Friday, March 4.

SECOND DIVISION.

CAMPBELL'S EXECUTOR *v.* CAMPBELL'S TRUSTEES.

Interest—Rate of Interest—Sum Due under Partial Settlement.

By a partial settlement a testator assigned to trustees out of the estate belonging to him at his death a certain sum. He died intestate as regards the remainder of his estate, and an executor-dative was appointed. No *mora* in winding-up the estate was alleged against the executor.

Held that the trustees were only entitled to interest at 3 per cent. from the date of death till payment of the principal sum.

By trust-disposition and settlement dated 15th September 1894 John Campbell, solicitor, Edinburgh, disponed and assigned out of his means and estate belonging to him at the date of his death, to the trustees therein named, a house situated at 4 Argyle Terrace, Edinburgh, and the sum of £5000 in trust for the ends, uses, and purposes therein mentioned.

On 30th September 1897 John Campbell died intestate so far as regards the remainder of his estate. He left moveable estate of the nett amount of £10,555, 10s. 6d., besides heritable property. The moveable estate was invested in the stocks of the North British and Mercantile Insurance Company and Scottish banks and railways to the amount of £8000 or thereby. The remainder of the moveable estate consisted of accounts, furniture, &c., and of shares in various companies.

For the purpose of winding-up the estate James Campbell, Glasgow, was decerned his executor-dative, and was duly confirmed as such conform to testament-dative in his favour granted by the Sheriff of the Lothians and Peebles at Edinburgh, dated 3rd November 1897.

On 12th November 1897 the executor-dative paid to the trustees under the partial settlement £2300 to account of the sums payable under the deed, and this sum was on that date invested in heritable security at 3 per cent.

Various questions arose in regard to the winding-up of Mr Campbell's estate, and in order to decide these questions a special case was presented to the Court in February 1898 by (1) the executor-dative, (2) the trustees, (3) the heir-at-law in heritage, and (4) the heirs *in mobilibus*. The questions at law included, *inter alia*, the following:—"(2) From what date are the trustees under said partial settlement entitled to interest on said sum of £5000, and at what rate?"

In the special case it was stated that the average rate of interest received from the money invested in the stocks of the North British Mercantile Insurance Company and Scottish banks and railways from the date of the death to the dates of realisation thereof was about 3½ per cent., that the whole shares were in course of realisation and the proceeds (other than the £2300 paid as aforesaid) had been deposited in bank, and that the sums so deposited amounted at the date of the special case to £4100, and on these sums only interest at the deposit rate of 1½ per cent. was received.

Argued for first and fourth parties—No interest was due, or at all events, a smaller rate of interest than 5 per cent. There was no inflexible rule in the matter, and no *mora* had been alleged against the trustees—*Inglis' Trustees* v. *Breen*, February 6, 1891, 18 R. 487.

Argued for second parties—The £5000 was payable with interest at 5 per cent. from the date of Mr Campbell's death. The fixed rule was that legal interest at 5 per cent. was due from the time a sum became payable till it was paid, and the Court would not lower this rate except in special circumstances — *Kirkpatrick* v. *Bedford*, November 15, 1878, 6 R. (H. L.), *per* Lord Chancellor Cairns, 7.

LORD JUSTICE-CLERK—In regard to the second question, I am of opinion that we should allow interest at 3 per cent. from the date of the death. I think the case of *Inglis's Trustees* is a distinct authority for our considering the matter judiciously, and not merely giving the second parties, as a matter of course, interest at 5 per cent., which is a rate of interest that no trustees, if we take into consideration the present state of the money market, can possibly get on sums of money invested under their charge on proper securities.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"Answer the second question therein stated by declaring that the trustees under the partial settlement are entitled to interest on the sum of £5000 at the rate of 3 per centum per annum from the date of the testator's death till payment."

Counsel for First and Fourth Parties — Sym. Counsel for Second Parties—F. M. Anderson. Counsel for Third Parties—Craigie. Agent — Thomas J. Cochrane, S.S.C.

Friday, March 4.

FIRST DIVISION.

[Sheriff of Caithness, &c.

SINCLAIR *v.* THE CAITHNESS FLAGSTONE COMPANY, LIMITED, AND OTHERS.

Lease — Quarry — Obligation to Work Quarry "in a Proper and Regular Manner" — Action ad factum præstandum after Expiry of Lease—Competency.

By the terms of their lease the tenants of certain quarries bound themselves to work these "in a proper and regular manner."

After the expiry of the lease the landlord raised an action against them to have them ordained to execute the necessary works of construction and repair to put the quarries in proper order and condition.

Held that the action was incompetent, the possession of the tenants having determined, and that the landlord's proper remedy was an action of damages.

Process—Accumulation of Defenders—Conjunct and Several Liability.

A, the tenant of quarries, after working them for some years, assigned his lease to B, who was accepted as tenant by the landlord, subject to the condition that A should remain bound for all the obligations of the lease. After the expiry of the lease the landlord raised an action against A and B, to have them ordained "jointly and severally, or severally and according to their respective liabilities as these shall be established in the present action," to pay a sum of money as damages for failure to implement their obligation under the lease to work the quarries in a regular and proper manner, and to leave buildings in good tenantable condition, and to leave roads, drains, and ditches in good order and repair at the expiry of the lease. There was no averment on record apportioning the liability between the defenders. The defenders first called did not lodge defences.

Held (*following Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651) that the action was incompetent as regards the claim for damage for wrongous working of the quarries, in respect that it concluded for a lump sum of damages for separate wrongs, but that the averments were relevant as regards the claim for failure to leave the buildings, roads, &c., in proper condition at the termination of the lease, an obligation for which both defenders were liable.

Sir John George Tollemache Sinclair raised an action in the Sheriff Court of Caithness at Wick against the Caithness Flagstone Company, Limited, and the Caithness Flagstone Quarrying Company and the individual partners thereof, praying the Court "to ordain the defenders, jointly and severally [or severally, and according to their respective liabilities, as these shall be established in the present action], forthwith to execute the necessary works of construction and repair, to put in proper order and condition the several quarries, roads, ditches, fences, drains, and buildings after mentioned, and that within the period of two months, and at the sight of a person appointed by the Court, and failing the defenders so doing, to authorise the pursuer to execute said necessary works at his own cost, and to ordain the defenders, jointly and severally, or severally as aforesaid, to pay to the pursuer the sum of £1759, 10s., or such other sum as may be determined to be the cost and expense to the pursuer of executing said works; or alternatively to pay to the pursuer the sum of £1759, 10s. as damages." The words in brackets were added to the petition by way of amendment.

The pursuer averred that in 1875 he let certain subjects in Caithness to the Caithness Flagstone Quarrying Company and the individual partners, and that, by assignation in 1892, the Caithness Flagstone Company, Limited, became vested in the whole rights of the first-mentioned Company. By the said assignation the Limited Company bound themselves "to perform, implement, and fulfil, and to free and release and keep skaithless," the Quarrying Company of all the obligations and prestations incumbent on the latter by the lease subsequent to the 14th day of December 1888. The Limited Company were accepted by the pursuer as tenants under the lease of 1875, "but under special reservation of all rights competent to me by virtue of the within-mentioned lease granted by me to the Caithness Flagstone Quarrying Company . . . and under the express declaration that the said Caithness Flagstone Quarrying Company and individual partners . . . shall continue to be bound jointly and severally for payment of the rent and lordship and implement of all the conditions and obligations incumbent upon them, notwithstanding the written assignation and the intimation thereof."

The lease terminated at Martinmas 1895, and the parties failed to arrange for its renewal.

By the said lease it was, *inter alia*, provided that "the said second party (*i.e.*, the quarrying company and the partners thereof) bind and oblige themselves to work the said quarries, and also those that may hereafter be found by them, with as little destruction of ground as possible, and in a proper and regular manner, and in regular faces and of sufficient depth to take out all the marketable flags and slates, and on no account to cover up with rubbish or otherwise the face of any portion of any quarry which is being worked at the time notice is given that such quarry has become unremunerative, nor so as in any way to obstruct or interfere with the full and free access to such quarry."

The pursuer proceeded to aver—"(Cond. 4) In terms of said obligation to work the