trustees, within the distance of 25 feet from the centre of any turnpike road." The question is, whether that section of the Turnpike Act is or is not applicable to a street within the burgh of Galashiels.

Clauses 83 to 92 and others of the General Turnpike Act are by section 40 of the local Act adopted "so far as said clauses are applicable to the roads and streets within the burgh, and in so far as the same are not inconsistent with" the local Act. Now, there are various provisions in the incorporated clauses, and in particular in clause 91, which would be quite inapplicable to a street within burgh. But I do not think a prohibition to erect new buildings above a certain height within a certain distance of the centre of the street is in that position. There is no difficulty in its practical application if it be applicable in law. Our attention was not called to any clause in the local Act which would be inconsistent with this provision, except to those to which the Lord Ordinary has adverted, and as to these I agree with his Lordship. But the ground on which it was maintained that the clause in question is inapplicable was, that it would be inequitable to enforce it, inasmuch as it would deprive the respondent of a valuable right without adequate compensation. But that is not a consideration for this Court. It may be that powers which have been given to the Corporation for the benefit of the community may operate harshly in particular cases. But the only question we are to determine is, whether they have or have not been conferred. On this part of the case I agree with the Lord Ordinary.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court refused to ordain the respondent to set back the houses previously built, but interdicted him from erecting buildings to a greater height than 7 feet within 25 feet of the centre of the street upon the hitherto vacant space.

Counsel for the Complainers—Dickson—Dundas. Agents—Bruce & Kerr, W.S.

Counsel for the Respondent — Party. Agent—Andrew Tosh, S.S.C.

Saturday, March 17.

SECOND DIVISION.

BISHOP'S TRUSTEES *v.* BISHOP.

Succession—Legitim—Amount of Legitim Fund — Whether Fund Available for Payment of Legitim to Child of First Marriage is reduced by Marriage-Contract Provisions to Children of Second Marriage which have been Surrendered

B was twice married. He was survived by seven children, of whom five were by the first marriage and two by the second. His wife predeceased him. There was no marriage-contract on his first marriage, but when he married a second time he entered into an antenuptial contract, whereby, in order to make a provision for the children of the marriage, he bound himself to pay them on his death a just proportion and share of the means and estate that might happen to belong to him at his death along with the children of his first marriage, and any children that might be born of a future marriage, and that either among them equally or in any other proportion as he might appoint. These provisions were made in full of legitim. B left a settlement under which he directed his trustees at the first term occurring one year after his death to divide his whole estate equally among his children, declaring that the issue of deceasers should take the parent's share, and that in the event of any of them dying without having lawful issue, the share that would have fallen to them should be divided equally among the survivors. A son of the first marriage survived B, but predeceased the term of payment without leaving lawful issue, and consequently no right vested in him under the settlement. This son left a widow, whom he made his universal legatee, and she claims the legitim to which he was entitled out of his father's estate. The trustees under B's settlement maintained that before the legitim fund was struck, two-sevenths of the entire estate was to be deducted as being due to the children of the second marriage under the marriage-contract. *Held* that the marriage-contract could not be put forward in order to diminish the amount payable as legitim, in respect that the children of the second marriage would surrender their provisions under that contract in order to obtain the greater benefit which they would receive under the settlement.

Succession—Legitim—Interest.

Held that interest at the rate of 5 per cent. per annum was due upon a child's legitim from the date of the father's death, although the funds in the hands of the father's testamentary trustees had only been earning interest at the rate of about 2 per cent.

John Baillie Bishop was twice married. By his first marriage he had five children, and by his second two. There was no contract of marriage between Mr Bishop and his first wife, and none of the children of the first marriage discharged or transacted their claim for legitim.

In contemplation of his second marriage, Mr Bishop entered into an antenuptial contract of marriage with his intended wife whereby he conveyed to the marriage-contract trustees, for her behoof in liferent allenarly, and the issue of the marriage in fee, a policy of insurance upon his life amounting to £499, 19s., and his household furniture, &c.

The deed then proceeded—"And for a provision to the child or children who may be procreated of the said intended marriage, the said John Baillie Bishop hereby binds and obliges himself and his heirs, executors, and successors to content and pay to the issue of the said marriage at the first term of Whitsunday or Martinmas that shall occur after his death, a just proportion and share of the means and estate that may happen to belong to him at his death, and exclusive of the sum that may be received under the said policy of insurance, along with the children of his former marriage, and along with the children of any future marriage he may contract, and that either among them equally or in any other proportion, and either *per capita* or *per stirpes*, in such manner and under such conditions and restrictions, including a power to restrict the interest of all or any of the said children to a liferent provision, as he may appoint by a writing under his hand, which failing, among the said children equally *per capita*, which provisions shall be in full satisfaction to said children respectively of all bairns' part of gear, legitim, executry, and all other claim whatever which they or any of them can ask or demand out of the subjects and estate of their father in and through his decease, or out of the goods in communion between their parents respectively, excepting what further provisions the said John Baillie Bishop may hereafter think fit to bestow on them of his own good will and accord."

Mr Bishop died on 17th March 1892, predeceased by his wife, and leaving a holograph testamentary disposition and settlement executed by him on 23rd November 1888. By this deed, which contained no reference to the marriage-contract, he conveyed to certain trustees, whom he also named executors, all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description then owing and belonging, or which should be owing and belonging to him at the time of his death. By the third and ultimate purpose of this settlement Mr Bishop directed that his trustees should, "at the first term of Whitsunday or Martinmas occurring one year after my death, divide the residue of my means and estate between my children," naming them, and declared "that in the event of the death of any of them leaving lawful issue, such issue shall succeed to their parent's share equally among them, and in the event of any of them dying without leaving lawful issue, the share that would have fallen to them shall be divided equally among the survivors, and the lawful issue of such as shall have died leaving such issue."

The truster was survived by all his seven children, but a child of the first marriage, Thomas Bishop, died on 7th July 1892, leaving a widow but no children. By his last will and testament, dated 3rd November 1890, he left to his widow the whole means and estate which should belong to him or be subject to his disposal at the time of his death, and nominated her to be his sole executrix. Thomas Bishop having predeceased the term of division under the settlement, Whitsunday 1893, no interest therein vested in him, but his widow claimed the share of legitim which vested in him at his father's death.

Questions having arisen regarding the amount to be set apart as legitim, a special case was presented, to which the parties were (1) the trustees acting under John Baillie Bishop's holograph trust-disposition and settlement; and (2) the widow of Thomas Bishop.

The questions for the consideration of the Court were—"1. Whether or not two-sevenths of the free personal estate of the truster falls to be deducted before striking the amount of legitim due to the late Thomas Bishop. 2. Ought the rate of interest payable by the trustees in respect of legitim to be restricted to the rate actually earned, and if not, what is the rate payable.

The personal estate left by John Baillie Bishop amounted to £7849, 6s. 1d. Of this sum £1110, 10s. was invested at an average rate of interest of 3 per cent. The remaining funds were deposited by the trustees in bank, where they did not earn a greater rate of interest than 1¾ per cent.

The widow maintained that the whole moveable estate should be divided into two equal parts viz., legitim and dead's part, without deducting two-sevenths of the free personal estate as legitim due to the two children of the second marriage under the marriage-contract, and that she should have one-fifth of the legitim fund so found. Secondly, she claimed that interest upon her husband's share of the legitim should run at 5 per cent. from the date of his father's death.

The trustees maintained that the two-sevenths must first be deducted before fixing the legitim due to the children of the first marriage, and that interest upon the amount found due should be paid only at the rate actually earned.

Cases cited—*Goddard* v. *Stewart*, March 9, 1844, 6 D. 1018; *Marquis of Breadalbane's Trustees* v. *Marchioness of Chandos*, August 16, 1836, 2 S. & M'L. 377; *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H. of L.) 88; *Rait* v. *Arbuthnott*, March 18, 1892, 19 R. 687; *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048.

At advising—

Lord Rutherfurd Clark—Mr Bishop was twice married. He was survived by seven children, of whom five were by the first marriage and two by the second. His wife predeceased him.

There was no marriage-contract on his first marriage. But when he married his second wife he entered into an antenuptial contract. By that deed, and in order to make a provision for the children of the marriage, he bound himself to pay to them on his death "a just proportion and share of the means and estate that may happen to belong to him at his death along with the children of his former marriage," and any children that might be born of a future marriage, "and that either among them equally or in any other proportion as he may appoint." These provisions were made in full of legitim.

Mr Bishop left a settlement under which he directed his trustees at the first term occurring one year after his death to divide his whole estate equally among his children, declaring that the issue of deceasers should take the parent's share, and "in the event of any of them dying without leaving lawful issue, the share that would have fallen to them shall be divided equally among the survivors."

One son survived Mr Bishop, but died before the period of distribution without leaving issue. Consequently no right vested in him, and under the will the estate is divisible in equal shares among the six survivors. The son left a widow whom he made his universal legatee. She claims his legitim, to which she is no doubt entitled. But she further maintains that the legitim fund is one-half of the entire estate, and is not to be diminished by the amount payable under the contract to the children of the second marriage.

On the other hand, the trustees maintain that two-sevenths of the executry estate is to be deducted before the legitim fund is struck. They do so, on the ground that the children of the second marriage are, under the marriage-contract, creditors for that amount. The remainder of the estate would then be divisible among the children in equal shares—and with this result, that the children of the second marriage would take more than they could claim under the contract of marriage, and all the children more than they could take as legatees.

I have grave doubts whether the children of the second marriage are, under the antenuptial contract, creditors for two-sevenths of the executry. It may well be that they have no higher right than to receive as much as the others. But whatever view is taken of that question it is plain that the will of Mr Bishop satisfied all the obligations which he undertook. For the children will receive more under the will than under the contract. I assume, therefore, that they do not repudiate the will. It is their interest to accept it, and I take it for granted that they do so. But in that case they have no other claim than that the estate shall be distributed according to the will. They cannot claim two-sevenths of the executry under the marriage-contract and two-sixths of the remainder under the will. It follows that in claiming under the will they surrender the less valuable marriage-contract provisions, and these provisions being surrendered cannot form a charge against the executry estate.

Of course if the children were creditors for a debt of which they could exact payment, and at the same time claim their rights under the will, the debt must be deducted before the legitim fund is struck. But a debt which is surrendered can have no effect. It is in the same position as if it had never been due.

It is not proposed to exact payment of the two-sevenths of the executry. The marriage-contract is put forward only as a means of diminishing the amount payable as legitim, but without diminishing the amount of the dead's part. When the legitim at its reduced amount is paid, the residue will be divided in equal sixths amongst all the children, so that the shares of the legatees are increased. In my opinion this is wholly illegitimate. If there be a debt, it diminishes dead's part as well as legitim, and if it does not diminish both it diminishes neither. The children of the second marriage cannot plead the marriage-contract against the other children because they are claiming as equal legatees, and the latter cannot found on it in order to enlarge their legacies.

It seems to me that the case of the trustees would have been more plausible if they had maintained that the children of the second marriage were creditors for as much as might be given to the other children, and that they were entitled to exact their share as a debt. But even on this view they would not in my opinion be entitled to prevail. For the debt due under the marriage-contract is not defined by that deed. It is the amount due under a will. Consequently it cannot be ascertained without deducting legitim; for nothing can be due under a will until that deduction be made.

Again, the claim under the marriage-contract is for a just proportion and share with the other children. It follows, I think, that both sets of children are to have equal shares in the same fund. The marriage-contract, which gives a claim for equality cannot be used to produce inequality. In the view which I am now considering, inequality would be the necessary result, because each of the children of the second marriage would take one-sixth of the entire executry, while each of the other children would take a sixth of the remainder, after deducting from that remainder the legitim due to the second party. It might be said that this is not a just inference inasmuch as all the children would take an equal share of the remainder after the payment of legitim. But this equality is only attained by a surrender of the claims under the marriage-contract after they are used to diminish the legitim, and with the result of giving to the children more than they can claim as legatees.

In this case the testator has disposed of his whole estate by a universal settlement which embraces the legitim fund as well as the dead's part. It is, as I have said, the interest of the children of the second marriage to surrender the legitim in order to obtain the greater benefit which they take under the will. The share of each child under the will is a sixth of the estate after deduction of the legitim due to the second party, and in my opinion the marriage-contract cannot be used to obtain more, either for the children of the second marriage or for the children of the first.

Legitim is a debt due at the date of the father's decease, and it bears interest at 5 per cent. from that date till payment. I need not enter on this question. It is sufficient to refer to the case of *M'Murray*, 14 D. 1048, and especially to the interlocutor of the Court.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court found (1) that two-sevenths of the free personal estate of the truster did not fall to be deducted before striking the amount of legitim due to the late Thomas Bishop; and (2) that the rate of interest payable by the trustees in respect of the legitim found due was 5 per cent. per annum.

Counsel for the First Parties—Dundas—Sym. Agent—William C. Bishop, W.S.

Counsel for the Second Party—Rankine—C. Watt. Agents—Irvine & Gray, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

THE SCOTTISH VULCANITE COMPANY, LIMITED.

Company—Reduction of Capital—Minute—Qualification—The Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *secs.* 9 *and* 15—*Process—Errors in Petition and Minute—Intimation and Advertisement.*

By virtue of a special resolution passed at an extraordinary general meeting and confirmed at another extraordinary general meeting, a company proposed to return the shareholders capital to the extent of one-tenth part. The company thereafter presented a petition craving the Court to make an order confirming the proposed reduction of capital, and to approve of a minute to be registered in terms of section 15 of the Companies Act 1867. This minute, after enumerating the amount of the capital and the number of shares into which it was divided, proceeded, "But in respect of each of the said shares, the company is empowered to pay or return to the shareholders 20 per cent. of the amount so paid up, upon the footing that the amount so paid or returned or any part thereof may be called up again."

The reporter, to whom the petition was remitted, brought under the notice of the Court both the qualification in the minute and also the error of putting 20 per cent. instead of 10 per cent. He also pointed out an error in the prayer of the petition in a wrong reference to the section of a statute, but reported that in other respects the petition and proceedings had been regular, and that the order craved might in his opinion be granted.

The Court, in respect of these two errors, *ordered* the petition to be intimated and advertised anew, and *remitted* to the Lord Ordinary on the Bills to *grant* the prayer of the petition, after intimation and advertisement had been made.

This was a petition by the Scottish Vulcanite Company, Limited, under the Companies Acts, and particularly the Companies Act 1867, craving the Court to make an order confirming a proposed reduction of capital, and to approve of a minute to be registered in terms of section 15 of the Companies Act 1867.

The company was incorporated under the Companies Acts 1862 and 1867, having its registered office at Viewforth, Edinburgh, and carrying on business in Scotland. Its original capital was £60,000, divided into 1000 shares, of which 500 were A shares of £100, and 500 B shares of £20 each. The memorandum of association authorised the company "To increase or reduce the capital of the company to provide sinking or reserve funds . . . and to undertake and carry out such financial operations as may be incidental or useful to the general business of the company." By special resolutions passed and confirmed at extraordinary general meetings in 1884, the capital was increased to £72,000 by the addition of 600 B shares of £20 each; 60 of these shares were not taken up, and the capital was afterwards reduced to £70,800 by cancelling these 60 shares. . . . The petitioners stated—"A considerable portion of the additional capital brought in as before mentioned can now be dispensed with, and a return to the shareholders of capital to the extent of one-tenth part thereof has been considered desirable. To carry out the repayment of capital a special resolution was passed at an extraordinary general meeting of the company held on 24th January 1894, and confirmed at another extraordinary general meeting of the company held on 12th February 1894, by which it was resolved—'That in respect of each share of £100 in the company's capital upon which the sum of £100 has been fully paid up, and in respect of each share of £20 in the company's capital upon which the sum of £20 has been paid up, capital be paid off to the extent of £10 on each of the £100 shares, and £2 on each of the £20 shares, upon the footing that the amounts returned, or any part thereof, may be called up again.' . . . There are no debts due by the company, and therefore the petitioners do not propose to lodge a list of creditors in terms of section 13 of the Companies Act 1867. The company presents this application to the Court for an order confirming the special resolution above quoted, and to have the other statutory requirements for giving effect to such confirmation carried out."