LORD ADAM and LORD KINNEAR concurred.

The Court answered the first two questions in the negative.

Counsel for the First Parties—Guthrie, Q.C. — Salvesen. Agents — Kinmont & Maxwell, W.S.

Counsel for the Second Parties—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—W. & J. Burness, W.S.

Saturday, June 4.

SECOND DIVISION.

[Sheriff-Substitute of Glasgow.

GRANT *v.* GRANT'S TRUSTEES.

Interest — Rate of Interest — Legitim — Parent and Child.

A testator died on 14th January 1891, leaving a trust-disposition and settlement in which he directed his trustees to hold his whole estate for his daughter in liferent and her issue in fee. The trustees paid the whole income of the estate to the daughter down to 4th December 1897, when she attained majority. On that date she claimed her legitim, and it was paid to her.

Held that she was not entitled to interest at 5 per cent. per annum on the amount of her legitim from the date of her father's death, but only to the actual income of the trust received by her.

Observations by Lord Young on the legal rate of interest now exigible.

William Grant, wine and spirit merchant, Dunoon, died on 14th January 1890, leaving a trust-disposition and settlement whereby he directed his trustees to hold his estate (subject to payment of two annuities) for Agnes Hood Grant, his daughter, in liferent and her issue in fee, and in the event of her dying without issue, for his two sisters equally between them, and failing them their issue.

The trustees accepted office and administered the trust, and down to 4th December 1897, the date when Agnes Hood Grant came of age, they paid to her the whole income of the trust (less annuities and expenses) amounting to £1240.

When Miss Grant came of age she at once claimed her legitim, and it was paid to her on 6th December 1897, reserving the question of interest. Miss Grant maintained that she was entitled to interest at 5 per cent. per annum on the amount of her legitim from the date of her father's death, amounting to £1445, 4s., under deduction of the income actually paid to her during her minority, viz., £1240. The trustees, however, maintained that Miss Grant was only entitled to interest at the average rate earned by the trust during her minority, which was £3, 6s. 10d. per cent., while she had been paid the whole income, amounting to £1240, which was more than 4 per cent. on her legitim.

In these circumstances Miss Grant raised against the trustees in the Glasgow Sheriff Court an action for £205, 4s., being the difference between £1445, 4s. and £1240.

The pursuer pleaded—"(1) The pursuer being entitled to interest on her legitim at five per centum, decree should be given for the sum sued for, with expenses. (2) The delay in payment of the legitim not being the fault of the pursuer, and the defenders never having put her to her election, decree should be granted as craved."

The defenders pleaded—"(1) The pursuer is entitled to interest only at the rate of £3, 6s. 10d. per cent., being the average rate earned by the trust during her minority. (2) The pursuer having already received an amount equal to more than four per cent. is not entitled to any further payment in respect of interest."

On 25th February 1898 the Sheriff-Substitute (BALFOUR) pronounced the following interlocutor—"Repels the defences: Decerns against the defenders for payment of the principal sum concluded for."

Note.—. . . "There are various decisions on the subject, and with one exception they all point in the same direction. The first case is *M'Murray* v. *M'Murray's Trustees*, 14 D. 1048, where it was held that legitim is a debt to be measured by the amount of the fund at the father's death, and the Court decerned for the legitim, with the legal interest thereof since the death. The point of this case is that legitim is treated as a debt, and is due from the date of the father's death, with the legal interest. The next case is *Gilchrist* v. *Gilchrist's Trustees*, 16 R. 1118, where legitim was characterised in the same manner as in *M'Murray's* case, and the Lord Ordinary (Fraser) held that if the executor, without justifiable excuse, delays to pay legitim he is liable in interest at 5 per cent. The next case is *Bishop's Trustees* v. *Bishop*, 21 R. 728, where the Court (dealing with the contention of trustees that interest was only chargeable at the average rate actually earned) held that legitim bears interest at 5 per cent. from the date of the father's decease till payment, and without remark they followed *M'Murray's* case. The next case (and this is the exceptional one) is *Ross* v. *Ross*, 28 R. 802, where the son, claiming legitim, was found entitled to interest at the rate of 4 per cent., that being the rate which the estate had earned. The facts of the case were that Sir Charles Ross at the time of his father's death was a minor, and thirteen years after his father's death, when he had become a major, he elected to claim his legitim, which he could not have done earlier. During his minority his mother was in possession of the estate, and 4 per cent. was taken to be a fair estimate of the actual income of the estate. There was no *mora* on the part of the executrix, and she had no power to accelerate her son's election. She had been in possession of the estate for thirteen years, and the amount claimed for interest was

equal to two-thirds of the entire sum claimed for legitim. The Court held that under the circumstances it was inequitable to lay such a burden upon the widow, and that it would be really imposing a penalty on her for an administration of the estate which she had no power to prevent. It was admitted that 5 per cent. was the customary rate of interest on such a debt, but it was held that there was no fixed rule as to the interest due on claims of legitim to prevent the Court from giving effect to equitable considerations in exceptional circumstances.

"It appears to me that the present case is different from *Ross's* case. It makes no difference that the time which has elapsed since the father's death in this case is eight years, or that there has been no *mora* either on the part of the daughter or on the part of the trustees, but it makes a great difference that during these eight years the income of this estate has been paid over to the pursuer herself and not to a third party, and there is no one who can be prejudiced by the payment of 5 per cent. unless in the eventuality of the death of the pursuer without issue, when the truster's sisters become beneficiaries. I do not however think that their contingent rights should be taken into serious consideration in dealing with the present question. Their possible claims are not to be compared with the claims of Dame Ross in *Ross's* case, she having been in possession of the estate for thirteen years in the belief that it was her own, and she would have been the instant sufferer by her son's claim for 5 per cent. interest. I understand, moreover, that in about two years the income of this estate will suffice to make up the claim now made for £205, 4s.

"I therefore am of opinion that, according to the ordinary rules of practice and according to the decisions, 5 per cent. is the rate of interest chargeable on a debt like legitim, and that it is only in exceptional circumstances that the Court will give effect to equitable considerations and interfere with the ordinary rule, and these circumstances do not exist in the present case.

"I may finally refer to the House of Lords decision in *Kirkpatrick* v. *Bedford*, 6 R. (H.L.) 4, which does not appear to have been referred to in the Court of Session cases, and which decides that a legacy carries interest at the rate of 5 per cent. from the death of the testator."

The defenders appealed, and argued—It was not the case that 5 per cent. was the legal rate of interest. There was no rate fixed as the legal rate. The guiding principle in all such cases was, what was the average rate which could be earned by prudent investment of the money. The average rate earned by the trust in this case was £3, 6s. 10d. per cent. In any case the pursuer was not entitled to more than the income of the trust, which had been admittedly paid to her—*Ross* v. *Ross*, June 16, 1896, 23 R. 802; *Inglis's Trustees* v. *Breen*, February 6, 1891, 18 R. 487; *Baird's Trustees* v. *Duncanson*, July 19, 1892, 19 R. 1045; *Melville* v. *Noble's Trustees*, December 11, 1896, 24 R. 243; *Campbell's Executor* v. *Campbell's Trustees*, March 4, 1898, 35 S.L.R. 540.

Argued for the pursuer — The Sheriff-Substitute's judgment was right. Legitim was a debt. In *Ross* v. *Ross*, *supra*, all the judges recognised that legitim was a claim of debt. So far as decisions had gone the only exception to the rule of allowing 5 per cent. interest on legitim was *Ross*. That was an exceptional case, and it was plain from the opinions of the Judges that interest at a higher rate of interest than 4 per cent. would have been granted but for the exceptional circumstances of the case—see specially opinion of Lord Kinnear at 23 R. 806. The position of a trustee paying a debt like legitim was different from that of a trustee holding money for beneficiaries. Payment of a debt was not a question of administration. There was no exceptional circumstances in the present case and interest at 5 per cent should be granted.

LORD YOUNG—At the date of her father's death the pursuer was only thirteen years of age and was therefore not in a position to say whether she would elect to take the provision made for her in his settlement or her legitim. The trustees as such had a duty to perform, viz., to hold the deceased's estate and invest it with a view to its being kept safe and intact, and at the same time yielding such a profitable return as was consistent with safety. It is admitted that they performed that duty. When the lady attained her majority she elected to throw over her father's settlement and claimed her legitim, consisting of half of the estate. It then became the duty of the trustees to treat her as a creditor—they could not do that before—and pay her the amount. This they did. In the meantime, during the period from the date of her father's death when she was thirteen, till she attained the age of twenty-one, when she became a creditor for the first time and when for the first time the trustees were bound to pay her, she got all the income that the trustees made by investing the money with safety and at a reasonable return. This action is brought for £205, 4s. being the difference between that income and 5 per cent. I should have thought that, whether viewed from the standpoint of law or sense or justice, this was a ridiculous claim. I do not regard it as a debt in the sense of bearing interest other than the interest got by the trustees and paid over to this lady before she made her election on attaining majority, when the trustees were for the first time in a position and under a duty to pay it. The trustees could not offer her legitim before she elected to take it, and she could not elect before she attained majority. I am therefore of opinion that the pursuer is entitled to no more than she has received.

I just wish to say one other word on the notion that appears to be prevalent that by the law of Scotland interest at the rate of 5 per cent. is due upon all debts except in exceptional circumstances. For a long period 5 per cent. was such a usual rate of

interest that it got to be called legal interest. But circumstances have altered, and I think we have now got to this, that we frequently, indeed habitually, allow less, such as 4 or 3½ or even 3 per cent. It is not the law of Scotland that 5 per cent. is the interest payable to every creditor on every debt. There may be exceptional circumstances where 5 per cent. will be granted, but I do not think they occur here. This is just a simple case of a party not being in a position to make election for a number of years between her conventional provision and her legal rights, and the sole duty of the trustees is to account for what they have properly made of the estate in the meantime. If the party making the election was in a position to do it immediately after the death, then he is generally entitled to interest without reference to the income which the trustees received from the estate, but not necessarily to 5 per cent.

I am therefore of opinion that the defences should be sustained, and the defenders assoilzied.

LORD TRAYNER—I think that the result of the decisions, especially *Inglis' Trustees* v. *Breen*, is entirely opposed to the pursuer's claim. I therefore am of opinion that these decisions should be affirmed, with the result at which your Lordship has arrived.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Sustain the second plea-in-law for the defenders: Assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Pursuer—Clyde. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders—The Solicitor-General—M. P. Fraser. Agents—Cuthbert & Marchbank, S.S.C.

Friday, June 17.

FIRST DIVISION.

M'COSH, PETITIONER.

Bankruptcy — Sequestration — Misprint in Statutory Advertisement — Nobile Officium—Advertisement Ordered of New.

On the petition of a bankrupt, the Court in the exercise of its *nobile officium*, ordered of new advertisement in the *Edinburgh* and *London Gazettes*, and fixed of new a date for the creditors meeting for the election of a trustee, the original advertisement having been vitiated by printer's errors in the name of the bankrupt and of the subscribing agent.

On 7th June 1898 the estates of James M'Cosh were sequestrated in the Sheriff Court of Lanarkshire, and a meeting of creditors for the election of a trustee was appointed to be held in terms of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79).

In terms of the 48th section of the said Act (which provides for the insertion of a notice in the *Edinburgh Gazette* within four days, and in the *London Gazette* within six days of the deliverance awarding sequestration), the bankrupt transmitted a notice in the form of Schedule B annexed to the Act to the printers of the *Edinburgh* and *London Gazettes*.

Owing to a printer's error the bankrupt was designated James "M'Cash" in place of "M'Cosh" in the advertisement inserted in the *Edinburgh Gazette* of 10th June. The name of the subscribing agent was also misprinted in the advertisement in the *London Gazette* of the same date.

In these circumstances the bankrupt, with consent of certain creditors, presented an application to the Court to appoint of new advertisement in the *Edinburgh* and *London Gazettes* of 21st June, and to fix the 29th of June as the date for the meeting of creditors.

The Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 67, requires that the meeting of creditors for the election of a trustee should be held "on a specified date, being not earlier than six nor more than twelve days from the date of the Gazette notice of sequestration having been awarded."

Argued for the petitioner—This was an appeal to the *nobile officium* of the Court to rectify a fatal error in the procedure for which the printer of the Gazettes and not the petitioner was to blame. The provisions of section 48, which prescribed advertisement, were always strictly construed—Goudy on Bankruptcy, p. 158, and cases there cited—and if the mistake could not be put right, there must be a fresh "first deliverance" in the sequestration, which might have the effect of conferring preferences on creditors who enjoyed no preferences at present. The Court had granted similar applications—*Von Rotberg*, December 22, 1876, 4 R. 263; *Watt*, March 10, 1877, 4 R. 641; *Myles*, June 14, 1893, 20 R. 818. The expenses of this application should not be made a charge on the bankrupt's estates.

LORD PRESIDENT—This case seems to fall within that class of which *Von Rotberg* is the clearest type, where the Court do exercise their *nobile officium* to correct an error of this description; and I understand that the Court in so doing do not come to the rescue of an applicant who has made a blunder in the proceeding for his own sake, but rather exercise their power in order that the interests of creditors who may have been lying by should not be affected by a mistake for which they are not responsible. Accordingly, I think we may grant this application; and looking to the explanations which have been made, I think that nothing should be said about expenses.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.