It has often been said, and I think it is a rule of law, that interest is only due where there is either a contract to pay interest or a duty to invest, or in respect of *morata solutio*. The present case in my opinion falls under the second category, and the defender is only accountable for such interest or income as the money would have produced if safely invested. I should also wish to reserve my opinion as to the rate of interest chargeable where the right to legitim can be immediately determined but where the claim is allowed to lie over without fault on either side. After all, there is at present no statutory rate of legal interest; 5 per cent. was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent. in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country.

LORD ADAM—It is admitted in this case that legitim is one of that class of debts which bears interest, and the only question before us is, what is the amount of interest which should be allowed? For myself, I am of opinion that we ought to adhere to what is the customary rate of interest for a debt. I do not think that it is relevant to inquire in such a case what the party who is debtor has done or might have done with the same. I therefore differ in opinion from Lord M'Laren, and think that we ought to adhere to the customary amount of interest payable on this debt, that being 5 per cent.

LORD KINNEAR—I have come to the same conclusion as Lord M'Laren, and for substantially the same reasons. I do not dispute that legitim is a debt which bears interest, and that an executor, therefore, is not exactly in the position of a trustee holding money of the child, but is liable in the deceased's place to satisfy the child's claim for legitim. But then it does not appear to me that any question of interest can be safely or equitably decided without reference to the circumstances in which it is raised. It appears in this case that the executrix has been for 13 years in the possession of the entire personal estate of the deceased, and that she has had every reason to believe it her own, if not from the first, at least for many years. The son has nevertheless the right to make the claim now, and the executrix is bound to have funds to meet it. But the debt was not payable until the pursuer had made his election between his legal rights and his rights under the will. The executrix, therefore, was not *in mora*, and it is not suggested that in the reasonable administration, I do not say of a trust-estate, but of her own affairs, she would have earned five per cent. interest, and therefore a decision which should have the result, as Lord M'Laren has said, of compelling her to pay a sum equal to two-thirds of the entire sum claimed in addition to the amount of the claim itself, would, in my opinion, be in the highest degree inequitable. It would really be imposing a penalty upon her for an administration of the estate which she had no power to prevent. She had no power to accelerate the election, or in the meantime to earn interest at the rate of five per cent., and I see no reason why the pursuer should benefit at the expense of the executrix by reason of his own delay. It is enough that he should not be prejudiced. I think it would not be according to justice to compel her to pay in name of interest a larger sum than she might reasonably have obtained from a prudent administration of the estate.

I agree with Lord Adam that we should not in matters of this kind depart from the fixed rules of practice, but I also agree, from the examination of the cases which Lord M'Laren has made, that there is no fixed rule as to the interest due on claims of legitim to prevent us from giving effect to equitable considerations in exceptional circumstances.

The LORD PRESIDENT concurred with Lord M'Laren and Lord Kinnear.

The Court altered the interlocutor of the Lord Ordinary, and found interest due at the rate of four per cent.

Counsel for Pursuer and Respondent—W. Campbell—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for Defender and Reclaimer—Clyde. Agent—Keith R. Maitland, W.S.

Thursday, June 4.

SECOND DIVISION.

[Greenock Dean of Guild Court.

GREENOCK BOARD OF POLICE *v.* SHAW STEWART.

Burgh—Dean of Guild—Jurisdiction of Dean of Guild Court—Competition of Heritable Rights.

A petition was presented to the Dean of Guild of a burgh by the Board of Police to compel the alleged owner of a wall bounding a public street to repair the wall. The respondent, while admitting that he was the owner of the *solum* on which the wall was built, averred that the wall itself was built and maintained by the petitioners for the support of the street. He pleaded that a question of disputed ownership and heritable title having arisen, no decision would competently be pronounced by the Dean of Guild.

The Court *repelled* this plea, and *held* that the Dean of Guild had jurisdiction.

Process—Appeals from Inferior Courts—Competency—Effect of Appeals under Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 69.

By section 69 of the Court of Session Act 1868 it is enacted that appeals under the Act from inferior courts "shall be

effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal."

A respondent in a Dean of Guild petition appealed against a judgment of the Dean of Guild on the ground that he had no jurisdiction. Another respondent in the same petition, who had also pleaded "no jurisdiction" in the Dean of Guild Court, took advantage of the appeal to maintain his own plea-in-law before the Court. The Court, while finding that the first respondent had failed to show that the Dean of Guild had no jurisdiction in his case, *sustained* the plea-in-law of the second respondent, and *dismissed* the action so far as directed against him.

In November 1895 a retaining wall adjoining Cartsburn Street in Greenock, and separating that street on the west from the Cartsburn stream, gave way for want of sufficient repair. At the point where the retaining wall gave way, the level of the street was 5 feet 9 inches above the bed of the stream. The Burgh Master of Works, with a view to having it determined who was the person liable to repair the damaged wall, served notices to repair the same upon Sir Michael Robert Shaw Stewart of Greenock and Blackhall, Bart., who was the owner of the *solum* on which the street and wall stood, and whose property was bounded on the west by the *medium filum* of the Cartsburn stream, and upon the trustees of the deceased Charles Paterson, tanner in Greenock, who were the owners of a tannery on the west side of the Cartsburn stream, and whose property was bounded on the east by the *medium filum* of the stream. The master of works gave these notices, acting under section 318 of the Greenock Police Act 1877 (40 and 41 Vict. cap. 193), which enacts—"With respect to the enclosing or repairing of open and dangerous buildings and places, the following provisions shall take effect, namely—'(1) If any building, wall, structure, excavation, pond, place, open space, or other thing, is, in the opinion of the Board or the Master of Works, for want of sufficient repair, protection or enclosure, dangerous to the occupiers thereof, or of the neighbouring buildings or lands, or to the passengers along any street or footpath, or to any party using or who may use the same, or is suffered to become a resort of bad characters, or a nuisance to the locality, the Board or Master of Works may order the owner within the period in the order prescribed, to repair, protect, or enclose the same, so as to prevent any danger, nuisance, or annoyance therefrom. (2) If after service of the order on the owner, the directions of the order are not complied with within the prescribed period, the owner shall be liable to a penalty not exceeding £20, and in that case, and also if the owner is not known, and cannot after the inquiry be found, the Board may cause such work as they think proper to be done for effecting such repair, protection, or enclosure, and the expenses thereof shall be payable by the owner.'" These notices were not attended to, and a petition under the said Act against Sir Michael Robert Shaw Stewart and Paterson's trustees was presented by the Board of Police and the Master of Works to the Dean of Guild, to grant warrant to the Board of Police to repair the wall and to do whatever works might be necessary to put the same in such a state as to prevent any danger therefrom, either to the adjoining lands or to the passengers along the street, all at the expense of the respondents or such one of them as might be found by the Dean of Guild to be the owner or owners of the said retaining wall and the adjoining stream. Objections to the competency of this petition were taken by the respondents, but these were repelled, and after a judicial inspection of the premises on 12th December by the Dean of Guild and his council, an interlocutor was pronounced finding that the retaining wall had become dangerous to the neighbouring lands and to the passengers along the east side of Cartsburn Street, and in respect that the notices had not been complied with, warrant was given to the petitioners without prejudice to any of the parties, and under reservation of all questions of personal liability, to put the wall in a proper state of repair. In accordance with this warrant the damaged wall was repaired by the petitioners at a cost of £53, 13s. 9d.

The question then arose as to the person liable for the cost of repair, and the Dean of Guild appointed a record to be made up to try the point.

The petitioners pleaded—"(1) The petitioners having, in virtue of your Honour's warrant, executed the work necessary to restore the said portion of Cartsburn stream and retaining wall to a condition of safety, are now entitled to decree for the said sum of £53, 13s. 9d., being the expense of said restoration, or such other sum as the amount of said expense as may be fixed and ascertained by your Honour, against the respondents, Paterson's trustees and Sir Michael R. S. Stewart, as owners of the said portion of Cartsburn stream and the said retaining wall, jointly and severally or severally, and according to their respective liabilities, as the same may be ascertained and determined by your Honour. The petitioners are also entitled to the expenses of process."

Paterson's trustees averred that they were not the owners of the wall or of the ground upon which it was built, and pleaded—"(1) No jurisdiction."

Sir Michael Robert Shaw Stewart admitted that he was the owner of the *solum* but denied that he was owner of the wall. He averred that the wall had been built by the petitioners, and that it had been main-

tained by them as necessary for the proper support of the street. He pleaded—"(3) The Board of Police, being the owners of the retaining wall repaired by them, are bound to repair the same, and this action is unnecessary. (4) In any event the respondent, the said Sir Michael Robert Shaw Stewart, not being the owner of said retaining wall, should be assoilzied, with expenses. . . . (6) A question of disputed ownership and heritable title having arisen, no decision thereon can competently be pronounced by the Dean of Guild."

On 15th April 1896 the Dean of Guild pronounced the following interlocutor—"Before answer allows the respondent Sir Michael Robert Shaw Stewart a proof of his averments on record, that the retaining wall on the west side of Cartsburn stream, Greenock, as shown on the plan, is the property of the petitioners, the Board of Police of Greenock, and that they have erected and maintained the walls and fences along the whole course of the Cartsburn stream within the burgh, so far as these adjoin the public roads and streets, and to the petitioners conjunct probation: Reserves in the meantime all pleas of parties."

Note.—"The Dean of Guild is not prepared to decide the case until he is satisfied as to the ownership of the said retaining wall. The respondent Sir M. R. Shaw Stewart, admits that he is owner of the ground on which it is built, and has not conveyed it either to the Caledonian Railway Company, the Board of Police, or any other person. The Dean of Guild is therefore of opinion that the *onus probandi* has been shifted from the petitioners to said respondent by these admissions."

The respondent Sir Michael Robert Shaw Stewart appealed to the Court of Session, and argued—(1) Although owner of the *solum*, he was not the owner of the wall. On the pleadings a competition of heritable title arose, and in such a matter the Dean of Guild had no jurisdiction. (2) Even if section 318 applied, it gave the Board of Works power to repair the wall, but it gave them no power to bring an application in the Dean of Guild Court in order to saddle a conjectured owner with the expense. (3) If there was to be a proof, the Dean of Guild had gone wrong in the form of his order. There was no reason why the petitioners should not lead in the proof in the usual way.

Argued for the respondents Paterson's Trustees—They took advantage of Sir Michael Shaw Stewart's appeal in terms of section 69 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), which provided that appeals under the Act "shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal." There was no averment by the petitioners that they (the respondents) were the owners of either the wall or the *solum*. The Dean of Guild might have jurisdiction against the owner in terms of the statute, but in no possible view could he have jurisdiction against a person who was not owner.

Argued for petitioners—The appeal was incompetent. The Dean of Guild had jurisdiction. There was no case in which the judgment of the Dean of Guild had been set aside as incompetent because a bare averment of disputed ownership and heritable title had been stated in defence—*Smellie* v. *Thomson*, July 9, 1868, 6 Macph. 1024; *Fitman* v. *Burnett's Trustees*, July 7, 1881, 8 R. 914. See also *Maxwell* v. *Glasgow & South-Western Railway Company*, Feb. 16, 1866, 4 Macph. 447. The respondent Sir Michael Shaw Stewart admitted that he was the owner of the *solum*, and the only question in dispute was—did the wall belong to him as the boundary of the stream or to the Board of Works as put up by them, and necessary for the support of the street. This was proper subject of inquiry by the Dean of Guild. The *onus* lay on Sir Michael as owner of the *solum* to show that he was not the owner of the wall built upon it. He therefore ought to lead in the proof.

Lord Young.—There is no question that Cartsburn Street, which is situated alongside of the Cartsburn stream, is one of the old streets of Greenock, and that Sir Michael Shaw Stewart is proprietor of the *solum* of the street. In November 1895 the retaining wall at the edge of the street gave way where it abuts on the burn, and the public authority, acting for the interest of the public in maintaining a public street, sent to Paterson's trustees and to Sir Michael a notice requiring them as owners of the wall and the adjoining portion of the bed of the stream to repair the wall. They did this under clause 318 of the Greenock Police Act 1877, in the view that this was a "building, wall, or structure which was dangerous to the occupiers thereof or of the neighbouring buildings or lands, or to the passengers along the street." Neither Paterson's trustees nor Sir Michael having complied with the notice, the Board of Police presented a petition to the Dean of Guild to authorise them to repair the wall at the expense of Paterson's trustees and Sir Michael Shaw Stewart, or such one or other of them as should be found to be the owner of the wall. After inspection the Dean of Guild authorised the petitioners to repair the wall, and this was done at a cost of £53, 13s. 9d. The question now arises as to the party liable for this expense.

Sir Michael declines to pay upon the ground that he is not the proprietor of the wall which is supporting the street, and which is necessary for its support. In his averments he has raised the question whether the wall was put up by him as proprietor of the *solum* of the street to protect his own property, or whether it

was put up by the police authority, as the Solicitor-General suggested, under clause 363 of the Act of Parliament, or before the Act was passed, or by the proper local authority, in the interest of the public using the street.

Now, that raises between the parties a question of fact about which they are disagreed, viz.—Did the proprietor of the *solum* put up the wall to protect his property and to prevent the street falling into it, or is it a part of the street put up, in order to make the street a safe one, by the public authority as guardians of the interests of the public using the street?

If it should turn out that the wall was erected by Sir Michael or his predecessors in the property for their own interests, just as in the case figured by your Lordships, where walls are put up to protect cellars of houses built at the side of the street, it would, I think, *primâ facie* —though I express no decided opinion upon the matter—be his duty to put it into repair at his own expense. On the other hand, if it was part of the street put up, or reasonably to be maintained, by those who used the street, then the claim against Sir Michael would fail.

But that is a question which is dependent on inquiry, or at least upon which it is reasonable that there should be inquiry before any decision is pronounced, and the Dean of Guild has accordingly allowed a proof of Sir Michael's averments, and it is this interlocutor allowing proof which is here challenged.

Now, Sir Michael challenges the interlocutor by disputing the Dean of Guild's jurisdiction, upon the ground that the case raises a question of heritable right. Paterson's trustees, the other parties called, also dispute the jurisdiction upon the ground that as they are not alleged to have erected this wall, or to be owners of the *solum* on which it is built, they ought not to have been made parties to this action as coming within the scope of section 318 of the Act.

The Dean of Guild has repelled both pleas. As regards Paterson's trustees, I think his judgment is wrong, and that he has no jurisdiction against them. I think he has rightly repelled Sir Michael's plea to jurisdiction, because there is no question of heritable right as to the proprietorship of the street raised here at all. The question which is raised is whether what has been done for the repairing of the street ought to be paid for by the proprietor of the *solum* or by those having the charge of the street as guardians of the public interest. There being no question, then, of heritable right in the case, and the Dean of Guild having allowed proof, I think this appeal is incompetent as far as Sir Michael Shaw Stewart is concerned. We cannot interpose at this stage, and the case must remain in the Dean of Guild's Court till it is concluded.

Under the old law of advocation, which is preserved in the law of appeal, an appeal was allowed with reference to jurisdiction. An appeal is allowed wherever an advocation was formerly allowed, and it is conceded that this appeal on the matter of jurisdiction is competent just as an advocation would formerly have been. Therefore, dealing with the matter of jurisdiction, I would suggest that we should recal the interlocutor of the Dean of Guild in so far as it repels the plea of Paterson's trustees as to jurisdiction, by holding that he has no jurisdiction as against Paterson's trustees, and that we should sustain it in so far as it repels the plea against his jurisdiction by Sir Michael Shaw Stewart on the ground that it raises a question of heritable right.

The question still remains—it is a serious one, and I would suggest that the town authorities had better give it a little more attention than it has hitherto received—whether it is incumbent upon Sir Michael Shaw Stewart or upon them to do what is necessary upon his property to support the street. The case is, upon the mere statement of it, very distinguishable from that of a party having cellars at the side of a street which he uses as an access to his property. It is quite different from that. It is a case in which the public have—I assume with the consent of the proprietor —taken possession of, and have had possession of for a very long period, the banks of this stream, and the public authority have turned it into a more commodious street. The question arises — Is it not for them, and not for the proprietor of the *solum*, to do what is necessary to keep the protecting wall standing up and in good condition. That is a question which I think might be considered and settled to the avoidance of further litigation.

In the meantime I think the case must be disposed of in accordance with the views which I have expressed, the practical result of which is that we should find that the Dean has no jurisdiction against Paterson's trustees, and that as regards Sir Michael Shaw Stewart the case should be remitted back to the Dean of Guild to hear proof.

LORD TRAYNER, LORD MONCREIFF, and the LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

> "Sustain the appeal and recal the interlocutor appealed against: Sustain the first plea-in-law for the respondents, the trustees of the deceased Charles Paterson, and dismiss the action so far as directed against them: Repel the sixth plea-in-law for the respondent Sir Michael Robert Shaw Stewart, and remit the cause back to the said Dean of Guild to allow the petitioners and the respondent Sir Michael Robert Shaw Stewart a proof of their averments *habili modo*."

Counsel for Petitioners—W. Campbell—Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

Counsel for Respondent Sir Michael Robert Shaw Stewart—Sol.-Gen. Dickson, Q.C. — Dundas. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents Paterson's Trustees — Salvesen — Crole. Agents — W. B. Rainnie, S.S.C.