

COURT OF SESSION.

Tuesday, February 27.

FIRST DIVISION.

(SINGLE BILLS.)

[Small Debt Court
at Edinburgh.]SMITH v. SCOTTISH LEGAL LIFE
ASSURANCE SOCIETY.

Friendly Society—Process—Appeal—Sheriff—Stated Case—Competency—Dispute between Friendly Society and Member—Friendly Societies Act 1896 (59 and 60 Vict. cap 25), sec. 68 (7).

The Friendly Societies Act 1896, sec. 68, sub-sec. (7), enacts—"Notwithstanding anything contained in the Arbitration Act 1889, or in any other Act, the court and the chief or other registrar or other arbitrator or umpire to whom a dispute is referred under the rules of a registered society or branch, shall not be compelled to state a special case on any question of law arising in the case, but the court or chief or other registrar may, at the request of either party, state a case for the opinion in England or Ireland of the Supreme Court, and in Scotland of either Division of the Inner House of the Court of Session, on any question of law. . . ."

Held that an appeal by way of stated case, submitting for the opinion of the Court certain questions of law decided by the Sheriff, was incompetent and must be dismissed.

Johnston's Trustees v. Special Committee of Glasgow Corporation, December 21, 1911, 49 S.L.R. 269, followed.

William Smith, 2 Balcarres Street, Edinburgh, respondent, brought an action in the Small Debt Court at Edinburgh against the Scottish Legal Life Assurance Society, appellants, a friendly society registered under the Friendly Societies Acts, for repayment of £16 odd, being the premiums paid by him on a policy of assurance which he had effected, but which he now averred was not in the terms ordered by him.

On 29th January 1912 the Sheriff-Substitute (GUY) granted decree as craved, and thereafter, in terms of section 68 of the Friendly Societies Act 1896 (59 and 60 Vict. cap. 25), stated a case for the opinion of the Court. After expressing doubt as to the competency of the case on other grounds, the Sheriff-Substitute stated:—"Further, the stated case would appear to be too late. The stated case provided for is for the opinion of the Court of Session, presumably to aid or direct me in coming to my judgment. I was not asked to state a case until after my judgment was given. The question of the competency of the appeal is properly left for the decision of the Court."

On the case appearing in the Single Bills, counsel for the respondent objected to the

competency of the appeal on the ground that it was too late. He cited *Steele v. M'Intosh Brothers*, November 12, 1879, 7 R. 192, 17 S.L.R. 98; and *Johnston's Trustees v. Special Committee of Glasgow Corporation*, December 21, 1911, 49 S.L.R. 269.

Argued for appellants—The case was competent—*Linton v. City of Glasgow Friendly Society*, October 30, 1895, 23 R. 51, 33 S.L.R. 42; Fuller on Friendly Societies (3rd ed.), p. 136. The case of *Johnston (cit.)* was distinguishable, for the statute there in question gave a much more limited right of appeal.

LORD PRESIDENT—There has been an interesting question raised upon the competency on the first point, but I do not think it is necessary to give any opinion upon it, and we must leave it to lie till it occurs again, because I am clearly of opinion that this stated case, even assuming that a stated case might have been competent at an earlier stage, is not competent now, because it has been stated too late. The defender only asked the Sheriff-Substitute to state a case after the judgment in the Small Debt Court was given. Sub-section 7 of section 68 of the Act says—" . . . [quotes, *v. sup. in rubric*] . . ." But the Act does not go on to say anything more which would give the Court before whom the case is stated what I may call executive powers to deal with the matters in the appeal. I am therefore of opinion that this case falls within the rule of the case of *Johnston's Trustees v. The Special Committee of Glasgow Corporation*, December 21, 1911, 49 S.L.R. 269. I need not repeat what I then said, and only remind your Lordships that we were there only carrying out what had been the rule which was stated in the earlier case of *Steele v. M'Intosh Brothers*.

I am therefore of opinion that this case as presented is incompetent.

LORD KINNEAR and LORD HUNTER concurred.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court sustained the objection and dismissed the appeal.

Counsel for Pursuer—Fenton. Agent—Francis S. Cownie, S.S.C.

Counsel for Defenders—Macmillan. Agents—J. & J. Ross, W.S.

Tuesday, February 27.

SECOND DIVISION.

KIRKWOODS v. NICOL AND OTHERS
(KIRKWOOD'S TRUSTEES).

Succession — Trust — Administration — Trustees Directed to Invest Certain Sum to Provide Alimentary Liferents to Children, to Pay Themselves Annually Certain Sums, and to Divide Residue among Children—Retention of Residue to Meet Payment to Trustees—Payment out of Income of Alimentary Fund.

A testator directed his trustees to invest a certain sum for behoof of his children in alimentary liferent, to divide the residue among his children on a certain event, and to pay themselves a certain sum annually.

Held that, on arrival of the period for division of the residue, the trustees were not entitled to retain part thereof to provide for the annual payment to themselves, but must charge the same against the income of the alimentary fund.

A Special Case was presented for the opinion and judgment of the Court by John Macdonald Kirkwood and others, the four children of the late James Kirkwood, printer in Edinburgh (*first parties*), and the Rev. Thomas Nicol, D.D., and others, the trustees acting under James Kirkwood's trust-disposition and settlement (*second parties*).

The late James Kirkwood, who died on 25th March 1901, by his trust-disposition and settlement conveyed his whole estate to certain persons named and such others as might be assumed, "and the acceptors and acceptor, survivors and survivor of them, and the heir of the last survivor," as trustees, and after directing payment of mournings for his children and household debts, deathbed and funeral expenses, and the expenses of executing the trust and certain legacies, provided as follows—*"In the sixth place, with the view of securing to my children an alimentary provision, I direct my trustees on my decease to set aside out of the first available funds of my estate the sum of Sixteen thousand pounds sterling, to be held by them in trust for my children equally,"* for, *inter alia*, payment to the children and the survivors or survivor equally among them of the free annual income of the said sum in liferent alimentary: . . . *"And in the seventh place, I direct my trustees to hold and retain the whole residue and remainder of my means and estate for behoof of my children equally, share and share alike, . . . and, subject to the discretion hereinafter conferred on my trustees, I direct them to make payment to my sons of their shares at the first term of Whitsunday or Martinmas which shall happen after my death, and after they shall respectively attain twenty-five years of age; and in regard to the shares of my daughters, I direct my trustees at the first term of*

Whitsunday or Martinmas which shall happen after my death, and after my daughters respectively attain twenty-five years of age or to be married with the approbation of my trustees, whichever of these events shall first happen, to pay or to settle on my daughters, exclusive of the *ius mariti* and right of administration of their husbands, their respective shares. . . . And I hereby direct my trustees to pay to themselves annually the sum of Twenty-six pounds five shillings sterling, to be divided equally among them, but I declare that the acceptance by them of said sum shall not deprive them of the powers, privileges, and immunities of gratuitous trustees as conferred by statute."

The Case stated—"5. The second parties, in terms of the testator's directions, set aside the alimentary trust fund of £16,000 provided for by the sixth purpose of the trust-disposition and settlement, and have paid the revenue thereof to the first parties regularly. They have also divided among the first parties the residue of the estate, but have retained the sum of £900 or thereby to meet the legacy of £26, 5s. per annum payable to the trustees.

"6. . . . The first parties maintain that the said legacy forms a proper charge against the said alimentary fund of £16,000, upon the ground that the trust administration only now subsists for the purposes of this particular fund, and that the said sum of £900 retained out of the general residue to meet the said legacy falls to be divided among the first parties as residuary legatees of the testator.

"7. In the event of the Court being of opinion that the said legacy of £26, 5s. cannot be charged against the alimentary fund, the second parties hereby express their willingness to discharge the said legacy. Upon this further ground the first parties also maintain that they are entitled to an immediate division among them of the said sum of £900.

"8. The second parties maintain that the said legacy is a charge upon the general estate of the testator, and that the said alimentary fund of £16,000 is not liable to be charged with the said legacy or any part thereof. Further, the second parties have been advised that it is doubtful whether, in the event of a discharge by them of their annual legacy, they would be in safety to divide the said sum of £900 or thereby among the first parties as residuary legatees of the testator, as he directed the said legacy to be paid yearly to his trustees for the time being, whether original or assumed, and that, although they should discharge their said legacy, their discharge would not bind future trustees who may hereafter be assumed."

The *questions of law* were—" (1) Are the second parties, in the circumstances set forth in the case, entitled to charge their annual legacy against the alimentary fund of £16,000? (2) In the event of the first question being answered in the affirmative, or, otherwise, in the event of the second parties discharging their annual legacy,