

SECOND DIVISION.

KENNEDY v. BELL.

Interest. Circumstances in which held (alt. Lord Kinloch) that a claim by a child against her father for her share of her mother's succession bore interest at 5 per cent. from the date of her mother's death, 28 years ago.

Counsel for Pursuer—Mr Patton and Mr Gifford. Agent—Mr George Cotton, S.S.C.

Counsel for the Defender—The Lord Advocate, Mr Clark, and Mr Moncrieff. Agents—Messrs J. W. & J. Mackenzie, W.S.

This is an action by Mrs Kennedy against her father, Mr Bell of Enterkine, for payment of her share (one-ninth) of the movable succession of her mother, who died in September 1838. It has been several times before the Court. The pleas maintained by the defender—(1) that the question of domicile fell to be regulated by the law of Jamaica; (2) that the claim had been discharged by the pursuer's marriage contract; (3) that Mr Dunlop's Intestate Succession Act excluded the claim—had been repelled; and a remit had been made to an accountant, who reported the succession as amounting to £60,943, rs. 4d., including in that sum £13,800 as the balance of the price of a Jamaica estate (Woodstock), which had been sold previous to Mrs Bell's death, but the price of which to this extent had not been paid till afterwards, and had been made a burden upon the estate. The Lord Ordinary on this point took the opinion of English counsel, which was to the effect that the price of Woodstock was personal estate; and his Lordship so found, approved of the accountant's report, and also found that the defender was chargeable with interest at 5 per cent., but only from the date of the pursuer's marriage in 1857.

Both parties reclaimed. Various pleas were stated by the defender which do not require notice, some of them being reserved. In making up his report the accountant in fixing the value of the estate as at Mrs Bell's death, had drawn back to that date the amount subsequently received by calculating and deducting interest simply at 5 per cent. The defender maintained to the Court—(1) That he was entitled to have these sums drawn back as discount, not as interest; (2) that the price of Woodstock should be held as heritable, and be struck from the pursuer's claim; and (3) that he was entitled to deduct from the sums due a provision of £5000 contained in Mrs Kennedy's marriage contract, by which Mr Bell had provided this sum in full of what he intended to leave her at his death, and settled it upon Mr and Mrs Kennedy in life rent and their children in fee, with a clause of return in the defender's favour failing children of the marriage. As the counterpart of this provision, Mr Kennedy had settled considerable provisions upon his wife.

On the other hand, the pursuers contended that they were entitled to interest at 5 per cent. from the date of Mrs Bell's death in 1838, subject to a reasonable allowance for aliment, and they referred to *Steel's Trustees v. Cooper*, 16th June 1830, and other cases. They contended that to allow the whole interest of her share, which amounted to about £350 per annum, to be applied in the aliment of a daughter from her second to her twentieth year, was, in the circumstances of the case, quite against principle, as well as unreasonable.

After hearing parties, the Court approved of the accountant's report, and found the defender liable in five per cent. interest from the date of Mrs Bell's death. They repelled also the other pleas stated for the defender, and found him liable in expenses since the date of the Lord Ordinary's interlocutor; but they reserved to the defender to state as a deduction any claim which he may have in

respect of the maintenance and education of his daughter; and the case was remitted back to the Lord Ordinary to settle this and other reserved points.

The LORD JUSTICE-CLERK said—The first objection which is now maintained by the defender to the report is, that he should have been allowed discount instead of mere interest on the sums received after Mrs Bell's death, and drawn back to that date. I shall only say that on this point the accountant is right on the most obvious grounds of reason and justice. As regards the price of Woodstock, that is fixed by the opinion of English counsel; and the result brought out by that opinion is binding on the Court as a matter of fact. Now, the Lord Ordinary's interlocutor repels the fourth plea stated by the defender, which is, that he is entitled to impute the provisions contained in the contract towards the pursuers' claims. Now, in this process, the only effect of this plea would be to diminish the balance due to the pursuers. And how can this be done? How can we deduct a sum not paid nor payable, while the debt against which it is to be set is not only presently due, but has been due since 1838? A contingent payment or claim can never be an answer to a claim past due. The only question remaining relates to the interest. It is important, but clear. It is settled law that a claim like the present is a pure claim of debt, and must bear legal interest—that is, interest at five per cent. There may be cases in equity for a lower rate, as where it is shown that the funds have been securely invested, so as to raise a smaller rate of interest. On the other hand, cases may arise, such as investments in trade, where the profit actually made might be claimed. In the present case the ordinary rule should be followed. Mr Bell kept the money; he employed it in no dangerous trade or speculation, but he bought an estate with it. His child, however, had not the security of that estate. So there is no ground for the contention that the rate of interest should be reduced to the rate received from good heritable securities. His daughter was merely a personal creditor, and is entitled to legal interest as such. In case of Mr Bell's bankruptcy she would have had no security. Now this interest must run from the date of her mother's death. Compensated or discharged it may be, but still it runs; and I cannot agree with the Lord Ordinary in any of his views. The defender must be chargeable with interest from September 1838, reserving the defender's claim for aliment and maintenance. It is quite obvious the defender's views would infer great injustice; as, for instance, in the case of the interest drawn back on the Woodstock produce, where the defender would absolutely pocket a part of the principal fund; but this I need not pursue further, as there is no possible view on which it can be contended that the whole produce of the claim is to be given the defender as an allowance for maintenance. I think we must therefore to this extent recal the Lord Ordinary's interlocutor, and find the defender liable in interest, reserving his right to make a claim for maintenance.

Lord COWAN said—I am of the same opinion. As regards interest, the Court have no discretion. Interest is due as on a debt. As regards the rate of interest, no more is claimed than 5 per cent., and less should not be allowed. There may be a discretion on the part of the Court in fixing aliment, taking into view the circumstances of parties, and the proper course is to remit this question back to the Lord Ordinary.

Lord BENHOLME and Lord NEAVES concurred.

NISBET v. AIKMAN.

Landlord and Tenant—Removing. Suspension of a decree of removing presented by a landlord against a tenant, on the ground that the suspender was not the tenant of the petitioner for the removing, refused.