his trustees and executors paid up the debt due to the bank and redeemed the security.

The first question raised is whether the two bonds in question fall to be treated as part of the deceased's moveable estate in the computation of the pursuer's *jus relictæ*. The Lord Ordinary has answered this question in the negative, and I agree with him. Under each of the bonds the principal sum is repayable after a term of years, and there is an obligation for payment of interest half-yearly during that period. I think it is clear on the authorities that money so laid out on bond and bearing interest falls to be treated as heritable in a question with the widow, and excluded from computation in ascertaining the amount of her *jus relictæ*. The pursuer sought to make a point to the effect that the bonds were taken in favour of Mr Grant and "his executors or assignees" and not in favour of his heirs, executors, and assignees. I see nothing in this. The same element was present and founded on in argument in the case of *Downie*, referred to by the Lord Ordinary. The bonds in question are by statute moveable save *quoad fiscum* and *jus relictæ*. They thus pass to the executor for distribution, although the distribution is governed by a rule different from that which applies to other parts of the moveable estate.

The next question relates to the transaction with the bank regarding the bond for £4000. To the extent of £2500 this bond was assigned by Mr Grant to the bank by way of security. It was redeemed by his trustees and executors on payment by them of the amount of the debt due to the bank. The pursuer maintains that, *esto* the bond was originally heritable *quoad jus relictæ*, the effect of the security transaction with the bank was to render it moveable to all effects to the extent of the balance of the £2500 after meeting the debt to the bank. The ground advanced for this contention was that as Mr Grant had divested himself of the bond by an *ex facie* absolute assignation to the bank, there remained nothing *in bonis* of him but a money claim to the said balance. This appears to me, as it did to the Lord Ordinary, to be an untenable contention. The position at Mr Grant's death was that he was the radical owner of the bond for £4000, which he had encumbered with a security in favour of the bank. The right to the bond belonging to him and thus encumbered passed on Mr Grant's death in the same way as would have passed the unencumbered bond had no security been created over it in favour of the bank.

The next question (raised under the reclaiming note by the defenders and respondents) is whether the foresaid debt due to the bank falls to be charged against the £4000 bond on part of which it was secured, or against the moveable estate in which the pursuer is interested. The Lord Ordinary has held that it falls to be charged against the bond, and I agree with him. Had the security given for the debt to the bank been heritable, there is on the authorities no room for question that the heritage so burdened would have descended to the parties entitled to it in the succession of the deceased *cum onere*. The principle on which these authorities proceed appears to me to be equally applicable to encumbrances which have been specially imposed on moveable property of a deceased, as was held by Lord Kyllachy in the case of *Stewart*, 19 R. 310.

The next question relates to the mode in which the general debts due by the deceased—that is to say, debts which *ex lege* fall on his moveable succession in a question *inter hæredes*—have been treated in the trustees' account. The trustees have deducted the whole of these debts from the amount of the gross moveable estate as ascertained for the purpose of computing the *jus relictæ*. The pursuer's contention is that a rateable share of the debts should be borne by the bonds above mentioned. Now in a question with the pursuer these bonds fall to be treated as heritable in the same way as they would have been prior to the Act of 1661, and the *jus relictæ* falls to be computed on that footing. That being so, it appears to me that as the Lord Ordinary has held, the trustees are right in stating their account as they have done. Were the pursuer's contention to be given effect to, it would result in the amount of her *jus relictæ* being increased by the addition of a part of the two bonds which in a question with her are heritable, and therefore excluded from computation.

[*His Lordship then dealt with another question on which the case is not reported.*]

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

LORD SALVESEN and LORD GUTHRIE were absent.

The Court adhered.

Counsel for the Pursuer (Appellant)—M'Lennan, K.C.—Ingram. Agent—R. Arthur Maitland, Solicitor.

Counsel for the Defenders (Respondents)—Cooper, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S.

Tuesday, October 29.

FIRST DIVISION.

[Dean of Guild Court at Dunoon.

MASON *v.* RODGER AND OTHERS.

Burgh—Street—New Street—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 11.

The Burgh Police (Scotland) Act 1903, section 11, enacts—"Every person who intends to form or lay out any new street, or to widen, extend, or otherwise alter any street, shall present a petition for warrant to do so to the Town Council. . . . The Dean of Guild Court shall not grant warrant for the

erection of any buildings abutting on any new street until warrant for the formation of such street has been granted. . . ."

The proprietor in a burgh of a feu which was bounded on one side by a public passage or esplanade, proposed to erect on his feu certain buildings and applied for a warrant. The Dean of Guild Court sisted procedure to enable the petitioner to apply to the Town Council for warrant to form a new street in terms of the above section.

The Court *recalled* the sist, *holding* that as the esplanade or street was not on the pursuer's ground the section did not apply.

[The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 11, is quoted in the *rubric*.]

Walter Mason, the proprietor of a certain feu in Dunoon, presented a petition to the Dean of Guild Court for warrant to erect certain buildings thereon. The petitioner's feu was described in his titles as bounded on the east by Jane Street, and on the south by "the walk or road called Baugie Place leading along the shore." This walk or road was sometimes called West Bay Esplanade.

Objections were lodged for William Rodger, Master of Works for the burgh of Dunoon, and for Robert Paterson, C.A., Glasgow, a neighbouring proprietor, and others.

On 11th April 1911 the Dean of Guild Court pronounced this interlocutor—". . . Find (the Chairman dissenting from the third finding in fact)—(1) That the general question of the loss of amenity is not one which the Dean of Guild Court can take cognisance of; (2) that the petitioner's property is, according to his title, bounded on the east by Jane Street, and on the south by the walk or road called Baugie Place; (3) that Jane Street is a public street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903, and that it extends from Hillfoot Street to the public thoroughfare or passage along the West Bay; (4) that the building proposed to be erected by the petitioner in Jane Street has not immediately adjoining it on the further side of the building from that fronting the said street on which it abuts an open space for light and ventilation equal in breadth at the narrowest part to the height of the building; (5) that the public passage, footpath, or esplanade which runs along the foreshore of the West Bay, and now forms the southern boundary of the petitioner's feu, is not a street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903; (6) that the buildings proposed to be erected by the petitioner along the said south boundary of his property will convert the said existing public passage into a new street; (7) that the Dean of Guild Court cannot grant warrant for the erection of any buildings abutting on a new street until warrant for the formation of such street has been granted by the Town Council: Therefore sustain the first plea-in-law for the respondent the Master of Works: Sist procedure in the cause to enable the petitioner to present the necessary petition to the Town Council for warrant to form a new street along the southern boundary of his feu, in terms of section 11 of the Burgh Police (Scotland) Act 1903. . . ."

The petitioner appealed, and argued—The petition should not have been sisted, and the sist should be recalled. Section 11 of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) did not apply. There was no intention to lay out a new street. The path or esplanade or street (whatever it was) existed already, and was not on the petitioner's ground, and building operations on petitioner's ground could not make the esplanade into a new street- *Mair* v. *Police Commissioners of Dumbarton*, December 14, 1897, 25 R. 298, 35 S.L.R. 239; *Glasgow and South-Western Railway Company* v. *Hutchison*, 1908 S.C. 587, 45 S.L.R. 444.

Argued for the respondents—The Dean of Guild Court were right in sisting the petition. Section 11 of the Act applied. The proposed buildings would make the esplanade into "a new street" within the meaning of that section. Even if the esplanade were already a street within the definition of the statute, that did not preclude it from being transformed into "a new street" within the meaning of the section, and the new street so formed would include the buildings erected as well as the roadway—*Robinson* v. *Local Board of Barton-Eccles*, 1882, 21 Ch. D. 621, 1883, 8 App. Cas. 798, Lord Selborne at p. 801. The question of the formation of a new street was a question of fact and circumstance—*Mair* v. *Police Commissioners of Dumbarton* (*cit. sup.*), *per* the Lord Justice-Clerk at p. 302, and the facts and circumstances here differed widely from *Mair*, where warrant was sought for a mere college.

LORD PRESIDENT—This is an appeal from the Dean of Guild Court of Dunoon, and the question arises upon a petition for a lining, the applicant desiring to put up on the frontage to the West Bay some buildings which are certainly of a very different character from those which have been built there hitherto. The buildings proposed to be erected would form the corner at the junction of a road or passage fronting the sea, known sometimes as West Bay Esplanade, and sometimes, apparently, by the name of Baugie Place, with the street called Jane Street, which comes from inland right down to the sea. I know it is a matter of controversy whether the street where it actually comes to the sea and joins this Baugie Place is Jane Street or a continuation of Jane Street. At any rate the street comes down to the sea in a straight line at that point.

The Dean of Guild's judgment is contained in certain findings. He first of all finds that the loss of amenity is not a matter of which he can take cognisance. Then he describes the *locus*, and he finds

that Jane Street is a public street within the meaning of the Burgh Police (Scotland) Acts, and that it extends from Hillfoot Street to the public thoroughfare or passage along the West Bay. Then he finds that the building proposed to be erected by the petitioner has not an open space for light and ventilation equal in breadth at the narrowest part to the height of the building; and then that the public passage, footpath, or esplanade which runs along the foreshore of the West Bay and now forms the southern boundary of the petitioner's feu is not a street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903. And then the interlocutor proceeds—"(6) That the buildings proposed to be erected by the petitioner along the said south boundary of his property will convert the said existing public passage into a new street; and (7) That the Dean of Guild Court cannot grant warrant for the erection of any buildings abutting on a new street until warrant for the formation of such street has been granted by the Town Council: Therefore sists procedure in the cause to enable the petitioner to present the necessary petition to the Town Council for warrant to form a new street. . . ."

Now the argument before your Lordships turned upon this last matter. There was really no argument upon the question of Jane Street, because the question of distance from the middle of the street to the buildings can be put right by modification of the plans, and is really not before us.

The theory of the Dean of Guild's judgment is really based entirely upon the provisions of the 11th section of the Burgh Police (Scotland) Act 1903. This Court has already considered that section very carefully and given judgment upon it in the case of the *Glasgow and South-Western Railway Company* v. *Hutchison* (1908 S.C. 587). I need scarcely say that I adhere to the opinion that I there formed; and I am afraid that if that opinion is carefully looked at it is really destructive of the Dean of Guild's view here. I have reconsidered the matter and see no reason to doubt the soundness of my opinion. In other words, section 11, when it speaks of "every person who intends to form or lay out any new street," is speaking of the physical act of laying out or forming a street; and it follows from that that it can only refer to an operation upon a man's own ground. Accordingly, as soon as one finds—as one finds here—that the petitioner's ground is bounded by the street, and that therefore the street is not in the petitioner's ground, it is quite impossible to hold that he is forming or laying out a new street.

In so holding I am not, I think, running counter to the English cases that were cited; and in particular, if I may say so with respect, I entirely agree with the remarks of both the Master of the Rolls (Sir George Jessel) and also Lord Justice Brett in *Robinson's* case (21 Ch. Div. 621) which was quoted. It is always to be kept in view that the word "street" has two significations. It may mean a street by definition, or a street in the ordinary popular sense. You must go to the particular Act of Parliament concerned. The definition of a street in the set of statutes known as the Burgh Police Acts in Scotland might not be, and probably is not, the same definition of street as in the Local Government Acts in England with which the learned judges were dealing. But you may have a street by definition which is not a street in the ordinary sense of the word at all; and by practical operations a place that is a street by definition may become a street in the popular sense of the word. When precisely it becomes a street — whether it becomes a street by the erection of three or four houses, or whether it can so become by the erection of one house—is really a practical matter associated with the old puzzle known as the Sorites; and nobody can lay down a general rule as to when a street by definition becomes a street in the popular sense of the word; each case would have to be judged on its own merits. But the English judges were really dealing with that kind of case. They were dealing with a power in a local authority to make certain regulations as regards streets; and they held in those cases that "street" meant street in the popular sense of the word, and they held in the case before them that the time had come at which what had been merely a street by definition should be held to be also a street in the popular sense.

That reasoning would, I think, apply to any provisions of our set of statutes which give certain powers as regards streets, but it obviously does not apply to the expression "Every person who intends to form or lay out any new street." I do not think, with the utmost straining of language, you can truly describe a man as forming a street who simply proposes to build a house upon his own ground, although there is contiguous to it something that may be a street by definition. The opposite view, as we pointed out in the *Glasgow and South-Western Railway Company* v. *Magistrates of Ayr* (1909 S.C. 41), would really lead to most inconvenient and unjust consequences, because then you would be entitled to build up to the boundary of your own ground and proceed to form a street on somebody else's ground.

Now that being so, I am afraid the Dean of Guild's judgment sisting the cause in order that this gentleman may present a petition to the Town Council cannot stand, because I do not think he is in a position to present a petition. He has no ground upon which he can form a street, and it is not necessary for him to form it. Nor does he come under the following words of the clause of proposing to widen, extend, or alter a street, upon the hypothesis that Baugie Place is a street already.

I think myself it is inadvisable at this time to pronounce on the question what is the precise position of Baugie Place. I do so for this reason—it may be a mere public passage, without being a street, of the class that we had to deal with in this

Division, not long ago, in a case from Saltcoats (*Taylor* v. *Magistrates of Saltcoats*, 1912 S.C. 880). On the other hand, it may be that it is within the definition of private street, in which case the council, if these buildings are to be erected, might be in a position to call upon the owner to put the private street bounding his ground in a proper state. I do not want to take away from the council the power of considering that matter. Therefore I would propose that we should recal the fifth, sixth, and seventh findings, not thereby meaning that the fifth finding is necessarily wrong, but merely giving the Dean of Guild Court an opportunity to consider the matter now that the fifth finding cannot really form the basis upon which the sixth is rested. With that I think the case must go back to the Dean of Guild Court.

LORD KINNEAR — I agree with your Lordship.

LORD JOHNSTON — I have come to the same conclusion as your Lordship, but upon somewhat different and probably narrower grounds. The appellant in this case is the proprietor of a long and narrow strip of ground in Dunoon, bounded on the north by a main street called Clyde Street, on the east by a side street leading down to the shore called Jane Street, and on the south by what is termed the Esplanade, lying between his boundary wall and the shore. He holds in feu of the estate of Milton, and his west boundary is another feu, similar to his own, on the Milton estate. The feuar to the east, and therefore on the opposite side of Jane Street, also holds of Milton. In the original charters of these three feus, executed between 1824 and 1829, the south boundary of the eastmost of the feus is described in 1824 as a public road to be made along the seashore of Baugie Bay, and in 1829 the south boundary of the appellant's and of the westmost feu is described as the walk or road called Baugie Place. It is obvious, therefore, that Baugie Place, now called the Esplanade, lies outside the appellant's south or seaward boundary.

At present there stands on the appellant's feu a villa residence at the end next Clyde Street, having its main entrance from that street, and the ground between this house and the Esplanade is in garden, with, I think, a door opening on to the Esplanade.

The appellant having these three open frontages proposes to utilise his ground by pulling down the villa and building a long stretch of tenement buildings with a front to each of the three open spaces, making thus three sides of a rectangular oblong. In the present case we are only concerned with the frontage to Jane Street and the frontage to the Esplanade.

The municipal authorities in Dunoon are not unnaturally concerned about the interference with the amenity of the town's sea frontage which the appellant's proposals would cause, and when his application for approval of his plans came before the Dean of Guild Court there was opposition. The Dean of Guild Court rightly held that they had no concern with the question of amenity—their functions being statutory only. When the case came before the Court the appellant's proposal was at his own hand to widen both Jane Street and the Esplanade by throwing a portion of his ground into these accesses. But when he found that he could not do this without the authority of the Town Council, under the Burgh Police Act 1903, section 11, he asked leave to amend his plans and application so as to show no widening or alteration of either Jane Street or the Esplanade, and this leave was granted.

Two points arose before the Dean of Guild Court. The first depended shortly upon whether there was sufficient width in the appellant's ground to admit of his proposed buildings facing Jane Street being erected without a breach of the statutory provisions with regard to free space behind. This matter is left by the Dean of Guild Court in such a position that it is not properly before this Court. We are only concerned with the question raised regarding the Esplanade and the buildings proposed to be erected *ex adverso* of that frontage. The Dean of Guild Court have come to the conclusion (1) that the public passage, footpath, or esplanade along the foreshore of the West Bay, and which forms the southern boundary of the appellant's feu, "is not a street within the meaning of the Burgh Police (Scotland) Acts 1892-1903"; (2) that the erection of the buildings proposed on this frontage "will convert the said existing public passage into a new street"; (3) that the Dean of Guild Court cannot grant warrant for the erection of buildings abutting on a new street until warrant for the formation of the street has been granted by the Town Council, and they therefore sisted procedure to enable the appellant to present the necessary petition for warrant to form his new street in terms of section 11 of the Burgh Police Act 1903. It is these conclusions of the Dean of Guild Court which we are called upon to review.

It is pretty clear that the appellant is seeking to force the hand of the Town Council into the opening of the Esplanade as an ordinary means of access to his proposed buildings, and that the municipal authorities would like to checkmate him in some way or another. Whether their effort is justified in the public interest or not we are not concerned with considering. The question before us is whether the Dean of Guild Court has rightly understood the situation, and is justified by anything in the statutes in the conclusion at which they have arrived.

It may be unnecessary for the purpose of this case to determine finally what are the rights of parties in the Esplanade. But a joint minute of admissions has been lodged, and a consideration of this and of the statements on record lead, I think, without doubt to the conclusion that the Esplanade was nothing but a passage for foot-passengers—in other words a footpath—and, as I have already said, that it was no part of the appellant's property. The appellant may

or may not be entitled to build *ex adverso* of it in its present condition. But his proposing to do so will not make it a new street in the sense of the statute. If he proposes to widen, extend, or otherwise alter it under section 11, he may apply to the Town Council, and then will be decided whether he can compel the turning of an existing foot-passage into an ordinary street for vehicular traffic for his benefit, and if so on what conditions. But he is not proposing to do anything to the Esplanade except to utilise it as an access to his houses. If he attempts to use it without widening or alteration as anything but an access for foot-passengers, the municipal authorities, under whose control the passage now is, will no doubt take steps to prevent him, unless he can establish a right, which does not at present appear on the papers, so to do.

But the Dean of Guild Court appears to me to have approached the matter from a wrong point of view. The question before them is whether a lining should be granted for the erection of certain buildings with a frontage to, and whose only access will be from, a footpath. There may be other objections to the proposed buildings, but the power of the Dean of Guild Court is statutory, and I do not find anything in the statute which justifies the Dean of Guild in refusing sanction to the erection of a building simply because the access to it is from a footpath, or in compelling a new street in the proper sense to be made by the intending builder on his own ground.

To arrive at a complete understanding of what is a public street and what a private street in the sense of the statute is no easy task, and it is rendered none the easier by the new definition in the Act of 1903, section 103. But I think that we are relieved from considering whether the Esplanade is a street, and what kind of a street, by section 128 of the Act of 1892 as amended by section 104 (2) (*c*) of the Act of 1903. The Esplanade is certainly a public footpath. The Town Council, by that section as so amended, have "the sole charge and control" of it, and it is thereby vested in them accordingly.

Now the Town Council's authority in the matter of new buildings is derived from the Act of 1892, section 166. It requires the applicant for a lining to accompany his petition with a plan of the site, showing "the immediately conterminous properties, and also the position and width of any street, court, or footpath from which the property has access or upon which it abuts." This clearly recognises that a new building may have its access from a footpath as well as from a street or court. If that be so, and there is no express enactment—and I can find none—empowering the Town Council to enforce the substitution for the footpath of a street in the statutory sense as an access to the buildings as a condition of granting a lining, then it follows that the appellant may erect his buildings, if otherwise unobjectionable, with no access other than the footpath or Esplanade upon which his property abuts.

It follows that the judgment of the Dean of Guild Court falls to be recalled, though I doubt whether its recal will much advantage the appellant.

LORD MACKENZIE—I concur with your Lordship in the Chair.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Dean of Guild Court dated 11th April 1911: Of new find in fact in terms of findings (1) to (4) inclusive therein, and remit to the Dean of Guild Court for further procedure. . . ."

Counsel for the Petitioner—Christie—A. A. Fraser. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent, the Master of Works—M'Lennan, K.C. — Mercer. Agents—Alex. Campbell & Son, S.S.C.

Counsel for the Respondent, Paterson—D. P. Fleming. Agents—Alex. Campbell & Son, S.S.C.

Wednesday, November 6.

SECOND DIVISION.

[Lord Dewar, Ordinary.

AIKEN *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Slander—Master and Servant—Relevancy—Malice—Slander by Servant Uttered to Gratify Personal Spite and not for Benefit of Master — Scope of Employment—Sufficiency of Averments to Impute Malice of Servant to Master.

In an action of damages for slander brought by a barmaid against a railway company as the owners of a bar at a railway station, the pursuer averred that she was in the defenders' employment as a barmaid at the bar; that the bar manager, whose duty it was to engage and dismiss the barmaids, dismissed her and made slanderous statements as to the cause of her dismissal, imputing dishonesty to her; that the bar manager had conceived an ill-will towards her, and made the statements "in order to gratify the ill-will which . . . he had conceived towards the pursuer." The pursuer admitted that the occasion was privileged, and the defenders pleaded that the action was irrelevant.

The Court *dismissed* the action, *holding* that the pursuer had not sufficiently averred malice which could be imputed to the defenders, inasmuch as the pursuer's averments disclosed that the manager did not make the statements complained of with the intention of benefiting the defenders, but in order to gratify his personal spite, and therefore the uttering of the slander was not within the scope of his employment.