

Friday, December 2.

SECOND DIVISION.

[Sheriff of Caithness, &c.]

WICK v. WICK.

Mora—Legitim—Jus Relictæ—Compensation between Jus Relictæ and Cost of Widow's Maintenance—Interest.

The tenant of a small farm having died intestate, his second son became tenant of the farm, and carried it on with the implements and stock which were on it at his father's death. He supported his mother during the seventeen years of her widowhood until her death. During that time she was not able to do regular field work, but only house work and light work out of doors. She died intestate at the age of 77. Neither she nor any member of the family during her lifetime made any claim upon the estate left by the father, which consisted solely of the stock and implements on the farm at his death, but after her death the eldest son brought an action of accounting and for payment of certain sums as legitim, and as one of the next-of-kin of his father and mother respectively. He explained that he had not made any claim sooner because he did not wish to disturb matters till after his mother's death. No accounts were produced. A proof was allowed, from which it appeared that the value of the estate left by the father was £165. *Held* (1) that the eldest son was not in the circumstances barred by *mora* and acquiescence, and (2) that he was entitled to his share *ab intestato* of his father's estate, but without interest, but that (3) he was not entitled to anything from his mother's estate, which consisted solely of her *jus relictæ*, amounting to £55, against which the defender was entitled to set off the cost of her maintenance during her widowhood.

Expenses—Tender—Extra-Judicial Tender.

After a decree of absolvitor in the Sheriff Court, and before an appeal was brought to the Court of Session, the defender offered payment of £40 in full of all claims, but did not offer to pay expenses to date. On appeal the pursuer obtained decree for £36, 13s. 4d., but was refused decree for a further sum of £15 claimed by him. The Court refused to give weight to this offer as a tender in respect that it did not include expenses, but as there had been divided success on the appeal, *found* the pursuer entitled to one-half of the expenses thereof.

This was an action of count, reckoning, and payment brought in the Sheriff Court at Kirkwall by William Wick, farmer, Saltness, Longhope, in the island of Walls and county of Orkney, against his brother James Wick, farmer, Grassethowe, St Ola,

in the same county. The pursuer prayed the Court to ordain the defender to produce an account of his intromissions with the estates of his and the pursuer's deceased father and mother, and for payment to the pursuer of the sum to be found due to him as legitim, and as one of the next-of-kin of his parents, and failing production of such accounts to ordain the defender to pay to the pursuer the sums of £66, 13s. 4d. and £33, 6s. 8d., with interest from the dates of his father's and mother's deaths respectively.

No accounts were lodged by the defender.

A proof before answer was allowed.

Prior to Martinmas 1880, James Wick senior, the father of the parties to this action, had been tenant of the farm of Easter Sands, in Deerness, and had worked that farm with the assistance of his family. His wife, his sister, a daughter, and a son, the defender, lived and worked on this farm along with him. His other son, the pursuer, for many years prior to 1880, was generally away from his father's house, but he occasionally resided at the farm, and when there worked on it. Since May 1880 the pursuer had been in service, but he visited his parents as often as he was able. None of the family received wages for their work, but they got their maintenance when residing on the farm. At Martinmas 1880 James Wick senior removed from the farm of Easter Sands to that of Grassethowe—his whole family (with the exception of the pursuer) going with him. James Wick senior died at Grassethowe on the 11th of March 1881. He left no will disposing of his property. Mrs Wick, his wife, died also at Grassethowe, intestate, on the 23rd October 1897. She was 77 years of age at the date of her death.

No inventory of the moveable estate left by James Wick senior or by Mrs Wick was ever given up, nor was any executor appointed to either of them.

When the Wicks removed from Easter Sands to Grassethowe, they took with them certain stock, crop, and farm implements. Up till the date of his death James Wick senior remained sole tenant of Grassethowe. After the death of his father the defender became tenant of that farm, and took possession of the stock and implements which were upon it at that date. He worked the farm with the assistance of his mother and sister, who lived with him and were supported by him.

Shortly after the Wicks came to Grassethowe the defender's mother, who was then 60 years of age, met with an accident, the result of which was that she became lame and unable for field work after that date. She continued, however, to do work in the house and to manage the poultry.

No claim on his father's estate was made by the pursuer until after his mother's death, but shortly thereafter he raised the present action.

At the proof the pursuer deponed—"The reason why I did not put forward my claim sooner was that I did not wish to disturb my mother, and it was her wish that I should not do so. . . . I promised to my

mother not to disturb matters as long as she was alive."

No claim for *jus relictæ* out of her husband's estate was ever made by Mrs Wick.

The following statement as to the amount of the moveable property left by James Wick senior is taken from the note appended to the interlocutor of the Sheriff-Substitute (COSENS), whose finding on this point was adopted by the Court on appeal—"I now come to the question of accounting, and the determination of what sum of money the pursuer is entitled to. This is attended with very considerable difficulty on account of the lapse of time, seventeen years having passed since the death of James Wick senior; the fact that no books appear to have been kept; and the conflicting and unsatisfactory state of the evidence. I do not think that any remit would further elucidate matters, and such would only cause additional expense. I have therefore come to the conclusion that, after a careful consideration of all the evidence, the best thing I can do is to fix a sum which I consider fair and equitable. In doing this I only take into account the live stock and implements, &c., left by James Wick senior at his death, and the value of these I fix at £165 sterling. I have estimated nothing for the crop taken from Easter Sands, as I think it was nearly all consumed before James Wick's death, and also that the money for that part of it which was sold at Deerness went to assist in the payment of any debts. It was argued by the defender that, in the event of my finding for the pursuer, certain debts would have to be deducted before there could be any division. It is absolutely impossible now to ascertain the exact amount of any of them. According to the evidence of the defender's witness, his sister, the debts left by her father appear to have been paid out of his estate. . . . I am of opinion that the deceased James Wick left no debts that were not satisfied out of money belonging to him. There is no evidence that any of the stock was sold to meet any of his obligations; and I take it the defender had no money of his own to satisfy them."

The defender pleaded (1) that the pursuer's averments were irrelevant, and (2) that the pursuer was barred by his own actings and by *mora* and taciturnity from insisting in the present action.

On 7th July 1898 the Sheriff-Substitute issued the following interlocutor—"Repels the first and second pleas-in-law for the defender: Finds, in point of fact, (1) that the late James Wick died at Grassethowe on the 11th day of March 1881 intestate, and survived by his widow and three of a family, *i.e.*, the pursuer and the defender of this action, and their sister Elizabeth Garrioch Wick; (2) that at the time of his death he was the sole tenant of the farm of Grassethowe, and died possessed of moveable property which the Sheriff-Substitute estimates at the value of £165 sterling; (3) that the sum of £165 sterling is subject to no deductions in name of debts, &c.: Finds in law

(1) that the defender is bound to account for the said sum of £165 sterling; (2) that the pursuer is entitled in name of legitim, and as succeeding to his father the said deceased James Wick, as one of his next-of-kin, to the following share, *viz.*—to one-third of two-thirds of the said sum of £165 sterling, being £36, 13s. 4d.; (3) that the pursuer is not entitled to interest on the said share as from the death of the said James Wick till the date hereof: In regard to the claim by the pursuer on the estate of his late mother, the Sheriff-Substitute finds in fact (1) that Mrs Isabella Leask or Wick, widow of the said James Wick, died intestate, on the 23rd day of October 1897; (2) that she resided on the farm of Grassethowe from the date of the death of her husband till her own death; (3) that she maintained herself by her own labours on the said farm; (4) that at the time of her death she died possessed of moveable estate which the Sheriff-Substitute estimates at £55 sterling; (5) that from that sum there falls to be deducted the sum of £10 sterling: Finds in law (1) that the defender is bound to account for the sum of £45 sterling; (2) that the pursuer is entitled to succeed to one-third of the said sum of £45, being £15 sterling, with interest at 5 per cent. from the date of the said Mrs Wick's death till paid: Therefore decerns and ordains the defender to make payment to the pursuer of the said sums, *viz.*—(1) the said sum of £36, 13s. 4d. sterling, with interest thereon at 5 per cent. from the date hereof till paid; (2) the sum of £15 sterling, with interest thereon at 5 per cent. from the 23rd October 1897 till paid: Finds the pursuer entitled to expenses," &c.

"*Note.*— . . . The defender pleads (1) That the action is irrelevant, and (2) that the pursuer is barred by *mora* and taciturnity from insisting in it, as regards the effects on the farm of Grassethowe, as at the date of his father's death. I have repelled both these pleas. My opinion is that the action is relevant and sufficient to support the conclusions. In regard to the second plea, this is a plea, as I read the authorities, which can only be sustained after a very careful discrimination of all the facts, the relations of the parties, and the whole surrounding circumstances. The mere lapse of time and non-assertion of rights taken alone would seldom, if ever, be taken as a sufficient bar to a demand for justice. Here I find no proof that the pursuer ever intended to surrender his rights, but find, on the contrary, a perfectly satisfactory explanation of his delay in asserting them. . . . It was suggested that the defender and his sister were entitled to have a sum in name of wages for the three years prior to their father's death deducted. In the absence of any agreement, or of circumstances tending to show that either party had raised the subject of payment of wages, I hold that the provisions are not subject to this deduction—*Miller v. Miller*, June 8, 1898, 35 S.L.R. 769.

"I also am of opinion that, in the circumstances, I cannot seriously consider the defender's claim to deduct certain small

sums of money which he says he gave his father. These appear to have been handed over to his parent when he was quite a lad, and it appears to me quite natural that such moneys should have been so given.

“The loan of money by his sister, the defender’s aunt, to the deceased James Wick, I do not think is in the case, even if it were sufficiently proved. It never appears to have been claimed by the lender, and may, for aught we know, have been satisfied. The lender is now dead.

“I allow the pursuer no interest on what he is entitled to from his father’s estate. Since the decision in the case of *Ross v. Ross*, June 16, 1896, 23 R. 802, the rule that the claimant is entitled to interest on his claim is no longer an inflexible one. In the present case the pursuer might have insisted in his claim on the death of his father, but, for reasons (however laudable or filial they may be), he did not choose to do so, and I do not therefore think he is entitled to any interest on this claim.

“Now, with regard to the mother’s estate. She, of course, is entitled to one-third of the moveables left by her husband, which comes to £55. From this I think it fair to deduct a sum, which I fix at £10, as there is evidence that at the time she sustained an accident she was confined for six weeks to bed, and there were doctor’s bills which appear to have been paid for by the defender. I think, however, from the evidence, that both she and her sister-in-law, up to the time of their deaths, worked on the farm or in the farmhouse, and fairly earned their keep for so doing.

“With regard to the question of expenses. Looking at the correspondence before the raising of this action, and the attitude taken up by the defender, the pursuer was forced to raise this action to have his rights determined, and I therefore find him entitled to his expenses.”

The defender appealed to the Sheriff (THOMS), who on 8th August 1898 issued the following interlocutor—“Finds the case against the defender not proven: Sustains the appeal, and recalls the interlocutor submitted to review; Assoizies the defender,” &c.

“*Note.*—The claim here made by the pursuer is two-fold—first for legitim, and secondly for *jus relictæ*.

“(First) Old Wick died on 11th March 1881. He was a crofter, and took advantage of that Act. He had then arrears of £29. He removed from Easter Sands to Grassethowe at Martinmas 1880. He died there intestate, and no inventory of his estate was given up. It was thought there was none to give up. There is some evidence of stock on the farm, but that relates entirely to what he removed from Easter Sands, and there is none subsequent in date. There is, on the other hand, traces of bill transactions and advances for rent. On the whole, the case entirely fails as regards legitim.

“(Secondly) Mrs Wick at no date possessed any means, and the case as regards this also entirely fails.”

The pursuer appealed, and argued—The pursuer’s *mora* was sufficiently explained. The Sheriff-Substitute’s estimate of the estate was moderate. There could therefore be no answer to the pursuer’s claim for a share of his father’s estate. As regards the claim on the mother’s estate, the defender was not entitled to set off the cost of alimentering his mother. He had the benefit of her labour. There were no materials for estimating the cost of her maintenance.

Argued for the defender—The pursuer in the circumstances was barred by *mora* and acquiescence. There was no sufficient proof to entitle the Court at this distance of time to hold that the father of the parties left any estate. As regards the claim on the mother’s estate, the defender was entitled to set off the cost of her maintenance—*Mackenzie v. Mackenzie’s Trustees*, June 12, 1873, 11 Macph. 681. That was sufficient considering her age and infirmity to account for any estate to which she might ever have been entitled.

LORD TRAYNER—This is an action of count, reckoning, and payment at the instance of one brother against another, in which the defender is called on to account for his intromissions with the moveable estate of his father, of which the defender took possession on his father’s death. It does not appear whether the defender is sued as executor of his father or as vitious intromitter with his father’s estate, but in the view which I take of the case this is not of any importance.

The late James Wick died seventeen years ago. After his death the farm which he held at that date was carried on by the defender, who took possession of the whole stock and implements on the farm. The pursuer abstained from demanding anything in name of legitim from his father’s estate for about sixteen years after his father’s death, and the defender pleads this delay in bar of the pursuer’s present claim. But the pursuer explains that he abstained from making any claim in deference to the expressed wish of his mother, who continued to reside on the farm with the defender after her husband’s death. The mother is now dead. I think, with the Sheriff-Substitute, that the explanation is satisfactory and that the pursuer’s claim is not barred by *mora* or acquiescence on his part.

The next question in the case is, what was the estate left by James Wick. The Sheriff-Substitute has gone into this matter with great care. He does not make any findings as to the details of the property left by the deceased, but he estimates it at £165. After going over the proof I have come to the conclusion that this a fair and reasonable estimate. James Wick died intestate. From this sum of £165 one-third—that is £55—has to be deducted as the widow’s *jus relictæ*. That leaves a sum of £110, to one-third of which the pursuer is entitled as legitim, and the result therefore is that a sum of £36, 13s. 4d. is due to him as his share.

As regards this part of the case I see no

reason for differing from the interlocutor of the Sheriff-Substitute.

But the Sheriff-Substitute has also found that the pursuer is entitled to one-third of the sum of £45, being the sum of £55 which fell to the widow (his mother), as her *jus relictæ*, less £10 deducted for expenses defrayed by the defender when she met with an accident. That is a question upon which I think there is room for difference of opinion. The result of my consideration of the case is that the defender is not bound to answer to the pursuer for any part of this sum. The widow's right emerged some sixteen or seventeen years ago; and while there is no averment that she ever got payment of anything in discharge of it, we do not know what were her views with regard to it. Whether she gave it to her second son as a donation, or left it in his hands to enable him to maintain her with more comfort, we cannot tell; but at this distance of time I am scarcely prepared to hold, as in a question between the two parties, that the defender held that £55 all these years merely as custodian for his mother, and that he is now bound to account for it. It is quite reasonable to suppose that it was exhausted in providing for the mother's maintenance.

I have limited my observations entirely to the interlocutor of the Sheriff-Substitute, because although formally this case comes here on appeal from the Sheriff, we have no judgment by the Sheriff before us with which we can deal. His interlocutor contains no findings in fact and findings in law, and we only abstained from sending the case back to the Sheriff to have this defect remedied on account of exceptional circumstances which need not be stated.

LORD MONCREIFF—I entirely agree as to the pursuer's right to a share of the father's estate, and that so far the interlocutor of the Sheriff-Substitute is substantially right.

But as regards the mother's *jus relictæ* the Sheriff-Substitute finds—[His Lordship read the second, third, and fourth findings in fact of the second part of the Sheriff-Substitute's interlocutor.]—I do not think that is substantiated by the proof. I think it is proved that shortly after they came to Grassethowe the mother met with an accident, and that after that she was not able to maintain herself by her own labour. I assume that she was entitled to the sum of £55 as *jus relictæ*, but there is no proof that anything was paid over to her. If anything was paid over then it was exhausted in maintaining her. Probably the truth is that nothing was paid over. If so, it must be held to have been expended by the defender on her maintenance. I think it would be unreasonable now to call upon the defender to account for it.

The LORD JUSTICE-CLERK concurred.

Counsel for the defender stated that before the appeal to the Court of Session was brought he had offered £40 in full of all claims. It was submitted that although this was not, strictly speaking, a tender

(expenses to date not having been offered), it was a circumstance which the Court should take into account in considering the question of expenses—*Mavor & Coulson v. Grierson*, June 16, 1892, 19 R. 868. He moved that no expenses in the appeal should be allowed to either party.

Counsel for the pursuer were not called upon.

LORD TRAYNER—The law as to the effect of tenders has been in a somewhat unsettled position ever since the case of *Critchley v. Campbell*, Feb. 1, 1884, 11 R. 475. My opinion is that where a tender does not amount to more than the full sum found due with expenses of process, it is not a tender which can be taken into account as entitling the maker of it to expenses. In this case there has been divided success, and I think the pursuer should have half the expenses of this appeal.

LORD MONCREIFF and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel for the parties on the appeal, Sustain the same: Recal the interlocutors of the Sheriff dated 8th August last: and of the Sheriff-Substitute dated 7th July last: Find in fact (1) that the late James Wick died at Grassethowe on 11th March 1881 intestate, survived by his widow and three of a family viz., the pursuer and defender, and their sister Elizabeth Garrioch Wick; (2) that at the time of his death he was sole tenant of the farm of Grassethowe, and died possessed of moveable property estimated at the value of £165 sterling; (3) that this sum is subject to no deduction in name of debt, &c.: Find in law (1) that the defender is bound to account for said sum of £165 sterling; (2) that the pursuer is entitled in name of legitim, and as one of the next-of-kin of his father, to one-third of two-thirds of the said sum of £165 sterling, viz., £36, 13s. 4d.; (3) that the pursuer is not entitled to interest on such share since the date of his father's death: Therefore decern against the defender for payment to the pursuer of the sum of £36, 13s. 4d. with interest thereon at the rate of five per centum per annum from 7th July last till payment: Find the pursuer entitled to expenses in the Inferior Court and to one-half of his expenses in this Court: Remit to the auditor to tax the same, and to report.”

Counsel for the Pursuer—Salvesen—J. J. Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Jameson, Q.C.—Crole. Agent—W. B. Rainnie, S.S.C.