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, 1s. 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 liferent 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.*

Counsel for Complainer—Mr Gordon and Mr Scott. Agent—Mr David Crawford, S.S.C.

Counsel for Respondent—Mr Patton and Mr Lee. Agents—Messrs Hamilton & Kinnear, W.S.

This was a note of suspension at the instance of James Nisbet, Ferniegare, near Hamilton, and others, against H. H. Robertson Aikman, Ross House, Hamilton, of a decree of removing pronounced against them in the Sheriff Court of Lanarkshire. The respondent had presented a petition to the Sheriff setting forth that he was proprietor of certain subjects at Ferniegare occupied by the present complainers, and craving the Sheriff to grant warrant of summary ejection and removal against them. The defence to this petition was that the petitioner had no title, that the warning was defective, and that the defenders never having been the tenants of the petitioner, the summary proceeding by petition on an execution of warrant was incompetent. Decree was pronounced against the defenders, who thereupon presented this note of suspension. It appeared from the complainer's statement that he had been proprietor of the said subjects, and had disponed them to the Commercial Bank, on account of certain advances, by an *ex facie* absolute disposition, qualified by a back letter. The Bank had made other advances to him, and had thereafter sold the subjects to the respondent. In so doing the complainer alleged that the bank proceeded in violation of his right under the back letter, and he proposed to raise a reduction of the disposition in the respondent's favour, in respect that the bank had no right to sell the said subjects, of which he described himself in the suspension as proprietor. The Lord Ordinary (Mure) passed the note in order that the questions raised might be deliberately considered. To-day the Court recalled the Lord Ordinary's interlocutor, and remitted to him to refuse the note.

The LORD JUSTICE-CLERK said the Lord Ordinary had passed the note as the case raised points requiring more deliberation than they could receive in the bill; and probably if he had been in the position of the Lord Ordinary he would have done the same. But when the case came before the Court it was obvious that it was of such a nature as to require disposal at once, and accordingly they had had a full argument. The petitioner in the action of removing sets himself out as being the heritable proprietor of a dwelling house, &c., at Ferniegare. That is his title, and in support of it he produces a disposition which is registered, and therefore equivalent to disposition and infeftment. It further appears that he acquired the subjects as purchaser from the Commercial Bank. The petitioner further sets out that the subjects are occupied by the respondents as tenants under him, and that he has from time to time summoned them to remove, and he produces a percept and execution of warning in support of that. There is no doubt that the warning was timeously given. Upon these grounds he prays for summary ejectment of the respondents. Now, *ex facie*, in that petition the proceedings are perfectly regular, and I may just say, in passing, that there is no irregularity or impropriety in a petitioner seeking such a summary remedy, setting out that the respondents are either tenants or pretended tenants, because it may turn out that the title to tenancy is liable to objection, and I cannot think that merely because the title to tenancy is liable to objection the respondents could object to the petition. But all depends on the nature of the defence. If the defender had alleged in answer to the petition that he was proprietor, and thereby had a title to compete with him, the proceedings could not have proceeded before the Inferior Court. But that is not his defence. His defence is (1) that the summary remedy asked is incompetent, because the parties do not stand towards one another as lessor and lessee. That is a complete admission that he has not a good title of tenancy, and is therefore not a good answer to the petition. I can well enough understand the petitioner bringing a summons of removing, and not knowing very well whether the respondents had a good right of tenancy; but it would have been rash for him to proceed without warning. But after the defender said that he was not tenant, I hold his mouth shut as to the remaining objections, for they are all about the warning. No doubt there is, in a certain sense, another defence, to the effect that the pursuer has no title. It is said that Nisbet was proprietor of the subjects; but that is no allegation of property; and there is no production of any title by the defender. It appears to me, therefore, that in that state of matters the Sheriff-Substitute could do nothing else but grant decree of removing. His Lordship then adverted to the case of Waterstone *v.* Mason, June 30, 1848 (8 D. 944), which had been pleaded in argument as being counter to the judgment of the Sheriff-Substitute, and said that in that case the petitioner in the inferior Court libelled a missive of lease, and the allegation was that the defender possessed on that. The question raised on the merits was a competition of heritable rights, and the points decided were (1) that the petitioner, having taken his stand expressly on a missive of lease, he could not turn round and say that the respondent was not a tenant but a vitious possessor; and (2) that there was a competition of heritable rights in the inferior Court which the Sheriff could not decide. There was no such question here. It is a removing against a party who either was or might be supposed to be tenant, and who, when he admits that he is not tenant, admits enough to ground decree of removal. His Lordship continued—I do not think it necessary to fix any general principle beyond this, that a petition framed in the manner in which this is may competently proceed in the inferior Court, whether the defender has a good title of tenancy or not. The plea of *lis alibi pendens*, though stated in the inferior Court, not being insisted on in the note of suspension, requires no consideration.

The other Judges concurred.

Saturday, Jan. 13.

FIRST DIVISION.

RITCHIE *v.* RITCHIE'S TRUSTEES.

Reduction — Fraudulent Impetration — Essential Error. (1) Issues adjusted in a reduction of a deed alleged to have been fraudulently impetrated. (2) Issue of essential error disallowed.

Counsel for Pursuer—The Solicitor-General and Mr Thomson. Agent—Mr John Murray, S.S.C.

Counsel for Defenders—The Lord Advocate and Mr Millar. Agent—Mr Thomas Padon, S.S.C.

Patrick Grant Ritchie, only child of the late Patrick Ritchie, Buccleuch Place, Edinburgh, sued the defenders, who were the trustees nominated by his father, for reduction of a deed which he had signed in 1860, whereby he renounced and discharged all his claims as the next-of-kin of his mother, who died in 1830, and also his right to *legitim* out of his father's estate. There were also ulterior conclusions for count, reckoning, and payment. The grounds of reduction were (1) that the deed had been fraudulently impetrated from the pursuer by his father; and (2) that when he signed it the pursuer was under essential error as to its substance and effect.

The pursuer proposed two issues for the trial, which put these two grounds generally in issue. The defenders objected to the first issue, that it did not specify the nature of the fraud said to have been practised on the pursuer by his father; and to the second issue, that no case of essential error was relevantly averred on record.