presumitur donare will, for the most part, depend upon the particular circumstances of the case." He then goes on to point out that Edward Boyd had recognised his posision as an ordinary borrower, in respect that in the bond and disposition in security which he granted, while he took power to apply the interest to the maintenance and education of Joanna, no such power was given in the event, which happened, of the devolution of the legacy to the remaining children. He adds that the father having borrowed his children's money, it was his duty, more especially as he was a trustee and executor, to settle explicitly whether the interest was to be applied in the shape of aliment or not; and that he did settle it in the way which seemed most agreeable to the will of the testator.

I accordingly read that decision and the opinions of the Judges in the light of the explanations given by Lord Corehouse, which simply come to this, that it was plain from the father's own deed and actings that he did not intend to claim repayment of the sums expended by him upon the maintenance and education of his children other than Joanna.

I am aware that there are *dicta* in other cases which if taken by themselves might be read as meaning that a father who has means of his own is not entitled to recoup himself out of the interest of separate estate belonging to his children. For instance, in the case of *Fairgrieves* v. *Hendersons*, 13 R. 100, the Lord President, in distinguishing the position of a mother from that of a father in this matter, is reported to have said— "The father's obligation to aliment his children is absolute and unconditional; he is not in a position to say that the children shall maintain themselves out of any money they may have before he is called upon;" and he quotes in support of that statement Lord Gillies' remarks in the case of *Galt*. Now, Lord Gillies' remarks were made, I think, with special reference to the facts of the case with which he was dealing; and if the Lord President's words are to be read as meaning that a father who is not in indigence cannot in any case recoup himself for advances made for the aliment and education of his children when the children are amply provided for *aliunde*, I think this is not in accordance with the statement of the law either by Stair or Erskine.

Bnt in the present case it may be sufficient that the deed which settled the separate fund upon the children expressly directed the trustees to devote the annual produce to the maintenance and support of the children.

On the whole matter I think the pursuer is entitled to the decree which he asks.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor appealed against, and grant decree in terms of the conclusions of the action; Find the expenses incurred by both the pursuer and the defenders payable out of the accumulations of income referred to in condescendence seven, and remit" &c.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—the Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defender and Respondents—H. Johnston, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, March 12.

SECOND DIVISION.

[Dean of Guild Court, Greenock.

CAMERON *v.* CALEDONIAN RAILWAY COMPANY.

Burgh—Street—Formation of Public Street—Lands "fronting or adjoining" Street—Railway—Bridge Conveying Street over Railway — Liability to Assessment — Greenock Corporation Act 1893, *sec.* 34.

By section 34 of the Greenock Corporation Act 1893 it is provided that "the proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street," shall pay and relieve the corporation of the expense of the formation of any public street within the burgh in proportion to the length of their frontage.

In 1884 a railway company acquired house property in an uncompleted street in Greenock, and demolished the houses on both sides and excavated the ground for the purposes of their line, which ran under the street at right angles to it, substituting for the portion of the street excavated a bridge with parapets and steps giving access to the railway station underneath.

In 1903 the corporation decided to complete the formation of the street by causewaying the carriageway, &c.

Held that the railway company were liable under section 34 of the Act to pay the expense of the formation of the street so far as carried by the bridge.

Great Eastern Railway Company v. *Hackney Board of Works*, 1883, 8 App. Cas. 687, *distinguished.*

Section 33 of the Greenock Corporation Act 1893 provides that where any public street or portion of a public street shall not have been completed, it shall be competent to the Procurator-Fiscal, by direction of the Corporation as Board of Police, to present a petition to the Dean of Guild craving warrant to complete the formation of the street in the manner therein mentioned at the expense of the proprietors of lands and heritages in such street or portions of a street.

Section 34 provides—"The proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street, shall severally be bound to pay and relieve the board of the expense of making such foot-pavements, kerbs, and guttercourses, altering walls, crossings, cesspools and cesspool drains, and also of the expense of making such causeways to the central line of the street opposite to their respective lands and heritages . . . in proportion to the length of frontage to such street of such respective lands and heritages as compared with the total length of the street or portion of street upon which such expense shall be laid out or incurred by the board at the time, as such proportion of expenses shall be ascertained and decerned for by the Dean of Guild on the application of the Procurator-Fiscal." . . .

In June 1903 John Cameron, Procurator-Fiscal of the burgh of Greenock, presented a petition to the Dean of Guild Court of the burgh stating that the Corporation had resolved to form a section of Inverkip Street, Greenock, in a permanent manner by causewaying the carriageway with whin silts and doing other work necessary for the formation of the street, and asking for authority to execute the work and craving decree after the work had been finished for the amount to be allocated by the Court upon the respondents, being the proprietors of land and heritages in the said part of the street, including the Caledonian Railway Company.

The Railway Company, whose line of railway ran in a deep cutting at right angles to Inverkip Street, the street being carried over the railway by a bridge belonging to the Company, objected to pay for the cost of formation so far as it was over their railway bridge, in respect that they were not owners of ground fronting or adjoining Inverkip Street as carried by said bridge.

The following narrative of the facts is taken from the opinion of Lord Moncreiff:—"The present question relates solely to that part of Inverkip Street which is spanned by the bridge erected over their line by the Caledonian Railway Company; the length of the parapet on the north side being 188 feet, and 160 feet on the south side. The Railway Company admit liability in respect of 170 feet of frontage on the north side of the street, but they maintain that in ascertaining their 'frontage' to Inverkip Street the length of the bridge must be disregarded.

"Inverkip Street is, we are informed, one of the oldest streets in Greenock. In the year 1884 the Caledonian Railway Company obtained powers to construct a railway line between Greenock and Gourock; and for the purposes of their line they acquired, *inter alia*, several subjects lying in or along Inverkip Street, both on the north side and on the south. When purchased by the Railway Company these lots, as I understand, had buildings erected upon them; and in every case the feuars had free ish and entry under their titles to and from Inverkip Street. It is clear that at the date of the purchase the proprietors of those subjects would have been liable, under sections 346 to 350 of the existing Greenock Police Act 1877, to pay the cost of forming the foot-pavement and roadway in proportion to their respective frontages if the Board had decided upon completing the street in that manner.

"Having acquired the subjects in question, the Railway Company used it as follows. At the point where it was intended to construct their line under Inverkip Street they demolished the houses on both sides and excavated the ground to a depth of between 20 and 30 feet, substituting for that part of the street a bridge of the same breadth, the parapet of which on the north side was 180 feet in length and the parapet on the south side 160 feet. Accordingly, at the point occupied by the bridge, instead of there being on either side houses fronting the street or land upon the level of the street, there were simply the parapets of the bridge, the Railway Company's line and station buildings being below the level of the street. The parapets, however, were built entirely on the Railway Company's ground, and at the west end of the north parapet a booking-office was constructed on the street level, and I understand that there are steps giving access from the station platform to the street."

On 28th July 1903 the Dean of Guild pronounced the following interlocutor:—"Finds in fact that the Corporation of Greenock have resolved to form a section of Inverkip Street, Greenock, in a permanent manner by cause-waying the carriageway with whin setts, and doing all other work necessary for the formation of the street in the manner described in the petition: Finds that said street is an uncompleted street of the town: Finds that the respondents, the Caledonian Railway Company, are proprietors of lands and heritages in said street, and that they admit their liability to pay for the expense of forming said street to an extent of 170 feet of frontage on the north side of said street; but finds that said respondents have 188 feet or thereby of additional frontage on said north side, together with 160 feet or thereby of frontage on the south side—making in all a frontage of 358 feet or thereby on the north side, and 160 feet or thereby on the south side: Finds in law, with respect to the objections of said respondents, that they are the proprietors of lands and heritages in or fronting or adjoining Inverkip Street aforesaid, within the meaning of 'The Greenock Police Act 1877,' 'The Greenock Corporation Act 1893,' and Acts therewith incorporated, and are liable to pay the cost of formation thereof to the extent of their said frontage of 358 feet and 160 feet or thereby respectively: Therefore repels the objections of the said respondents and grants warrant to and authorises the Corporation of Greenock to form Inverkip Street from Roxburgh Street to the part of Inverkip Street, laid with tar-macadam, which is about 180 feet

north or north-east from Bruce Street, in a permanent manner, by lifting the existing gutter-courses and crossings and relaying the same, causewaying the carriageway with whin-setts, and lifting and relaying existing work, and doing all other work necessary for the formation of the street, all as shewn by and in accordance with the plan and specification produced, but without alteration of the present levels."

The Caledonian Railway Company appealed, and argued—They were not liable for the expense of forming the street in respect of the extent to which the parapets of their bridge extended along Inverkip Street. Both with regard to the fences along the bridge and the railway cutting under the bridge the case was ruled by the decision in *Great Eastern Railway Company* v. *Hackney Board of Works*, 1883, 8 App. Cas. 687. That case was on all fours with the present. "Bounding and abutting on"—the words in the Act construed in that case—meant the same as "fronting or adjoining" in section 34 of the Greenock Act. *Brighton Railway Company* v. *St Giles, Camberwell*, 1879, 4 Ex. Div. 239, was also an authority in their favour.

Argued for the petitioner and respondent—The decision of the Dean of Guild was right. This was an old street, and the Railway Company when they commenced their operations had purchased houses fronting the street. They had thereafter pulled down the houses and excavated the ground, but that did not alter their obligations. They were liable as owners of the parapets and the bridge itself, which certainly adjoined the street—*Wakefield Local Board* v. *Lee*, 1876, 1 Ex. Div. 336; Burness, Bateman, and Parker's Contract [1899], 1 Ch. 599. There was here no access from the bridge to the station, so the present case was more favourable to the petitioner's contentions than either—*Caledonian Railway Company* v. *Corporation of Edinburgh*, March 12, 1901, 3 F. 645, 38 S.L.R. 452, or *London and North-Western Railway* v. *St Pancras Vestry*, 1868, 17 L.T. (N.S.) 654, in both of which the railway companies were held liable. It did not matter whether or not the property adjoining the street yielded a rent—*Magistrates of Leith* v. *Gibb*, February 3, 1882, 9 R. 627, 19 S.L.R. 399; *Campbell* v. *Magistrates of Edinburgh*, November 24, 1891, 19 R. 159, 29 S.L.R. 146; *Williams* v. *Wandsworth Board of Works*, 1884, 13 Q.B.D. 211. The bridge formed a continuation of the land in which it rested, so that even if the parapets were left out of account the bridge adjoined the railway company's land as in the case of adjoining strata in a mine. The case of the *Great Eastern Railway Company, supra*, was distinguished from the present, as in that case (1) the street was not an old one, (2) the owner was defined by the Act construed as "the person receiving a rack-rent," and (3) the words used were "bounding or abutting," not "fronting or adjoining."

At advising—

LORD JUSTICE-CLERK — The Caledonian Railway in carrying their line across Inverkip Street of Greenock did so by removing the buildings on either side of the street, and carrying their line in an excavation below the street, placing that part of it on a bridge which they erected. On either side of the line and next the bridge they have buildings connected with the line, and which abut upon Inverkip Street, and as regards these the company do not object to assessment, but they object to being assessed in respect of the lands forming the line.

Inverkip Street is an old street, which is public and must be kept open, and the building of the bridge was for the purpose of keeping it open, this being made necessary to the company themselves as their accesses to their line and station underneath are by Inverkip Street, the street being reached by a stair from the station below through the booking-office, which is on the street level, and their railway sidings at the other end of the bridge are reached in a similar manner from the street.

It is difficult to understand upon what principle it is to be held that if property assessable for the maintenance of the street in front of it is no longer used for buildings above the street level, but is cut down for the proprietors' own convenience to a lower level, it shall be exempt from the assessment.

The company founded upon the case of the *Great Eastern Railway* v. *Hackney Vestry*, where the question was whether the parapets of a bridge by which a new street was taken across a line that was in a cutting were lands and heritages abutting upon the street, and the question turned very much upon whether they could be held to be subjects which would let for a rack-rent, "receiver of rack-rent" being the definition of owner in the Act in question in that case; the Act declaring that "owner shall mean the person receiving rack-rent." But it does not appear to me that that case can be held to rule the present. It is particularly to be noticed that the Act in question in this case does not use the word "abut" but the word "adjoins," and it is not easy to see how lands can be held not to adjoin a street when there is direct access to the street from them by a stair opening into the street only a few yards from the end of the bridge which spans them. A number of cases were quoted to us in which "adjoins" or "adjoining" were interpreted to cover places where something was interposed between the two subjects. In one case a rivulet and in another a road were not to exclude the application of the term "adjoining," and it appears to me that no other decision would in such a case be reasonable.

I am therefore of opinion that the decision at which the Dean of Guild arrived was right and ought to be affirmed.

LORD TRAYNER — The argument addressed to us on behalf of the appellants

was mainly, if not entirely, based upon the decision pronounced in the House of Lords in the *Hackney* case. That decision was said to be conclusive of the question now before us, and if I had been able to concur in that view, I should of course have been ready to follow it and sustain this appeal. But I think this case distinguishable both in fact and in law from the *Hackney* case. In that case, as I understand, the Railway Company had no property "bounding or abutting on" the street, for the making of which they were sought to be made liable, except the parapet of the bridge which crossed the street. The railway ran below the street, and at that part of the railway there were no railway offices, station, or platform, or other works necessary for carrying on the business of the railway—nothing but the rails. The fact here is different. At Inverkip Street, and fronting it, the appellants have their booking-office, from which there is a staircase by which travellers find their way directly from the street to the platform of the railway station below, and covered from the railway platform to the street. What difference that may make between this and the *Hackney* case, in so far as the appellants' liability is concerned, I shall afterwards advert to. At present I merely point out the fact. What was determined in the *Hackney* case was that the ground on which the rails were placed being below the level of the street, in a deep cutting, did not bound or abut on the street above, and that while the parapet of the bridge was land belonging to the Railway Company, and did certainly abut on or bound the street, yet the Railway Company were not liable in the assessment they challenged, because they were not "*owners*" of that land within the meaning of the particular statute under which the liability was sought to be imposed. Ownership being the ground of their alleged liability, I take it to be settled by that decision that the ground below the railway bridge on which the rails are placed does not abut on or bound the street above; but that does not go far to determine the question before us, for in the statute relied on by the respondents, and which we have now to construe, the words "bounding or abutting on" do not occur. By section 34 of the Greenock Police Act of 1893, on which the present action is based, it is provided that "the proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street, shall severally be bound to pay" the Police Board the expense of making up the street. The question is, do the appellants fall within this definition? The appellants are no doubt the owners of the parapet of the bridge; they are built on and supported by the lands of the appellants beneath; they are *partes soli*—part of the lands and heritage of the appellants. They "front" and are "in" Inverkip Street, and the owners, the appellants, are therefore liable *pro rata* in the expense of making or completing that street. But if this should be considered too narrow a ground on which to affirm the appellants' liability, the other fact that I have already alluded to affords sufficient ground for doing so. The appellants' platform and other works beneath their booking-office seem to me to be lands and heritages within the 34th section above cited. They were not in the street, nor do they front the street, but I think they do adjoin the street. They adjoin the street in the sense that they are joined to it by the continuity of the appellants' works—that is, by the stair which directly connects the street with the appellants' platform beneath. But I am prepared, in construing this section, to give it if necessary a somewhat wider and more popular interpretation. "Adjoin" is not unfrequently used as a synonym for "adjacent," and that is the meaning which I think may quite fairly be given to it here. The appellants cannot complain that such a view with their consequent liability for part of the expense of completing the street does them any injustice. They used the street at this point for access to the railway, and they may and probably will make additional access from the street to their platforms through their parapet walls as the necessities of their traffic may require. However that may be, I am of opinion that the appellants are proprietors of lands and heritages adjoining Inverkip Street, and that therefore the judgment of the Dean of Guild appealed against is right.

LORD MONCREIFF—I have found considerable difficulty in distinguishing this case from the case of *The Great Eastern Railway Company* v. *Hackney Board of Works*, as decided in the House of Lords 11th June 1883, 8 App. Cas. 687, which it closely resembles in several particulars. But I think there are distinctions sufficiently substantial to warrant me in concurring in affirming the Dean of Guild's judgment. [*His Lordship then stated the facts as given in the narrative.*]

But for the decision in the House of Lords in the case of *The Great Eastern Railway Company* I should have thought that the liability of a proprietor of land immediately adjoining a street for a proportion of the expense of the formation or repair of the pavement or causeway under the provisions of such a statute as we have here did not depend upon the use which the proprietor chose to make of his land; that the ground being his *a cœlo ad centrum* he could erect buildings upon it or leave it bare, or excavate it, according to his requirements; that in any of these cases the land would still "front or adjoin" the street, and the proprietor would remain liable for the obligations which attached to the property in the state in which he acquired it.

I do not see why land should be held to cease to adjoin a street because the proprietor chooses to excavate it and erect houses or works below the level of the street, especially if communication with the street exists by means of stairs. Of course extreme cases may be figured, as that of a viaduct, but in the ordinary case

the ground beneath a viaduct could never in any reasonable sense have fronted or adjoined the roadway of the viaduct.

But it was decided in the House of Lords in the case mentioned (*first*) that the line and embankments of a railway below the level of a street were not lands "bounding or abutting on such street;" (*secondly*) that it made no difference that there was a passage communicating between the railway line and the street; (*thirdly*) that although the parapets of the bridge were built and supported entirely upon the railway company's ground, and were the property of the railway company, the parapets could not be regarded as land "bounding or abutting" on the street in the sense of the Act, because they did not admit of being used or let for profit.

That decision turned upon the construction of different statutes from those with which we are dealing, viz., The Metropolis Management Acts of 1855 and 1862. But I cannot say that the provisions of the Greenock Police Acts in regard to this matter are materially different from the statutes which fell to be construed in that case. Instead of the words "owners of land bounding or abutting on such street," we have here "the proprietors of all lands and heritages in such street, or fronting or adjoining both sides of the line of such street."

Again, while in The Metropolis Management Act of 1855 "owner" is defined (sec. 250) to mean "the person for the time being receiving the rack-rent, or who would receive the same if let at a rack-rent," "proprietor" is defined in the Greenock Police Act 1877, sec. 3, to mean proprietors of lands and heritages, and to apply to fiars, liferenters, heritable creditors, &c., "or other persons who shall be in the actual enjoyment, or who shall take the rents or profits or produce of such lands and heritages."

Again, here, as in the case of *The Great Eastern Railway Company*, there is on the level of the street at the point in question no property of the Railway Company presently adjoining the street except the parapets of the bridge, the line and station buildings being at least 20 feet below, although there is a communication by means of steps with the street.

It will thus be seen that both as regards the terms of the statute and the condition of the ground there is a very close resemblance between the two cases. But there are features which, not without hesitation, I think sufficiently distinguish this case. (*First*) Inverkip Street is not a new street, as was the case in the *The Great Eastern Railway Company* v. *Hackney*. The Railway Company acquired property and houses fronting and having access to the street, the former proprietors of which undoubtedly would have been liable in this expense under the existing Act, which had similar provisions, and I am disposed to think that the Railway Company could not at their own hand free themselves from that liability and, as it were, withdraw so much of the frontage to the street from contribution according to the use which they chose to make of their property. It is to be observed that the decision of the House of Lords (which reversed the decision of the Court of Appeal) was concurred in with some difficulty by one of the three noble and learned Lords who decided it, Lord Blackburn saying (p. 698)—"I have had more difficulty than seems to have been felt by either of the two other noble and learned Lords who heard the argument." And Lord Watson, who gave the leading opinion, says on p. 696—"Whether land situated below the level of a street is or is not to be deemed as abutting on it within the meaning of the statutes appears to me to be a question of degree depending on the circumstances of the case."

The question then being one of degree, I find it sufficient for my judgment that the land when acquired by the railway company fronted and adjoined an existing street in the sense of the Greenock Police Acts, and that they altered the level of it to suit the purposes of their own undertaking.

But (*secondly*) there is this not unimportant feature, that there are not merely a line of rails but station buildings and platforms at that spot, no doubt below the level of the street but connected by a stair with the street and the booking-office which undoubtedly fronts and adjoins the street.

On the whole matter I am for affirming the judgment of the Dean of Guild.

LORD YOUNG was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Petitioner and Respondent—Salvesen, K.C.—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Respondents and Appellants—Guthrie, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* MUIRHEAD'S TRAWLERS LIMITED.

Railway—Carriage of Goods—Perishable Merchandise — "Passenger Train" — Railway Rates and Charges (Caledonian Railway) Order Confirmation 1892 (55 *and* 56 *Vict. c. lvii.*)

In a question between a railway company and consignors of fish under consignment notes "for merchandise to be carried by passenger train at owner's risk," *held* that a fish train having all the equipment and all the privileges of a passenger train was a "passenger train."

By contract dated 16th February 1893 between Muirhead's Trawlers, Limited, fish