

DIVISIONAL COURT.

FEBRUARY 7TH, 1912.

McKINLEY v. GRAHAM.

Limitation of Actions—Action to Enforce Charge on Land—Will—Legacy—Executors—Devisee—Trust—Devolution of Estates Act—Limitations Act.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 256.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. Shilton, for the plaintiff.

H. L. Ebbels, for the defendants the executors.

H. C. Macdonald, for the defendant Charles Harper junior.

The judgment of the Court was delivered by BOYD, C.:—The provisions of this will were considered in April, 1890 (see Harper v. Graham, in my book of that date), in an action wherein the plaintiff was a party and the other beneficiaries and the executors. It was then held that the land devised to the son William was charged with the payment of \$200 per year for five years after the death of the testator towards satisfaction of the legacies—including that of the plaintiff. These payments for the five years have been made, and the executors have administered the personalty, and turned over the other land devised to Charles to him in 1891, which was charged with an annuity for the life of the widow as a first charge and as a second charge any unpaid balance remaining due on the legacies. That act of transfer concluded the duties of the executors, and thenceforth the devisee Charles took the land subject to the lien for legacies. This lien was, by the terms of the will, exigible at the end of the five years from the testator's death, so far as the balance then unpaid was concerned. The land might have been resorted to subject to the lien of the widow, and sold, but this course was not taken—it may be because it was considered that the land would not realise sufficient to pay anything on the legacies, if sold subject to the widow's annuity. But of this there is no explanation in the evidence, and all that appears is, that from 1894, when the five years expired, until the issue of the writ in October, 1907, nothing has been done to relieve the plaintiff from the bar imposed on this action to recover the