Tuesday, June 16.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROSS *v.* ROSS.

Interest — Succession — Legitim — Mora — Election.

Where legitim with the legal interest thereon was claimed by a son thirteen years after his father's death, there having been no power of election, owing to the son's minority, between his legitim and his testamentary provisions till shortly before the claim was made — *held* (*diss.* Lord Adam, *rev.* judgment of Lord Stormonth Darling) that interest was due upon the legitim by the executor only at the rate which the executor could have earned in the reasonable administration and by the safe investment of the fund in his hands, here admitted to be four per cent.

Bishop's Trustees v. *Bishop*, March 17, 1894, 21 R. 728, and *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048, *distinguished.*

Opinion reserved as to the rate of interest chargeable where the claimant might be called upon to make his election at the opening of the succession.

Observed (*per* Lord M'Laren) that there is no statutory rule obliging the Court, where interest is due, to award interest at the rate of five per cent., and that it may not be beyond the power of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country.

On 15th January 1894 Sir Charles Henry Augustus Frederick Lockhart Ross of Balnagown raised an action against Dame Rebecca Sophia Ross, widow of the late Sir Charles William Augustus Ross of Balnagown, for payment of legitim, with the legal interest thereof since 26th July 1883, being the date of the late Sir Charles Ross's death.

By joint-minute parties concurred in admitting that the nett value of the personal estate of the late Sir Charles Ross was £32,537. The only question therefore between the parties in this case was, what rate of interest was due on the legitim, although that question was not raised expressly on record.

The pursuer came of age on 4th April 1893.

The facts relevant to the question are set forth in the second paragraph of Lord M'Laren's judgment.

On 19th November 1895 the Lord Ordinary (STORMONTH DARLING) decerned against the defender for payment to the pursuer of £16,268, "with interest thereon as concluded for."

Note.—"I feel bound by practice and decision to give decree for interest at five per cent. from the date of death, but my own view is very strongly in favour of reducing the rate of interest in cases like this where it is impossible that anything approaching five per cent. can have been earned, and where the facts do not raise a plea of *mora*. Such a departure from practice, however, is rather for the Inner than for the Outer House."

The defender reclaimed, and argued — There was no suggestion here of delay in making payment of legitim, and there had been no possibility of election till 1893—see *Cowan* v. *Turnbull's Trustees*, March 17, 1848, 6 Bell's App. 222. The question arose purely what interest was due on legitim, which was admittedly a debt, not a trust fund — see *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048. The true test in deciding this was, what has the money actually earned? The defender was prepared to pay interest at four per cent., which might be taken as the average amount earned by the fund. The judgment in *M'Murray* did not deal with the question, while in *Gilchrist* v. *Gilchrist's Trustees*, July 19, 1889, 16 R. 1118, Lord Fraser's opinion was based on the fact that there had been *mora*—(*cf. Fraser*, H. & W., pp. 984, 999). *Hardie* v. *Cauvin*, February 12, 1823, 2 S. 187; *Smith* v. *Barlas*, January 15, 1857, 19 D. 267; and *M'Intyre* v. *M'Intyre's Trustees*, July 9, 1865, 3 Macph. 1074, were cases dealing with the *communio bonorum*, but even in that case *M'Intyre* seemed to show that only the interest actually earned was due. Again, in the case of legacies, interest was no doubt due—*Kirkpatrick* v. *Bedford*, November 15, 1878, 6 R. (H. of L.) 4; but there was no general rule that that interest must be at the rate of five per cent.—*Inglis' Trustees* v. *Breen*, February 5, 1891, 18 R. 487. In questions of debt, moreover (and the foundation of the obligation to pay interest here was identical with the case of loan), interest was due—*Cuninghame* v. *Boswell*, May 29, 1868, 6 Macph. 890, but the rate was not necessarily five per cent. from the moment when the debt became due — *Blair's Trustees* v. *Payne, &c.*, November 12, 1884, 12 R. 104, *per* Lord Fraser; *Greig* v. *Magistrates of Edinburgh*, March 12, 1879, 6 R. 801. [*Per curiam*—But in *Greig* the pursuer consented to take interest at two and a-half per cent.] In short, unless there was *mora* or *mala fides* on the part of the trustee or executor, the actual interest earned by the fund was all that could be demanded—*Baird's Trustees* v. *Duncanson*, July 19, 1892, 19 R. 1045. The only case in the pursuer's favour was that of *Bishop's Trustees* v. *Bishop*, March 17, 1894, 21 R. 728, where Lord Rutherfurd Clark said no more than that the question was decided by the case of *M'Murray*.

Argued for the pursuer—It was conceded here that interest was due on the legitim from the death of Sir Charles's father; the only question was as to the rate. The invariable rule was to allow five per cent. in all cases of debt; and if the Court recalled the interlocutor of the Lord Ordinary, it would have to lay down an entirely new

principle applicable to every summons. "Legal interest" still meant interest at five per cent.—*Smith* v. *Barlas, ut sup., cf.* the ordinary form of petitory summons in Schedule A of the Court of Session Act 1850 (13 and 14 Vict. cap. 36). Besides, the question had been definitely decided in *Bishop's Trustees, ut sup.*

At advising—

LORD M'LAREN—In this action the pursuer claims legitim with the legal interest thereof from 26th July 1883, being the date of his father's death. I am not sure whether this is an irrevocable election on his part to take legitim in preference to the heritable estate; but in any view it is proper that the value of the legitim should be judicially ascertained, so that the pursuer may be in a position to consider his course, if it is still open to him to do so. The Lord Ordinary has decerned in his favour for the principal sum of £16,268, 18s. 9d., with interest at the rate of five per cent. as concluded for—that is, for a period of nearly thirteen years reckoned from the father's death. This interest would amount to about 65 per cent., or very nearly two-thirds of the principal sum sued for. His Lordship, in a brief note, gives the weight of his opinion in favour of applying a lower rate of interest to such cases, but states that, sitting alone, he feels bound by practice to allow interest at 5 per cent.

The facts which raise this question may be stated in a sentence. Sir Charles Ross's father left his unentailed lands to his son, burdened with a liferent in favour of his widow, and he left all his personal estate to his widow, who was also, in the events which happened, sole trustee and guardian of her pupil son. It could not be known at the time of the father's death whether after the son should come of age it would be more for his advantage to take the heritable estate or the legitim. The result might depend on whether Lady Ross was alive at her son's majority, and on her expectation of life at that time. Even if a good actuarial estimate could have been made, Lady Ross had not the power to elect for her son, and the son had not the power to elect for himself effectually until he became of full age, because the election to take legitim involved the alienation of the heritable estate, and such an election might have been reduced on the ground of minority and lesion.

In such circumstances all that could be done by Lady Ross for the conservation of her son's rights was to keep the personal estate, or at least one moiety of it, safely invested for his benefit should he choose to claim it at the proper time. This has been done, and on the mere statement of the facts it is evident that Lady Ross was in the position of a depositary of this fund, having no duty in relation to it except that of the safe-keeping of the principal sum, and of such interest as it might produce when safely invested. If it could be shown that the fruits of the personal estate amounted to five per cent. per annum, or 65 per cent. in the period of thirteen years, I see no reason to doubt that the pursuer would be entitled to what he claims. But his case is that he is entitled to receive five per cent. as on a debt, while Lady Ross contends that she is only liable for such interest as the legitim fund, if safely invested, could produce. It is assumed that four per cent. may be taken as representing on a fair estimate the actual income or produce of the fund.

Now, it is undoubtedly the fact that interest at 5 per cent. has been generally allowed on claims of legitim and on claims by a wife's representatives to a share of goods in communion under a law which is now repealed. The case of a claim by a wife's representatives for a share of goods in communion could not raise a question of election, and is not very much in point. But when the decisions are examined with reference to interest on legitim claims, it will be found that they are no more conclusive than cases of the other class, because, with the exception of the recent case of *Bishop's Trustees* v. *Bishop*, they are all cases where there was either no election or where the election might have been made at the opening of the succession. Now, it may very well be that if a son or daughter is disinherited and has no claim except under the law of legitim, the testamentary representatives ought to be treated as *in mora* for not immediately settling the claim. In such a case interest would be due as in any other case of the withholding payment of a just debt. The same principle may be held, but I think with less reason, to apply to a case where there is an election between legal and testamentary provisions, but where the claimant is of age and may be called on to declare his election.

In the case of *Bishop*, 21 R. 728, the vesting of the rights under the father's will was suspended for the period of one year after the father's death, and the action was heard in Court in the following year. The question of the rate of interest was very unimportant, because it was only the interest of one year, and the Court simply followed the case of *M'Murray* without, as far as we can judge from the report, having its attention drawn to the peculiarity of the case, where the action of the trustees is suspended and the election cannot be immediately made. But in *M'Murray's* case the question was whether the child claiming legitim was entitled to profits which it was assumed would exceed 5 per cent. per annum. The question was not raised whether the liability of the persons administering the legitim fund might be limited to the interest obtained from a safe investment, and this question could not well be raised because the facts were that the money had been invested in trade and had produced more than 5 per cent. It therefore appears to me that we are in a position to consider the question I have stated without being bound by authorities, although of course the decisions referred to may be very good authority for giving 5 per cent. in a case where legitim is withheld from a child who is entitled to it.

It has often been said, and I think it is a rule of law, that interest is only due where there is either a contract to pay interest or a duty to invest, or in respect of *morata solutio*. The present case in my opinion falls under the second category, and the defender is only accountable for such interest or income as the money would have produced if safely invested. I should also wish to reserve my opinion as to the rate of interest chargeable where the right to legitim can be immediately determined but where the claim is allowed to lie over without fault on either side. After all, there is at present no statutory rate of legal interest; 5 per cent. was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent. in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country.

LORD ADAM—It is admitted in this case that legitim is one of that class of debts which bears interest, and the only question before us is, what is the amount of interest which should be allowed? For myself, I am of opinion that we ought to adhere to what is the customary rate of interest for a debt. I do not think that it is relevant to inquire in such a case what the party who is debtor has done or might have done with the same. I therefore differ in opinion from Lord M'Laren, and think that we ought to adhere to the customary amount of interest payable on this debt, that being 5 per cent.

LORD KINNEAR—I have come to the same conclusion as Lord M'Laren, and for substantially the same reasons. I do not dispute that legitim is a debt which bears interest, and that an executor, therefore, is not exactly in the position of a trustee holding money of the child, but is liable in the deceased's place to satisfy the child's claim for legitim. But then it does not appear to me that any question of interest can be safely or equitably decided without reference to the circumstances in which it is raised. It appears in this case that the executrix has been for 13 years in the possession of the entire personal estate of the deceased, and that she has had every reason to believe it her own, if not from the first, at least for many years. The son has nevertheless the right to make the claim now, and the executrix is bound to have funds to meet it. But the debt was not payable until the pursuer had made his election between his legal rights and his rights under the will. The executrix, therefore, was not *in mora*, and it is not suggested that in the reasonable administration, I do not say of a trust-estate, but of her own affairs, she would have earned five per cent. interest, and therefore a decision which should have the result, as Lord M'Laren has said, of compelling her to pay a sum equal to two-thirds of the entire sum claimed in addition to the amount of the claim itself, would, in my opinion, be in the highest degree inequitable. It would really be imposing a penalty upon her for an administration of the estate which she had no power to prevent. She had no power to accelerate the election, or in the meantime to earn interest at the rate of five per cent., and I see no reason why the pursuer should benefit at the expense of the executrix by reason of his own delay. It is enough that he should not be prejudiced. I think it would not be according to justice to compel her to pay in name of interest a larger sum than she might reasonably have obtained from a prudent administration of the estate.

I agree with Lord Adam that we should not in matters of this kind depart from the fixed rules of practice, but I also agree, from the examination of the cases which Lord M'Laren has made, that there is no fixed rule as to the interest due on claims of legitim to prevent us from giving effect to equitable considerations in exceptional circumstances.

The LORD PRESIDENT concurred with Lord M'Laren and Lord Kinnear.

The Court altered the interlocutor of the Lord Ordinary, and found interest due at the rate of four per cent.

Counsel for Pursuer and Respondent—W. Campbell—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for Defender and Reclaimer—Clyde. Agent—Keith R. Maitland, W.S.

Thursday, June 4.

SECOND DIVISION.

[Greenock Dean of Guild Court.

GREENOCK BOARD OF POLICE *v.* SHAW STEWART.

Burgh—Dean of Guild—Jurisdiction of Dean of Guild Court—Competition of Heritable Rights.

A petition was presented to the Dean of Guild of a burgh by the Board of Police to compel the alleged owner of a wall bounding a public street to repair the wall. The respondent, while admitting that he was the owner of the *solum* on which the wall was built, averred that the wall itself was built and maintained by the petitioners for the support of the street. He pleaded that a question of disputed ownership and heritable title having arisen, no decision would competently be pronounced by the Dean of Guild.

The Court *repelled* this plea, and *held* that the Dean of Guild had jurisdiction.

Process—Appeals from Inferior Courts—Competency—Effect of Appeals under Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 69.

By section 69 of the Court of Session Act 1868 it is enacted that appeals under the Act from inferior courts "shall be