

The Scottish Law Reporter.

SUMMER SESSION, 1870.

COURT OF SESSION.

Friday, May 13.

FIRST DIVISION.

SIMPSON v. MUNRO (RHYNAS' EXECUTOR).

Process—Dismissal of action—Sheriff-court Act, 16 and 17 Vict., cap. 80, sec. 15—Death of Party. The last procedure in an action having taken place on 2d February, and the pursuer having died on April 2d,—*held* that the 15th section of the Sheriff-court Act of 1853, which enacts that an action shall stand absolutely dismissed if no procedure takes place in it for six months, did not apply to such a case, in respect of the proviso at the end of the section.

On 26th July 1868 Rhynas raised an action against Simpson, the present pursuer and appellant, in the Sheriff-court of Banffshire. Rhynas died on 2d April 1869, and the present defender is her sole executrix. Simpson accordingly raised an action of transference against her on 19th October 1869. It was contended by Mrs Munro that this action was incompetent, in respect that the original action stood dismissed under the 15th section of the Sheriff-court Act, 16 and 17 Vict., cap. 80, by reason of there having been no procedure for more than six months. That section is as follows:—"Where in any cause neither of the parties thereto shall during the period of three consecutive months have taken any proceeding therein, the action shall at the expiration of that period (*eo ipso*) stand dismissed, without prejudice nevertheless to either of the parties within three months of such first period of three months, but not thereafter, to revive the said action on showing good cause to the satisfaction of the Sheriff." "Provided always, that nothing herein contained shall apply to cases in which the right under such action has been acquired by a third party by death or otherwise, within such period of six months."

The last procedure in the original action was on 2d February 1869, when revised condescendences were lodged, and the action of transference was raised on 19th October 1869.

The Sheriff-Substitute (GORDON) gave effect to the defence, and dismissed the action.

SIMPSON appealed.

MACKAY for him.

SCOTT in answer.

At advising—

The LORD PRESIDENT—The last procedure in the original action was on 2d February, and if nothing was done before 2d May, the process stood dismissed, and it was then competent for either party within the next three months (*i.e.*, till 2d August) to revive the action on certain conditions. But if nothing was done before that date, the process died absolutely under section 15 of the Sheriff-court Act. The peculiarity here is, that during the whole period between 2d April and the expiry of the six months on 2d August, there was only one party to the action. The question, therefore, is whether the section applies to such a case, or whether it does not expressly except it. There can, I think, be no doubt that the right of action was acquired by the executrix of the pursuer within the period of six months, and words can not be clearer than are used to except such a case from the penalty of the section. Therefore I am of opinion that the Sheriff-Substitute was wrong in dismissing the action of transference, and that we should remit to him to repel the defences and sustain the action.

The other Judges concurred.

Agent for Pursuer—Alex. Morrison, S.S.C.

Agent for Defender—David Milne, S.S.C.

Saturday, May 14.

SPECIAL CASE.—SHARP'S TRUSTEES v. SHARP.

Succession—Vesting—Widow. A truster directed his trustees to retain the share of the residue which he had destined to his son, and to pay him the interest only, but with power to pay him the whole or part of the principal if they deemed it expedient. The truster declared, in the event of any of his children dying without issue, the deceased's share should accrue to the residue. The son survived the period of division, and died leaving a widow but no children. *Held* the widow was entitled to her husband's share.

James Sharp, farmer, Townhead of Quoigs, died on 4th November 1856, leaving a trust-deed in which he conveyed to trustees for certain purposes his whole estate, heritable and moveable. By his trust-deed he assigned any years that might remain of the lease of his farm, and a life-

rent of the annual proceeds of his moveable estate. The fourth and fifth purposes were in the following terms:—"Fourthly, I direct my trustees, at the expiry of the current lease, provided my death shall happen prior to that time, or if not, at the first term of Martinmas after my decease, to sell, realise, and convert into money, the whole crop, cattle, sheep, horses, implements of husbandry, farm-stocking, and other moveable estate above conveyed (the household furniture and bed and table linen excepted): Fifthly, I appoint my trustees to pay to my wife, in case she shall survive me, one-fifth part of the whole personal or moveable estate before conveyed, or the proceeds thereof, and that at the first term of Whitsunday or Martinmas after the crops, stocking, and others have been sold and converted into money as aforesaid: And lastly, with reference to the residue and remainder of my moveable means and estate, I direct and appoint my trustees to pay over and divide the same to and among my children as follows, viz.—One-fifth share to each of my sons John Sharp and William Sharp, one-fifth share to each of my daughters, Christian Ann Sharp and Jean Sharp, and the remaining fifth share I direct my trustees to invest upon heritable or personal security, and hold and retain the same for behoof of my eldest son James Sharp, and pay over to him each year the interest only, but with power to my trustees to uplift and pay to my eldest son the whole or a portion of the principal sum so to be invested, if they deem it expedient so to do: declaring that in case any of my children shall die before the reversion of my means and estate shall be divided in manner herein provided without leaving lawful issue, then and in that event the share of such deceiver shall lapse and become part of the residue of my trust-estate, and be disposed of equally among my surviving children and their issue in manner herein directed: but declaring that should any of my children die leaving lawful issue, such issue shall succeed to their, his, or her parent's share of my estate in the same way as the parent would have done if alive."

Mr Sharp was survived by his wife and the five children named in his settlement. The trustees accepted of the trust. The lease of the farm of Townhead of Quoigs expired at Martinmas 1858, and towards the end of November 1858 the value of the trust-estate was ascertained, and the residue, in terms of the trust, divided into five shares, the amount of each share being £455, 4s. 10d. After the division was made, four of the children, viz., John Sharp, William Sharp, Christian Ann Sharp, and Jean Sharp, received payment of their respective shares. The share of James Sharp junior, with the exception of £53, 17s. 6d., which was paid by the trustees to him since the division was made, was kept in bank on deposit-receipt in the names of the trustees, and the interest regularly paid to him down to the 27th day of February 1869. Janet Andrew or Sharp was married to James Sharp junior on the 23d day of October 1865, and he having died on the 11th day of March 1869, intestate, and without issue, she as his widow claimed one-half of the balance of £401, 7s. 4d. of her husband's share of his father's estate. The trustees, and John Sharp, William Sharp, Christian Ann Sharp or Eadie, and Jean Sharp or Struthers, the surviving children of James Sharp, claimed the whole balance.

The questions for the opinion of the Court were—

- "1. Whether Mrs Janet Andrew or Sharp is entitled, as widow of James Sharp junior, to one-half of the said balance of £401, 7s. 4d.?"
- "2. Whether the whole balance falls to be divided equally among the surviving children of the testator?"

SOLICITOR-GENERAL for Mrs Sharp.

SHAND and KEIR for other parties.

The Court held the widow was entitled to her husband's share. The son's share was throughout the deed spoken of by the truster as his share, and, though under trust, it was equally his. The devolution to the children could only occur under the reversionary clause, but it did not contemplate the event that had occurred. The alternative was intestacy, and that was not to be presumed.

Agent for Mrs Sharp—James Webster, S.S.C.

Agents for other Parties—Dundas & Wilson, C.S.

Tuesday, May 17.

SPECIAL CASE—JOHNSTONE AND OTHERS.

Succession—Residue—Revocation. A truster directed his trustees, after payment of various provisions and legacies, to distribute the residue of the trust-funds in certain specified proportions amongst the families of his brother and four sisters. By codicil he directed £15,000 to be paid "to account of the residue," and the remainder of the residue to be halved, and one-half paid to four nephews, and the other half to the five families in the manner already specified. By a later codicil, he, on the narrative of his design to make alterations on the deeds previously executed, *inter alia* "restricted" the sum to be paid to the five families to £15,000, and declared that after payment of all "legacies and claims of every kind, the residue of my means and estate remaining is to be divided as follows:" and the truster therein assigned legacies of different amounts to the four nephews and a brother of one of them, "or less in proportion if the funds will not allow. But should there be a balance over after paying the above legacies, it shall be divided amongst my four sisters' families," &c. *Held*—(1) that the restriction of the interest of the five families to the £15,000 operated as a revocation of the half of the residue bequeathed to them by the first codicil; and (2) that as the terms of the second codicil implied an intention to deal with the whole free residue, the bequest of the other half of the residue to the four nephews was also revoked.

On 29th January 1861 the late Peter Johnstone, Esquire of Harthope, executed a trust-disposition and settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees for the purposes therein specified. By the fifth purpose the trustees were directed to divide the residue into five equal parts, and to pay and distribute these parts in certain proportions to the families of the truster's brother John, and of his sisters, Isabella Johnstone or Alexander, Margaret Johnstone or Grieve, Mary Johnstone or Gray, and Alison Johnstone or Gillespie. By annexed codicil, dated 6th June 1863, the trustees were directed to pay and distribute £15,000 to account of the residue, and to the same persons and in the same proportions