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.

Citizens Life Assurance Company v. *Brown*, [1904], A.C. 423, and *Finburgh* v. *Moss's Empires, Limited*, 1908 S.C. 928, 45 S.L.R. 792, *distinguished*.

Observed (*per* Lord Dundas) that a master was answerable for a wrong committed by a servant in the course of his employment if the servant intended the commission of the wrong for the master's benefit although the master realised no actual benefit.

On 3rd April 1912 Annie Aiken, Edinburgh, *pursuer*, brought an action of damages for slander for £500 against the Caledonian Railway Company, having its head office in Glasgow, *defenders*, as the owners of the refreshment bars in Princes Street Station, Edinburgh.

The pursuer averred that she was employed as a barmaid at the second class bar in Princes Street Station, and that the bars were managed by a Mr Brown, who "is empowered by the defenders, and it is part of his duties for them, to engage and dismiss, as well as to control, the persons employed for the defenders at the said Station Bars." Miss X, another barmaid employed at the bar, conceived an ill-will to the pursuer and poisoned Mr Brown's mind against her. "(Cond. 7) . . . The pursuer, although her relations with Miss X remained strained, began to think that Mr Brown felt more favourably disposed to her (the pursuer) than he had done. On or about the 23rd day of December 1911, in one of the corridors of the Caledonian Hotel, he attempted to take liberties with the pursuer and put his arms round her neck and tried to kiss her. This she resented and prevented, with the result that Mr Brown became very angry and ever after manifested an ill-feeling towards her. . . . (Cond. 8) On or about Saturday, the 3rd February 1912, Miss X informed Mr Brown that she suspected the pursuer of selling a flask of whisky and keeping the price, at the same time omitting to record the sale on her register. Mr Brown immediately sent for the pursuer and said to her—'You have not been ringing up your sales.' He thereby represented and intended to represent that the pursuer had received money from customers in payment for goods, and had not handed over the said money to the defenders, but had stolen the same. The said charge of theft was false, and was made by Mr Brown recklessly and maliciously and without making any previous inquiry whatever. Mr Brown knew Miss X's ill-will towards pursuer, and that no reliance whatever was to be placed on her alleged suspicions. The pursuer denied the said charge. She had, however, been made aware previously that Miss X was maliciously expressing unfounded suspicions concerning her, and went on to explain to Mr Brown the circumstances which Miss X had maliciously expressed as being suspicious. He, however, refused to listen to any explanations or to make any inquiry. He said to the pursuer—'This sort of thing has been going on too long,' meaning thereby that the pursuer had been engaged in a course of theft from the defenders. He then went on to say—'You made a sale for 1s. 10d., rang up the 10d. and put the 1s. in your own pocket.' He further said—'You sold eight bottles of whisky for £2, when the proper charge was £2, 4s.' He further accused her of misconduct in connection with credit given by her in the previous July. The pursuer denied all the accusations made against her, which were in fact untrue, and called on Mr Brown to make proper inquiry and investigation. He, however, refused to do so, but suspended the pursuer at once from her duties, telling her to come back to him on the following Monday morning. . . . (Cond. 9) On the following Monday the pursuer again called on Mr Brown at his office as instructed. Mr Brown then and there dismissed her from the service of the defenders, and said to her as his reason for the dismissal—'You have misappropriated the funds of the company.' The pursuer protested that this was untrue, but he would not listen to her. He went on to say that the pursuer was not entitled to receive any wages on account of the reason of her dismissal, but offered to pay her what he termed her lying money (consisting of two days' wages), which the pursuer refused to accept. On the same day, and in his office at the Caledonian Railway Station, Mr Brown said to pursuer's mother Mrs Aiken that the pursuer was 'dishonest, and had misappropriated the money of the company,' or used words of the like import and effect. Both Mrs Aiken and the pursuer requested that full inquiry and investigation should be made, and in particular that Miss X should be made a party to the interview. Mr Brown, however, refused to call in Miss X or conduct any inquiry, but repeated his charges against the pursuer, and said in presence and hearing of the pursuer's mother that the pursuer was being dismissed 'for dishonesty.' . . . (Cond. 11) On 24th February 1912 the pursuer wrote to the secretary of the defenders' company complaining of the circumstances in which she had been dismissed. He replied by letter of 5th March 1912, stating that inquiry had been made into the circumstances of her dismissal, and adding 'there does not seem to be any reason for interfering with the discretion of the hotel manager in the matter.' Thereafter the pursuer's agent wrote a letter direct to Mr Brown, and on 16th March he received a reply from the solicitor for the defenders, in which it was for the first time stated 'Miss Aiken's services were dispensed with because they were no longer required by the company.' The defenders' solicitor by the same letter offered payment of the sum of 18s. 6d. as a fortnight's wages in lieu of notice. . . . (Cond. 12) The pursuer has suffered very deeply in her feelings and in her reputation through the foresaid slanderous imputations of dishonesty made against her by Mr Brown. The said slanderous statements were made by Mr Brown maliciously in order to gratify the ill-will which, in common with and as an intimate friend

of Miss X, he had conceived towards the pursuer. Moreover, the said slanderous statements were made and persisted in by Mr Brown most maliciously and recklessly without any inquiry as to their truth or falsehood, although inquiry was sought and pressed for both by the pursuer and by her mother, and would have at once revealed that there was no ground whatever for the said charge. Further, the said slanderous statements were made by Mr Brown in the course of his duties for the defenders and ostensibly in their interests, as setting forth a reason for which alone he was entitled, in the exercise of his functions for the defenders, to discharge the pursuer, as he did discharge her, without notice and without adequate wages in lieu of notice. Further, the defenders through their secretary have homologated and adopted Mr Brown's actings in dismissing the pursuer and the slanderous statements of his reason for so doing as above narrated. The said Mr Brown, though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge, and himself afterwards gave information to the secretary of the defenders' company upon which, as above narrated, he admitted in writing that the pursuer was not dismissed for dishonesty. The pursuer will be greatly prejudiced in obtaining further employment if she does not vindicate her character. . . ."

The defenders pleaded — "(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should therefore be dismissed."

On 21st June 1912 the Lord Ordinary (DEWAR) allowed an issue.

The defenders reclaimed, and argued— Admittedly the pursuer relevantly averred that she had been slandered by Brown, who was a servant of the defenders, but the occasion was privileged, and it was therefore necessary for the pursuer to show malice which could be imputed to the defenders. The pursuer averred malice on the part of Brown, but that was not enough. In order to impute Brown's malice to the defenders, the pursuer must show that Brown uttered the slander while acting in the course of his employment, and solely in the interest and for the benefit of the defenders. This the pursuer did not aver. On the contrary, the pursuer averred that Brown uttered the slander in order to gratify his own private ill-will towards the pursuers, which was an abuse of authority and outwith the scope of his employment — *Riddell* v. *Glasgow Corporation*, 1910 S.C. 693, *per* Lord Ordinary (Salvesen) at p. 696, 47 S.L.R. 630, at p. 632. The following authorities were also referred to—*Limpus* v. *London General Omnibus Company*, 1862, 1 H. & C. 526, *per* Wightman, J., at p. 536; *Barwick* v. *English Joint Stock Bank*, 1867, L.R., 2 Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick*, 1874, L.R., 5 P.C. 394, *per* Sir Montague Smith at p. 411; *Citizens Life Assurance Company* v. *Brown*, [1904] A.C. 423; *Lloyd* v. *Grace, Smith, & Company*, [1911] 2 K.B. 489, *per* Farwell, L.J., at p. 507, *rvd.* 1912, 28 T.L.R. 547; *Eprile* v. *Caledonian Railway Company*, July 2, 1898, 6 S.L.T. 65; *Cameron* v. *Yeats*, January 27, 1899, 1 F. 456, 36 S.L.R. 350; *Ellis* v. *National Free Labour Association*, May 12, 1905, 7 F. 629, 42 S.L.R. 495; *Agnew* v. *British Legal Life Assurance Company, Limited*, January 24, 1906, 8 F. 422, 43 S.L.R. 284; *Mackenzie* v. *Cluny Hill Hydropathic Company, Limited*, 1908 S.C. 200, 45 S.L.R. 139; *Finburgh* v. *Moss's Empires, Limited*, 1908 S.C. 928, *per* Lord Ardwall at p. 938, 45 S.L.R. 792, at p. 798; *Beaton* v. *Corporation of Glasgow*, 1908 S.C. 1010, 45 S.L.R. 780; *Dinnie* v. *Hengler*, 1910 S.C. 4, 47 S.L.R. 1; *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35, 48 S.L.R. 399; *M'Adam* v. *City and Suburban Dairies, Limited*, 1911 S.C. 430, 48 S.L.R. 318.

Argued for the respondent—Admittedly the occasion was privileged, but the pursuer sufficiently averred malice which could be imputed to the defenders. If a servant in the course of his employment uttered a slander recklessly, that was proof of malice which could be imputed to his master, because the master had put the servant in a position which enabled him to commit the wrong—*Finburgh* v. *Moss's Empires, Limited* (*cit. sup.*). *A fortiori* the defenders in the present case were liable for the slander, since, as the pursuer averred, their servant Brown uttered the slander in the knowlege that the statements were untrue—*Citizens Life Assurance Company* v. *Brown* (*cit. sup.*). Even if a crime were committed by a servant in the course of his employment, his master might be liable for the civil consequences — *Dyer and Wife* v. *Munday and Another*, [1895] 1 Q.B. 742. Every unjustifiable intention or wrong feeling was malice — *Stuart* v. *Bell*, [1891] 2 Q.B. 341, *per* Lindley, L.J.. at p. 351—and the Court would not inquire into the motives of the slanderer and would presume that a slander by a servant was uttered for the benefit of his master if it was uttered within the scope of his employment — *Lloyd* v. *Grace, Smith, & Co.*, (*cit. sup.*), *per* Farwell, L.J., at p. 508. In the case of *Riddell* v. *Glasgow Corporation* (*cit. sup.*) the action was held to be irrelevant, but that was on the ground that the servant who uttered the slander acted outwith the scope of his authority, and in the present case the only question for the Court was the question whether or not it could reasonably be said that Brown acted within the scope of his employment. The pursuer's averments showed that Brown so acted—*Mackenzie* v. *Cluny Hill Hydropathic Company, Limited* (*cit. sup.*).

At advising—

LORD DUNDAS—The Lord Ordinary has approved of issues for the trial of this case by jury. I am sorry that in doing so he did not see fit to give us the benefit of his reasons for holding the action to be relevant, as I have reached an opposite con-

clusion from his Lordship on that matter. The case raises an interesting and rather important question as to the vicarious liability of an incorporated company in damages for a slander uttered by one of their servants. The defenders are the Caledonian Railway Company. The pursuer entered their service about the end of July 1911 as a barmaid at the second class bar in Princes Street Station. She was engaged by, or at least with the authority and approval of, Mr James Brown, who admittedly was manager of the defenders' hotel and bars at that station, and was authorised to engage, control, and dismiss the employees at these bars. On 5th February 1912 Brown dismissed the pursuer from the defenders' service, stating as the reason that she had misappropriated the funds of the company. The pursuer brings this action against the company for slander. The slanders are alleged to have been uttered by Mr Brown on three occasions—on 3rd and 5th February 1912 in presence of the pursuer, and, on the last occasion, of her mother also, and were to the effect that she had stolen money from the defenders and misappropriated their funds. The pursuer admits that the occasions were privileged, and that if issues are to be allowed malice must be put in them. It is important to emphasise at the outset that the action is one of slander pure and simple. It may well be that if the pursuer's averments are true the company might be made liable to her by an appropriate action in the pecuniary consequences of the termination by Brown of her contract of service without notice. But that is another matter. The question here raised is whether the company is to be held liable, upon the averments presented, in damages for Brown's alleged slander. In order to solve that question one must consider whether the pursuer has relevantly averred malice. Her averments are specific and very peculiar. She says that a special friendship and intimacy existed between Miss X, the head barmaid in the second class bar, and Mr Brown; that Miss X conceived a dislike and ill-will towards her, and carried tales about her to Brown, whose mind was thereby poisoned against her, so that he conceived a dislike and ill-will towards her. She states that on an occasion in December 1911 Brown attempted to take liberties with her, and that, on her resenting this, he became very angry and ever after manifested an ill-feeling towards her. The pursuer goes on to aver that the "slanderous statements were made by Mr Brown in order to gratify the ill-will which, in common with and as an intimate friend of Miss X, he had conceived towards the pursuer," that the "statements were made by Mr Brown in the course of his duties for the defenders and ostensibly in their interests," and that Brown, "though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge." These averments would clearly be relevant to support an action of slander against Mr Brown. The slanderous statements are said to have been to his knowledge false, and made with the sole object of gratifying his private spite and ill-will towards the pursuer. But it is, to my mind, almost equally clear that the averments do not import a case of malice as against the defenders. They exclude the idea of mere recklessness on the part of Brown, or of a mistaken overzeal in furthering his employers' interests. Brown's alleged malice was calculated and deliberate, to further his own private end. There is no room for dubiety in the pursuer's averments. I think the case ought not to be sent to trial. There is no precedent for such a course, and there are many precedents against it. In my opinion the defenders cannot be held liable for a slander uttered by their servant upon a privileged occasion when, upon the pursuer's own showing, the malice she is at pains to allege was of a purely personal and private character quite unconnected with the affairs and purposes of the company.

There is, I think, now no doubt that an employer, whether an individual or a corporate company, may be liable in damages for slander uttered by a servant—just as he may be in the case of any other wrong done—if the slander was uttered, or the wrong done, in the course and within the scope of the servant's employment and in the interest of the employer. This doctrine is supported and illustrated by a number of decisions, Scots and English, to some of which I shall refer. It has been held to apply even when the servant's act amounted to a crime, *e.g.*, assault (*Dyer* v. *Munday*, 1895, 1 Q.B. 742). But in order to such liability it must be clear upon the facts, or in a question of relevancy it must be at least consistent with the pursuer's averments, that the wrong was done subject to the limitations above indicated. The matter is well illustrated by the case of *Limpus* v. *London General Omnibus Company* (1862, 1 H. & C. 526). The driver of an omnibus belonging to the defendants drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. The defendants had instructed their drivers not to obstruct any omnibus. The report bears that at the trial Martin B. directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service; that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiffs' driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and in doing that which he believed to be for the interest of the defendants, then they were responsible; that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the true character of the

act of the defendants' servant was that it was an act of his own, and in order to affect a purpose of his own, the defendants were not responsible. A Court of six judges in the Exchequer Chamber held, with one dissentient voice, that the direction was right. Crompton, J., observed that the criterion is whether the act was done "in the course of the service and for his master's purposes." The general rule of the matter has never, I suppose, been better expressed than it was by Willes, J., in the well-known case of *Barwick* v. *English Joint Stock Bank* (1867), 2 Ex. 259. "The general rule," said his Lordship, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The rule thus expressed has since been repeatedly approved and adopted in the House of Lords, the Privy Council, and the Courts both in England and Scotland, *e.g.*, *Mackay* (1874, L.R., 5 P.C. 394, 411); *Houldsworth* (1880, 5 A.C. 317, 326); *British Mutual Banking Company* (1887, 18 Q.B.D. 714); *Brown* ([1904] A.C. 423); *Ruben* ([1906] A.C. 439); *Ellis* (1905, 7 F. 629, 42 S.L.R. 495); *Finburgh* (1908 S.C. 928, 45 S.L.R. 792). In *Ruben's* case Lord Davey said that "every part of the legal proposition stated by Willes, J. . . . is of the essence of it." I do not think that proposition has ever been successfully impugned or materially qualified. We were referred by the pursuer's counsel to some observations by the Lord Chancellor (Loreburn) in the recent case—*Lloyd* v. *Grace Smith & Company* (19th July 1912, only as yet reported in 28 T.L.R. 547), which counsel represented as negativing, or at least qualifying, the effect of the words of Willes, J., "and for the master's benefit." It appears to me that Lord Loreburn in what he said was only guarding against an interpretation of Willes, J.'s, language as meaning that an employer will be entitled to escape liability for his servant's fraud if he can show that he in fact derived no actual benefit from it, and pointing out that the employer, though wholly ignorant of the fraud and in no way benefited by it, may under given circumstances be liable for its consequences if he has held out the fraudulent servant to the defrauded plaintiff as authorised by him to transact the business in the course of which the fraud was perpetrated. *Barwick's* case was one of fraud. But Willes, J., broadly stated that "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Accordingly in *Citizens Life Assurance Company* v. *Brown*, [1904] A.C. 423, the "general rule" was expressly applied to a case of libel. The decision, setting at rest some previous uncertainty upon the point, finally established that "a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment." It is important for present purposes to note that the libel circulated by Fitzpatrick, a servant of the appellants, about the plaintiff, who had left their service and entered that of a rival life assurance company, was plainly written in the interest of the appellants and for their benefit, for it was "in order to counteract the mischief which Brown was doing to the business of the company." In the Scots case of *Ellis* (*cit. sup.*), where the "master" was a voluntary association, it was held (expressly following the rule in *Barwick*) that "a master is liable for a slander uttered by his servant while acting within the scope of his employment, although without special instructions." There was a dispute between the parties upon their pleadings whether the letter complained of was one falling truly within the scope of the secretary's employment, or, as the defenders alleged, a private letter of his own of which they had no knowledge and for which they were not responsible. An issue was accordingly adjusted in terms designed to leave open at the trial the respective contentions of parties upon that vital point. The case in this respect seems to me to afford a marked and useful contrast to the pleadings before us. *Agnew* v. *British Legal Life Assurance Company, Limited*, 1906, 8 F. 423, 43 S.L.R. 284, was an action of damages against a company for a verbal slander uttered by one of their servants. The case was thrown out as irrelevant, on the ground that the statements complained of were not slanderous; but the Lord Ordinary (Ardwall) expressed the opinion that even on a contrary view the action could not be maintained against the company. His Lordship, after referring to some of the reported cases, said—and I concur in his remarks—"To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by anyone in their employment in the course of such employment would be to introduce an appalling extension of the law of defamation. I take it to be the sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent." The views thus expressed by Lord Ardwall were repeated and approved by this Division in *Macadam*, 1911 S.C. 430, 48 S.L.R. 318. Other recent cases where actions against companies based on slanders by their servants have been thrown out as irrelevant are *Eprile* v. *Caledonian Railway Company* (1898, 6 S.L.T. 65, Lord Kincairney); *Nicklas* v. *The New Popular Café Company, Limited* (1908, 15 S.L.T. 735, Lord Mackenzie), and *Riddell* v. *Glasgow Corporation* (1911 S.C. (H.L.) 35, 48 S.L.R. 399). The pursuer's counsel sought to derive aid from *Riddell's* case. He pointed out that the ground upon which the House of Lords held the pursuer's record to be irrelevant was that the slander was uttered

by the tax collector under circumstances in which he had no authority to express any opinion to the pursuer as to the genuineness, or the reverse, of her receipts; and he urged that here the slander was uttered by Brown under circumstances which not merely authorised but bound him to state a reason for the pursuer's summary dismissal. There is nothing, I think, in this point. I do not see that Brown was bound to state a reason for the dismissal. As already said, it may be that the defenders are liable in the pecuniary consequences of that Act; but assuming that to be so, it has no apparent connection with the uttering of the slander. The only case, so far as I know, in which the Scots Court has allowed an issue against a corporate company in an action based on a verbal slander by its servant is *Finburgh* v. *Moss's Empires Limited* (*cit. sup.*). The case is an instructive one. I agree with Lord Ardwall when he said that "in applying the principle of liability to any particular case, the greatest care must be taken to secure that a principal is not made liable for a slander uttered by a servant or agent unless it be made perfectly clear that the slander was uttered directly in the interests of the master's business and in the course of executing such business, and that the words, or some of them complained of, in any particular case were not merely the outcome of heated or hasty temper on the part of the servant, or spoken with a view to gratifying his own private spite or malice. . . . And not only must the words of the alleged slander be strictly scrutinised with the view of determining whether the expressions used were such that the principal can in fairness be held responsible for them, but it is incumbent on the pursuer in such action to set forth distinctly and specifically on record facts from which it may be inferred that the verbal slander complained of is a slander that should be held in law to be imputable to the principals so as to justify the issue that it was a slander uttered by them by or through their servant." The words I have quoted seem to me not only to be sound, but to afford a useful comment upon the present pursuer's record. I think the weight of the authorities to which I have referred, at perhaps too great length, goes to support the view I stated at the outset, that the action is irrelevant. I cannot see how Brown's slander can be held to be the company's slander. It was uttered, it may be, in the course of his employment, but its utterance was not, in my judgment, in any true sense within the scope of that employment, nor for the purposes or the benefit of the defenders.

For the reasons now stated I think we ought to recall the Lord Ordinary's interlocutor, sustain the defender's first plea-in-law, and dismiss the action as irrelevant.

LORD SALVESEN — This case raises an important question as to the liability of a corporation for a verbal slander uttered by a servant. The pursuer is a barmaid, and she was engaged as such by a Mr Brown, who was the manager of the defenders' hotel and bars at Princes Street Station, Edinburgh. Shortly stated, her averments are, that Mr Brown having conceived an ill-will against her because she refused to permit him to take certain liberties with her, and on other grounds which need not be detailed, on 3rd February 1912 made certain statements to her, charging her in effect with misappropriation of the company's funds, and suspended her from her duties; that two days later he dismissed her from the defenders' service, after repeating the slanderous statements already referred to. She avers that it was part of Mr Brown's duty to engage and dismiss as well as control the persons employed by the defenders at their station bars, and admits that the statement he made as to the cause of her dismissal is *prima facie* privileged. She seeks, however, to elide this privilege by averments of personal malice against Brown. In Cond. 12 she says — "The said slanderous statements were made by Mr Brown maliciously in order to gratify the ill-will which in common with and as an intimate friend of Miss X, he had conceived towards the pursuer," and again—"The said Mr Brown, though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge, and himself afterwards gave information to the secretary of the defenders' company upon which, as above narrated, he admitted in writing that the pursuer was not dismissed for dishonesty." Interlarded between these statements there are averments that Mr Brown acted recklessly without inquiry as to the truth or falsehood of the slanderous statements he made, but I am unable to see how these are consistent with the very pointed allegation that Mr Brown, in making the statements, knew that they were false, and made them for no other purpose than to gratify his own private spite.

I do not doubt that the pursuer's averments disclose a relevant case against Mr Brown if he had been the defender in the action. The question is, whether they disclose any relevant case against the defenders as Brown's employers. It was decided in the case of the *Citizens Life Assurance Company, Limited* (*cit. sup.*) that "a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment." This decision was followed by this Division in the case of *Finburgh* v. *Moss's Empires, Limited* (*cit. sup.*), which, like the present, was an action based on a verbal slander of a privileged kind. In each of these cases, however, there were facts which in my opinion create a material distinction. In the *Citizens Life Assurance Company* the slander was published, not indeed with the employer's knowledge or assent, express or implied, but with the intention of benefiting his business. The writer of the letter had no object of his own to serve. His purpose was to counteract the mischief which the plaintiff, a

former employee, was doing to the business of the company. In *Finburgh's* case the slander complained of was uttered by an attendant in a theatre, part of whose duty it was to remove from the theatre women of immoral character. There was no allegation that the attendant acted otherwise than in good faith and in the intended performance of his duty towards his employers; but it was held that there were sufficient allegations that he had acted without due inquiry and without ordinary and reasonable regard to the character of the pursuer, so that a jury, if the statements were proved, might have drawn the conclusion that he had acted with such recklessness as to infer malice. The case is in this respect very analogous to those with which we are familiar of railway servants who, in the course of performing their duty of removing a passenger from the train who is travelling without a ticket, act with unnecessary violence so that their conduct in law amounts to an assault. For conduct of this kind the employers are responsible, because they have appointed the servants to perform this duty, and must take the risk of their performing it otherwise than in a lawful manner.

The present case does not appear to me to be ruled by either of these, the only reported cases in which an employer has been held responsible for a slander uttered by his servant.

It is, of course, true that an employer may be liable for a criminal act of his servant which he has neither directly nor indirectly authorised. That was established by the case of *Barwick* (*cit. sup.*), where Willes, J., laid down the rule in terms that have often been quoted with approval. The ground of the decision there was that the fraud which gave rise to the action had been committed for the bank's benefit, and I apprehend that the judgment would have been otherwise if this fact had not been established. It may be that the words "for the master's benefit" must be construed as including a case where no actual benefit has been realised, but to my mind it is plain that they cannot be left out of account, and that the fraud of the servant for which the master may be liable must at least have been intended by the servant to effeir to the master's benefit. If it were otherwise, all that would require to be proved was that the servant had committed a crime in the ostensible performance of his duties, although with the intention of benefiting himself personally and, it may be, of injuring his employer. I know no principle which supports such a view, and indeed the contrary is implied in the reasoning by which the master's liability has been affirmed in the reported cases. In all of these the wrongful act which the servant committed was so committed either (first) in discharging a duty which he owed to his employer, or (second) where the wrong was deliberately planned with the definite intention of benefiting the master. Were it otherwise we should have to affirm the master's liability where (1) a coachman deliberately drove over a person or animal that he could easily have avoided; or (2) a railway servant made the performance of his duty in removing a passenger whom he knew that he had no right to remove a pretext for avenging a private injury; or (3) a bar tender who threw a customer into the street because they differed on some political issue. Such liability has been expressly or impliedly negatived in the earlier cases of which *Gillespie* v. *Hunter*, 25 R. 916, 35 S.L.R. 714; *Robson*, 2 F. 411, 37 S.L.R. 306; and *Wardrope*, 3 R. 876, 13 S.L.R. 568, are fairly typical. We were referred to the case of *Lloyd* (*cit. sup.*), where the judgment of the Court of Appeal has recently been reversed in the House of Lords and the dissenting judgment of Vaughan Williams (L.J.) given effect to. I see no difficulty in reconciling that decision with the views already expressed, although I do not find myself in entire accord with all the *obiter dicta* of the Judges. The view of the Lord Chancellor that a lawyer who employs a managing clerk to attend to the business of his clients contracts that he shall perform his duties faithfully and honestly, was a sufficient ground for inferring responsibility; and I rather think that I should have reached the same result on the simple ground that the master had received the money of the client by the hands of a clerk and must account for it although it had in fact disappeared through the clerk's fraud. It is unnecessary, however, to pursue the matter further, because the decision has no bearing on the facts here. I have accordingly no hesitation in holding that the Lord Ordinary has erred in allowing an issue against the defenders, and that they are entitled to have the action dismissed.

LORD GUTHRIE—I concur. This is a question of relevancy. It seems to me that the whole actings of Mr Brown which are complained of by the pursuer, namely, the dismissal, the slander, and the antecedent malice, are alleged to have originated and to have been carried out by Brown, without any intention to further the purposes or interests, real or imaginary, of the defenders. It was suggested that the averments did not exclude the case of Brown having acted from a conviction that in the interests of the defenders either the pursuer or Miss X must go, and that he thought Miss X's retention most in the interest of the defenders. But no such case is made by the pursuer. The only case on record involves the proposition that a limited company, defending an action of damages brought for a slander uttered by its manager in the course of his employment, loses its right to plead that the occasion was privileged, not because of any malice on the part of the company itself, or of any person or persons with a general and unlimited authority to act for it, but because the manager who uttered the slander did so, knowing that the charge it contained was groundless, and solely

with a view to revenge himself for a private grudge against the person slandered. This is the only case which the record discloses, and it seems to me that none of the cases cited, which have been fully commented on by your Lordships, support it. The pursuer's averments appear to me expressly to negative any case of mere recklessness or excess of zeal in the real or supposed interests of the employer.

The LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Defenders and Reclaimers — Blackburn, K.C. — Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Pursuer and Respondent—Watt, K.C. —Graham Robertson. Agent —Allan M'Neil, S.S.C.

Tuesday, November 12.

FIRST DIVISION.

(SINGLE BILLS.)

HURST, NELSON, & COMPANY, LIMITED *v.* SPENSER WHATLEY, LIMITED.

Expenses — Taxation — Counsel — Skilled Witnesses—Local Agent Giving Evidence

In counter-actions, afterwards conjoined, arising out of nine contracts entered into at different dates from 1898 to 1905 for the maintenance and repair of railway waggons belonging to the defenders, the pursuers were found entitled to one-half of their expenses in the Outer House. The proof, which was a heavy and complicated one, lasted twelve days, there being two adjournments—the first from 28th May till 19th October, and the second from 23rd October to 18th January following. Objection was taken to the Auditor's taxation of the account, inasmuch as he had allowed (1) to senior counsel a fee of thirty guineas for the first day of the proof, and similar fees for the first day of each of the adjourned diets; (2) as was maintained, excessive amounts to the skilled witnesses; and (3) a fee to the pursuers' local agent, who had appeared and given evidence and had been treated as an ordinary witness.

The Court *sustained* the first objection, reducing the fee to twenty-five guineas, but *repelled* the others.

Expenses — Taxation — Proof — Statements Compiled from Documents in Process.

In a heavy and complicated case arising out of a series of contracts for the upkeep of railway waggons, the pursuers were awarded one-half of their expenses in the Outer House. Objection was taken to the Auditor's allowing the sums charged for the preparation of certain statements, made up for the purposes of the proof, of facts and figures, in tabulated form, compiled from the books and other productions in the case.

The Court *repelled* the objection and *approved* of the Auditor's report.

On 24th March 1908 Hurst, Nelson, & Company, Limited, waggon builders and repairers, Motherwell, brought an action against Spenser Whatley, Limited, London (against whom jurisdiction had been founded by arrestments), in which they sued for (1) a sum of £1933 odd, being the amount alleged to be due and unpaid in respect of their (the pursuers') maintenance and reconstruction of 583 waggons belonging to the defenders, and (2) a sum of £354 odd as damages for alleged breach of contract. A counter-action at Spenser Whatley's instance was brought on 22nd June 1908, in which he, *inter alia*, claimed £2751 as damages for imperfect work and undue detention of waggons. On 20th January 1909 the Lord Ordinary conjoined the actions and allowed a proof. The proof, which was a complicated and difficult one, lasted twelve days, there being two adjournments, viz., on the first occasion from 28th May till 19th October 1909, and on the second occasion from 23rd October 1909 till 18th January 1910. Thereafter on 22nd February 1910 his Lordship pronounced an interlocutor in which, after deciding the questions at issue between the parties, he found Hurst, Nelson, & Company, Limited, entitled to expenses in the separate actions, and also in the conjoined actions modified to three-fourths of the taxed amount thereof. Spenser Whatley having reclaimed, the First Division (Lords Kinnear, Johnston, and Mackenzie) on 8th March 1911 varied the Lord Ordinary's interlocutor in so far as it, *inter alia*, found Hurst, Nelson, & Company entitled to "three-fourths" of their taxed expenses in the Outer House, and substituted therefor the words "one-half" and *quoad ultra* adhered. No expenses were found due to or by either party in the Inner House.

On 16th October 1912 the defenders (Spenser Whatley, Limited) lodged a note of objections to the Auditor's report in so far as he had, in taxing the expenses found due to the pursuers, allowed the following items:—I. To senior counsel for the first day of the proof (besides a consultation fee of 10 guineas) a fee of 30 guineas, and similar fees for the first day of each of the two adjourned diets (20 guineas a day being allowed for the other days of the proof). To each of these three fees of 30 guineas the defenders objected on the ground that they were excessive to the extent of 5 guineas each. II. The cost of preparing the following items, viz.—"No. of process 153—Framing statement from Spenser Whatley's truck running books (Nos. 73 and 74 of pro.) and working railway waggon book showing when waggons at Spenser Whatley's depots in 1905, 1906, and 1907, and calculation, 29 shs. figs.; three copies thereof, 29 shs. figs. No. of process