

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-