; or alternatively, that the pursuer had the only title to the salmon-fishings from the north or right bank of said river and loch *ex adverso* of said glebe, and that the defender had no right of salmon-fishing from said bank in said river or loch *ex adverso* of said glebe, and should be interdicted from fishing for salmon from said bank in said river and loch *ex adverso* of said glebe.

The pursuer was proprietor of the estate of Inverlael, and was infert therein conform to disposition in his favour by Sir Arthur George Ramsay Mackenzie of Coul, Baronet, dated and recorded in May 1899, in which disposition the estate conveyed was described as follows—"All and whole

the lands of Inverlael and Glenbeg, . . . being the lands described in the title-deeds of the property as follows—All and whole the Davoch lands of Inverlauell in Lochbroom, . . . with the fishings of salmon and other fishes thereof."

The pursuer averred—"Said estate of Inverlael was held by the said Sir Arthur George Ramsay Mackenzie and his predecessors and authors, and is now held by the pursuer, immediately of the Crown. The titles to said estate flowing from the Crown contain an express grant of salmon-fishings, and the infestments of the pursuer and his said predecessors and authors have, at least since the year 1628, included said salmon-fishings. Said salmon-fishings include those in the river Broom and in Loch Broom *ex adverso* of said estate of Inverlael, and have been possessed by the pursuer and his said predecessors and authors from time immemorial."

The defender denied this, under reference to the pursuer's titles.

It was admitted that the estate of Inverlael was bounded on the south in part by the river Broom in its present course, and in part by Loch Broom, and that the glebe of Lochbroom lay opposite to Inverlael, and immediately to the south of, and upon the river and loch, extending along the said river and loch for a distance of nearly two and a-half miles.

The defender in a statement of facts averred—"The ministers serving the charge of Lochbroom have from time immemorial uninterruptedly, and exclusive of others, possessed as part of the benefice the fishings on both sides of the stream *ex adverso* of the glebe." This the pursuer denied.

The defender also averred, that until the alteration of the course of the river after mentioned, a portion of the glebe lay on the north bank of the river. "In 1849 an application was made to the then incumbent, the Rev. Mr Cameron, and the Presbytery of Lochcarron, by Duncan Davidson of Tulloch, then proprietor of the lands of Inverbroom, and Sir Alexander Mackenzie, Bart. of Coul, predecessor of the pursuer in the lands of Inverlael, to permit the channel of the river Broom where it passed through the glebe below 'The Bend' to be altered for their benefit. The change was to consist in forming an artificial channel for the Broom below the said 'Bend' and down to the sea, past the manse and church, but nearer to Inverlael, and it was proposed that as the glebe had land on the Inverlael estate, and Inverlael had some land on the left bank, it would be desirable that the new channel should be recognised as the boundary line between the glebe and Inverlael. It appeared to the minister and Presbytery that this might be agreed to on certain conditions, one of which should be that the fishings on both sides of the altered course should continue to belong to the benefice, as they had done from time immemorial while both banks of the stream were in the glebe. The Presbytery, by minute of 27th November 1849, agreed to sanction the proposed alteration and that the new channel should form the boundary

of the glebe, but only on condition—(1) that a piece of land equal in extent and value to that taken from the glebe to form the new channel should be given to the benefice for all time coming; (2) that the right to the whole salmon-fishings in the said river Broom, so far as running in the new channel along the margin of the glebe, should belong exclusively to the benefice as theretofore; and (3) that the heritors should bind themselves to secure the glebe from damage or encroachment by the river. The proposed alteration was then carried out by the said predecessor of the pursuer and by said Mr Davidson of Tulloch" in 1854. "Since the date of the said alteration of the channel, as before it, the minister of Lochbroom has possessed the fishings on both sides of the river Broom uninterruptedly and without challenge. He has also possessed the fishings in Loch Broom *ex adverso* of the glebe for a period exceeding forty years."

The pursuer denied that any part of the glebe was ever situated to the north of the river, and that the minister of Lochbroom had possessed the fishings on both sides of the river Broom.

The pursuer pleaded, *inter alia*—“(1) The pursuer being infest under titles flowing from the Crown in the salmon-fishings in the river Broom and in Loch Broom *ex adverso* of his lands, is entitled to decree of declarator and interdict as concluded for with expenses. (2) The pursuer, his predecessors, and authors, having possessed the salmon-fishings in the river Broom and in Loch Broom *ex adverso* of his lands for more than the prescriptive period under infestments flowing from the Crown, the pursuer is entitled to decree of declarator and interdict as concluded for. (6) The defender not having averred any habile title to the salmon-fishings in question his defences should be repelled.”

The defender pleaded, *inter alia*—“(5) The successive ministers of Loch Broom having had immemorial possession, and in particular having had more than thirteen years' possession down to the date of this action, as part of the benefice, of the fishings *ex adverso* of the glebe, the defender is entitled to prevail in this action, *et separatim*, is entitled to maintain his possession against the pursuer.”

The Lord Ordinary (KYLACHY) allowed a proof. The import of the evidence and the arguments of the parties sufficiently appear from the opinion of the Lord Ordinary.

The authorities referred to regarding the operation and effect of the brocard *decennialis et triennialis possessor non tenetur docere de titulo* were as follows:—Ersk. Inst. iii. 7, 33, and 34; Stair, ii. 1, 25; ii. 8, 29; Bankton, ii. 8, secs. 106-108; *Gordon v. Ogilvie*, August 1776, 5 Brown's Supp. 540; *Craig v. Hillhead*, December 21, 1644, Mor. 10,999; *Greig v. Queensberry*, November 21, 1809, F.C.; *Scot v. Ramsay*, February 15, 1827, 5 S. 367; *Bishop of Galloway v. Prebendaries of the Chapel-Royal*, 1660, M. 15,627; *Cochrane v. Smith*, December 16, 1859, 22 D. 252.

LORD KYLLACHY—"The pursuer is proprietor of the estate of Inverlael in Ross-shire. The estate lies on the north side of Loch Broom and the river Broom, and for a considerable distance it subtends the glebe of Lochbroom, which extends for about 2½ miles along the south side of the loch and river. The action is brought to have it declared (1) that the pursuer has the sole right to the salmon-fishings in the river and loch *ex adverso* of the glebe of Lochbroom, and that the minister has no right of salmon-fishing on either side of the loch or river; or alternatively (2) that the pursuer has the sole right of salmon-fishing on the north side, and that the minister has no right to fish for salmon on that side.

"There is no question that the pursuer has a good title to the salmon-fishings of the estate of Inverlael, and there is also no question that that estate as possessed for more than forty years has included the whole north bank of the river opposite to the glebe. It is also certain that the minister has no feudal title to salmon-fishings. He is not infeft in such under grant from the Crown or otherwise. Nor is there any trace of any formal designation of his glebe. Indeed, it is common ground that the glebe, like some other glebes in the Highlands, is of a size largely in excess of the legal limits. The tradition is (and it has some probability and some historical basis) that the glebe, including the salmon-fishings, was mortified to the benefice by one of the family of Seaforth, who were the original owners of Loch Broom under a barony title. But as I have said, there is no charter and no infeftment to which the minister can appeal.

"In these circumstances, apart from the special position of the defender as a churchman entitled to the benefit of the *decennalis et triennalis* prescription, there would, I apprehend, be but slight room for controversy. The pursuer having a title, which is at least capable of covering the whole fishings *ex adverso* of his lands, and the defender having *ex hypothesi* no title of any kind, in these circumstances the only question would be, whether (the Crown not appearing) the defender could be heard to dispute the pursuer's right. And having regard to the narrowness of the river, and the impossibility of fishing on either side within the *medium filum*, I should rather think that at least as regards the river that question must have had negative answer. But as matters stand various questions both of fact and law appear to arise, and on these my views are shortly as follows:—

"In the first place, as to the possession, I hold, as the result of the evidence, (1) that the pursuer and his authors have had no possession on the glebe side either of the river or loch such as could construe their titles as covering the fishings on both sides. In other words, failing the defender, the fishings *ex adverso* of the glebe on the glebe side would remain with the Crown.

"I hold (2) that the defender and his predecessors have for time immemorial, including the last thirteen years, had all the

possession of the fishings on the glebe side of which the subject was capable. They fished formerly by net-and-coble or its equivalent, and also by yair and rod, and latterly they have let the rod-fishing for a substantial rent—letting it as a commercial transaction to the best advantage. There is perhaps a scarcity of direct evidence as between 1871 and 1892, but there is sufficient general evidence that (as might be presumed) the possession continued, and there is no proof of adverse possession. In short, the minister's possession on the glebe side has been in my opinion reasonably continuous as far back as the evidence goes.

"But, on the other hand, I hold (3) that there is no sufficient evidence of possession by the minister on the Inverlael side. Nor can I hold it proved that the glebe prior to 1854 included both sides of the river, or did so as far as what is now called the new channel extends. There is some evidence to that effect, but I think that when examined it goes no further than this—that between Inverlael and the glebe the river formerly ran in various channels with small islands here and there which were claimed by both sides. In any view there has been no possession by the minister on the Inverlael side since the new channel was made in 1854—certainly no possession which was undisputed or which has come down to the present time. I do not overlook the minute of the Presbytery dated in 1849. But of course that minute cannot constitute or supply the place of a title. It is at best no more than evidence of a personal contract between the Presbytery and the pursuer's author, and although an element in the proof of possession, it is, I am afraid, not of sufficient weight to displace what I take to be the general result of the proof.

"Next, as to the application of the *decennalis et triennalis* prescription, I see no reason to doubt that within the limits of his possession the defender is entitled to the benefit of that prescription. The salmon-fishing has certainly been possessed as part of the benefice. The possession has not been traced to any subordinate or temporary title, or any title personal to individual ministers. And that being so, it does not appear material that salmon-fishing is not a subject which is capable of being designed as part of a glebe. If the designation had been extant and it appeared that it included the salmon-fishing, and that such had been the origin of the possession, the case would have been different. But nothing of that kind is suggested, and in the absence of proof *contra* the law presumes that there was a valid title although no deed is extant and no infeftment recorded. In this respect the *decennalis et triennalis* prescription differs from the ordinary prescription, from which it also differs as establishing not an absolute title but a presumption. I do not know that it is necessary to resume the authorities on this subject. They were all cited at the debate, and they were all, I think, considered, and will be found noted in the

Cupar case—*Cochrane v. Smith*, 22 D. 352. I refer particularly to the judgment of Lord Wood in that case, which is the latest judicial utterance on the subject.

“The result is that the pursuer fails in his first and succeeds in his second conclusion, while the defender on the other hand gets absolutor from the first conclusion and has to submit to decree under the second.

“Altogether, I propose to give the pursuer decree in terms of his alternative conclusion, and to assolzie the defender from the first or leading conclusion of the summons. Success being thus divided I allow no expenses to either party.”

The Lord Ordinary declared and interdicted the defender in terms of the alternative or second declaratory conclusion of the summons, and conclusion for interdict following thereon; *quoad ultra* assolizied the defender from the conclusions of the summons, found no expenses due to or by either party, and decerned.

Counsel for the Pursuer—Guthrie, K.C.—Chree. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Defender—Sir John Cheyne, K.C.—C. N. Johnston. Agents—Menzies, Black, & Menzies, W.S.

Wednesday, December 12.

OUTER HOUSE.

[Lord Kincairney.]

FLETT'S TRUSTEES v. ELPHINSTON.

Succession—Construction of Testamentary Writings—Causa improvisa—Accretion.

A testator, who died leaving no known heir or next-of-kin, by trust-disposition and settlement directed his trustees to divide his estate into three equal shares, and to hold one of these shares for A in liferent, and her children and the survivors of them in fee; another share for B in liferent, and his children and the survivors of them in fee; and the third share for C in liferent, and his children and the survivors of them in fee. The trustees were directed, on the death of the respective liferenters to pay over to their children in equal shares the fee of the respective shares set apart for them, payable to them on their respectively attaining twenty-one years of age, until which time the income was to be applied for their behoof. In the event of a fiar dying before the period of payment, his lawful issue were to take their parent's share, and if he left no issue the share of the deceiver was to be divided equally among his surviving brothers and sisters, the issue of a predeceasing brother or sister taking their parent's share; “and in the event of the whole fiars to any one share or portion dying without leaving issue before the said period of payment, such share or portion shall revert and fall to

be administered as part of the residue of my estate.” A and B died leaving issue. C died without ever having had issue. The children of A and C were, and if he had had any the children of B would have been, nephews and nieces of the testator's wife. On the death of C, *held* (1) that although apart from the direction at the close of the residuary clause the original bequests of residue were so framed that there could have been no accretion as between the three sets of fiars, and although the testator had not expressly provided for the event which had happened, it sufficiently appeared that his intention as expressed in the deed was that the direction at the close of the residuary clause should apply if there were no issue of a liferenter of a share to take such share, whether that resulted through the death of children who had been born or because no children had ever been born, and that therefore the one-third share of the estate liferented by C did not fall to the Crown as intestate estate; and (2) that said share, in virtue of the direction referred to, fell to be divided equally *per stirpes* among the issue of A and B.

This was a multiplepointing in which the pursuers and real raisers were John Russell Thomson and another, the assumed and sole acting trustees of the deceased William Flett, merchant, Leith, under the trust-disposition and settlement executed by him on August 2, and recorded in the Books of Council and Session on August 17, 1877. The said William Flett died on August 12, 1877, without leaving issue, and predeceased by his wife. The pursuers stated that they were not aware of the existence of any relatives of the deceased who would be entitled to any estate as to which he might be held to have died intestate, and that they did not know who were his next-of-kin.

The said trust-disposition and settlement after instructing the payment of the testator's debts and funeral expenses, and certain legacies, provided as follows:—“And lastly, I direct and appoint my said trustees to divide the whole rest, residue, and remainder of my means and estate before conveyed into three equal shares or portions, and to hold and apply, pay, and convey the same in manner following, viz.—They shall hold one share or portion for behoof of Mrs Janet Bannatyne or Elphinston, sister of my late wife, in liferent, and her children and the survivors and survivor of them in fee, one share or portion for behoof of the said Reverend Alexander Mackinlay Bannatyne in liferent, and his children and the survivors and survivor of them in fee, and one share or portion for behoof of Doctor William Finlay, Newhaven, in liferent, and his children and the survivors and survivor of them in fee: And they shall pay over to the said liferenters during all the days and years of their respective lives the nett income or annual produce of the said respective shares or portions set apart for them: And on the respective deaths of the said liferenters