the goods was enough to satisfy the debt. There is no room for such a presumption here. With reference to the observation of the Lord Ordinary in the present case that Lord Craigie dissented in *Crawford* v. *Black*, this is not so as regards the main part of the interlocutor. Lord Craigie's view was that the defender should be decerned to produce the goods or their value, to account to all the creditors, and divide them as a common fund. In my opinion that is what should be done here, and this will be effected by affirming the Lord Ordinary's interlocutor in so far as it orders consignation, and by recalling it *quoad ultra* and remitting the case to the Lord Ordinary for further procedure.

LORD DUNDAS—I have had an opportunity of reading the opinion just delivered by my brother Lord Mackenzie. I entirely agree with it, and have nothing to add.

LORD KINNEAR—I also concur in Lord Mackenzie's opinion.

The Court adhered to the interlocutor of the Lord Ordinary in so far as it appointed the defender to consign the sum of £156, 19s. 6d. with interest; *quoad ultra* recalled said interlocutor, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuers (Respondents) — Morison, K.C.—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for Defender (Appellant)—Maclennan, K.C.—Mercer. Agent—D. Maclean, Solicitor.

Thursday, March 16.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

DUNFERMLINE BURGH *v.* RINTOUL.

Road—Burgh—Private Street—Paving—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 104 (2) *d.*

A town council in terms of the Burgh Police (Scotland) Acts 1892 to 1903, and in particular section 104 (2) *d* of the latter Act, resolved to cause a certain piece of ground through which a public footpath ran, and which was occasionally used by vehicles, to be properly levelled, paved, &c., and served a notice to that effect on proprietors abutting on the ground. One of the proprietors objected in respect that the resolution was *ultra vires*, as the ground in question was not a "private street." *Held* in the circumstances that the ground in question was not a private street.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts—Section 4 (28)—"'Private street' shall mean any street maintained or liable to be maintained by persons other than the commissioners." Section 4 (31)—"'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), after providing that it shall be read and construed as one Act with the Burgh Police (Scotland) Act 1892, which is therein called the principal Act, enacts—Section 103 (5)—"'Public street' shall in the principal Act and this Act mean (1) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (2) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878 vested in the town council; (3) any road or street which has in any other way become, or shall at any time hereafter become, vested in or maintainable by the town council; and (4) any street entered as a public street in the register of streets made up under this Act." Section 103 (6)—"'Private street' shall in the principal Act and this Act mean any street other than a public street." Section 104 (2) *d*—"Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, causewayed, or macadamised, and flagged and channelled in such way and with such materials as to them shall seem most expedient . . . and thereafter to be maintained, all to the satisfaction of the council."

This was a Stated Case, obtained by the Town Council of Dunfermline, from a decision of the Sheriff-Substitute at Dunfermline (SHENNAN) in an appeal to him by John Rintoul, one of the proprietors abutting on Jigburn Road, Dunfermline, against a resolution of the town council under the Burgh Police (Scotland) Acts 1892 to 1903.

The Case stated—"This was an appeal under the Burgh Police (Scotland) Acts, which was heard by me on the 7th November 1910. On the 11th day of July 1910 the appellants resolved 'in terms of the Burgh Police (Scotland) Acts, 1892 to 1903 (and in particular section 133 of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1903), to cause Jigburn Road, extending from the line of the north side of Mid Beveridgewell to the junction of said road with Baldridgeburn (being a private street within the meaning of the said Acts, which has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the Town Council), and the footways thereof, to be freed from obstructions, and to be properly levelled, paved, macadamised and

flagged, and channelled, and completed with fences, posts, crossings, kerbstones, gutters and street gratings or gullies and drains for carrying off the surface water, all in terms of' plan, sections, and specification prepared by the Burgh Engineer and submitted to the appellants; and they directed notice of their intention to be given in terms of section 20 of the Burgh Police (Scotland) Act 1903.

"Notice of the said resolution was duly served on the owners of property abutting on the said Jigburn Road, including the respondent. The respondent appealed to me to quash the said resolution and notice in respect that (1) Jigburn Road not being a private street within the meaning of the said Acts, the resolution of the town Council was *ultra vires;* (2) the proposed work was unnecessary. Only the first of these two grounds of appeal was insisted on.

"At the hearing the following *facts* were proved:—1. The respondent is the owner of property which abuts on the west side of the 'Jigburn Road' referred to in the appellants' said resolution, and he owns part of the *solum* of said 'Jigburn Road.' 2. Prior to 1883 the site of what now goes by the name of the Jigburn Road consisted of (*a*) on the east a public footpath for passengers 4 or 5 feet broad, being an old right-of-way for foot-passengers; and (*b*) on the west of the footpath an open stream called the Jig Burn, with steeply sloping banks on the east side varying from 7 feet 6 inches to 14 feet 6 inches in height above the water level. The *medium filum* of the Jig Burn forms the eastern boundary of the respondent's property. 3. In the year 1883 the respondent put pipes in the Jig Burn for 12 to 15 yards northwards from Baldridgeburn and covered over the burn at that part, with the permission of the superiors of the land on either side of the burn, in order to have a cart access to this side of his property. He permitted one local builder to use this access, but it was not used by the public at that time for vehicular traffic. This operation did not in any way interfere with the public footpath. 4. In the year 1888 the appellants, on a complaint by residenters as to the condition of the Jig Burn and footpath, laid pipes in and covered the burn northwards from the place where respondent had stopped doing so, but they did this without admitting liability to do so. The result of their operations was that the public footpath was brought down to a lower level and shifted somewhat to the west. At the same time the appellants put in an iron post to prevent vehicular traffic between Baldridgeburn and the street known as Mid Beveridgewell, the west end of which abutted on the Jig Burn. 5. In the year 1901 the respondent erected new buildings on his ground. The appellants fixed the levels in the erection of these buildings with the view of making it possible to form a public street between Baldridgeburn and Mid Beveridgewell on the site of the covered burn and the public footpath. With the view of making a public street here the appellants raised the level of the street at Baldridgeburn 2 feet, and lowered the level at the west end of Mid Beveridgewell, thus making it possible for vehicles to use this ground as a short cut between Baldridgeburn and Mid Beveridgewell. In 1901 the appellants erected posts to prevent such use, but after litigation between the parties these were removed. 6. The only houses entering from the area to which the appellants' foresaid resolution relates are those on the upper flat of the small two storied tenement at the corner of Baldridgeburn and Jigburn Road on the west side, and the gateway to witness Litster's cottage on the east, and there is also a cart entrance to respondent's property on said area. The only purpose to be served at present by forming said area into a street is that of connecting the two thoroughfares of Baldridgeburn and Mid Beveridgewell. The area to which the resolution applies is about 148 feet in length and varies in breadth from 20 feet to 34 feet. The appellants have adopted Part II of the Burgh Police (Scotland) Act 1903. 7. The said area is to some extent used by vehicles passing between those two thoroughfares. It has never been to any extent bottomed, paved, causewayed, or macadamised, or flagged, and is entirely without footways, crossings, kerb stones, gutters or gullies. The levels are at present quite impracticable for street purposes or any other traffic. It is at present not a road suitable for vehicular traffic. 8. The appellants have laid a main sewer in said area, and a gas pipe was laid along the public footpath by the Dunfermline Gas Company before their undertaking was acquired by the appellants.

"I found that the area referred to in the resolution of the appellants under appeal was not a private road (meaning thereby a private street) within the meaning of the Burgh Police (Scotland) Acts. I was of opinion that the public footpath through said area was vested in the Town Council (the appellants) by virtue of the Burgh Police (Scotland) Act 1903, section 104, subsection 2 (*c*), and that to the extent of the said public footpath the area was not a private street. I was further of opinion that the said area apart from the public footpath was not a street, but at most a piece of derelict ground used for vehicular traffic not as a matter of right but by tolerance."

The *question of law* for the opinion of the Court was—"Whether on the above facts the portion of 'Jigburn Road' referred to in the resolution under appeal is a private street within the meaning of the Burgh Police (Scotland) Acts."

Argued for the appellants—This was a private street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903. To have a private street there need be no right of access by the public. It was enough if *de facto* the public used it—*Millar's Trustees* v. *Leith Police Commissioners*, July 19, 1873, 11 Macph. 932, 10 S.L.R. 643; *Hope* v. *Edinburgh Road*

Trustees, February 27, 1878, 5 R. 694, 15 S.L.R. 393; *Hamilton (Model) Lodging-House Company, Limited* v. *Watson*, January 23, 1900, 2 F. 431, 37 S.L.R. 326. The case of *Kinning Park Police Commissioners* v. *Thomson & Company*, February 22, 1877, 4 R. 528, 14 S.L.R. 372, decided that even after a road was declared a private street the proprietors could shut it up. The earlier cases occurred under the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), but it had practically the same definition as the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55). In the present case the Sheriff-Substitute had found facts which brought this ground within that definition of a "private street." The fact that there existed a public right-of-way over this ground did not prevent it from being a "private street" — *Glasgow and South-Western Railway Company* v. *Hutchinson*, 1908 S.C. 587, 45 S.L.R. 444. The ground in question was not derelict and it did not matter whether its use was of right or by tolerance.

Argued for the respondent — This was not a street in the sense of the Acts. A street was not formed until the proprietors had done something in the way of levelling, paving, &c.—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101). What in effect the Burgh were trying to do was to turn this ground into a private street, though under the statutes it could not become such. The amount of usage here found proved could never bring the ground within the definition words which meant actual usage as a street for street purposes. In *Millar's Trustees* v. *Leith Police Commissioners* and *Hope* v. *Edinburgh Road Trustees*, *cit. sup.*, there was a clear formation of the road before it was attempted to put the Act in operation. In the present case the use by foot-passengers was a right of footway and appellants could not found on it as making it a private street. On the other hand, the use by wheeled traffic was so casual that on appellants' contention any piece of waste ground could be turned into a private street.

At advising—

LORD JUSTICE-CLERK—This case relates to an alleged street in Dunfermline. The circumstances in which the case arises are very peculiar indeed. Between two properties in Dunfermline there was formerly a burn with steep sides and a certain breadth of ground occupied by the burn, and there was by the side of the burn a footpath, which I understand was a public footpath.

Now, of course, at that time there was no street; indeed, the very idea of a street was out of the question, because so long as the burn was there it was quite impossible that any street could be formed. The owner of the premises next to the street in front, and next to this place at the side, thought proper, for his own convenience, to cover up the burn, passing the water through a pipe up to a certain point of his own property, in order thereby that he might have additional access to his property.

Now, of course, that having been done did not in any way constitute a street; it led to no public place whatever. But later on the authorities of Dunfermline thought proper to cover up the burn further back, putting in pipes to carry the water. They covered up the burn practically to the same level as had been done by the owner of the premises in front. That certainly did not constitute it a street laid out but not properly laid or paved, though no doubt if you chose to go over the road by way of the footpath and over the ground which had been covered in filling up the burn you could get from one place to another with vehicles so far as width was concerned.

But it was quite certain that it was not laid out as a street. The state in which it was left by the burgh, when they had finished what they had done gave it nothing of the character of a street whatever. It was practically, as the Sheriff pointed out—and we must take the facts as he has stated them—not in a condition to be used as a street.

The purpose of the action is to have this passage declared to be a private street, and therefore to compel those who abut upon it to put it into a condition so that the burgh can take it over as a street in the burgh.

In the ordinary case that is done where the party has laid out a street—that is, laid out, but not properly laid out or paved, the street—which the party here opposing this petition never did, and nobody else did. The fact is simply just that a piece of property in the burgh, which consisted of the banks and bed of a burn, was by the burgh for their own purposes filled up so as to bring it up to the level of the neighbouring streets. It has been found in point of fact by the Sheriff that the levels at present are quite impracticable for street purposes or any other traffic, and that it is at present not a road suitable for vehicular traffic.

A road is generally laid off as such, but in this case it is obvious that the place, which in itself has nothing of the nature of a road about it, was not left by the parties when they were building for the purpose of being used as a road, the reason being that at that time the greater part of the surface was taken up by the channel of the burn and by the footpath.

In these circumstances I have come to the conclusion that this was not a private street within the meaning of the Act, and that the question of law which the Sheriff has put should be answered in the negative.

LORD ARDWALL—On 11th July 1910 the appellants resolved, in terms of section 133 of the Burgh Police (Scotland) Act 1892 as amended by the Burgh Police (Scotland) Act 1903, to cause Jigburn Road, which is alleged to be a private street, to be properly levelled, paved, macadamised, flagged and channelled, and completed with all the appurtenances of a street in terms of a plan, sections, and specification prepared

by the Burgh Engineer, and they directed notice of their intention to be given in terms of section 20 of the Burgh Police (Scotland) Act 1903 to the owners of property abutting on the said road, including the respondent. The respondent appealed to the Sheriff-Substitute, who quashed the resolution and notice in respect, *inter alia*, that Jigburn Road not being a private street within the meaning of the said Acts, the resolution of the Town Council was *ultra vires*. The Sheriff-Substitute found that the area referred to in the resolution of the appellants was not a private road, meaning thereby a private street within the meaning of the Burgh Police (Scotland) Acts, and that accordingly the resolution of the Town Council must be held to be *ultra vires*. A Stated Case was requested by the appellants, and upon that case we are asked now to decide whether the portion of the Jigburn Road referred to in the resolution under appeal is or is not a private street within the meaning of the Burgh Police (Scotland) Acts. I am of opinion that it is not, and that the decision of the Sheriff-Substitute is well founded.

The circumstances of this particular area of ground are peculiar, and I should think a similar question is not likely to arise again. No previous case of a precisely similar nature has been quoted on either side.

Prior to 1883 the site of what now goes by the name of Jigburn Road consisted of a public footpath 4 or 5 feet broad, being an old right-of-way for foot-passengers. The area or space to the west of the footpath was occupied by an open stream called the Jig Burn, with steeply sloping banks on the east side varying from 7 feet 6 inches to 14 feet 6 inches in height above the level of the water in the burn. That is very plainly shown on the plan and sections. There is no suggestion that prior to 1883 what is called the Jigburn Road could possibly be described as a road of any kind or description. A glance at the sections is sufficient to show that.

In 1883 the respondent put pipes in the Jig Burn from 12 to 15 yards northward from the street called the Baldridge Burn, and covered over the portion at that part in order to have a cart access to the west side of his property. In the year 1888 the appellants, on a complaint by residenters as to the condition of the Jig Burn and footpath, laid pipes in and covered the portion northward from the place where the respondent had stopped doing so, with the result that the public footpath was brought down to a lower level and shifted somewhat to the west. In the year 1901 the appellants, having fixed the levels for the respondent's new buildings, raised the level of the street at Baldridge Burn two feet and lowered the level at the west end of Mid Beveridgewell, thus making it possible for vehicles to use this ground as a short cut between Baldridge Burn and Mid Beveridgewell. From what is elsewhere stated in the case, I think it is clear that the only vehicles that could possibly use this ground were empty carts, and it is stated in the case that the levels at present are quite impracticable for street purposes or any other traffic. It is at present not a road suitable for vehicular traffic, nor indeed a road at all.

On these facts, I think it is plain that this area of ground is not a road or private street within the meaning of the Burgh Police (Scotland) Acts.

The section founded on, which will be found printed in the Burgh Police (Scotland) Act 1903, section 104, sub-section 2, sub-section (*d*), provides that "where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions and to be properly levelled, paved, causewayed or macadamised, and flagged and channelled," and so on. This section amplifies section 133 of the Act of 1892 by removing the restriction to streets in which houses have been erected on one-fourth of the ground fronting the same, and practically restores matters to the condition in which they were under section 150 of the Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101). The section in the later Act suggests, I think, that it applies only to a private street which has been formed and laid out as such, but which has not been sufficiently levelled, paved, causewayed, &c., and does not apply to a piece of ground which has never been laid out as a private street at all. I regard these words, however, as simply an abbreviated form of what is laid down in section 150 of the Act of 1862, which is in these terms—"Whereas it would conduce to the convenience of the inhabitants and be for the public advantage if provision were made for the levelling, paving, or causewaying and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, or causewayed and flagged, and for preventing such inconvenience in future, be it therefore enacted . . . " and here follows a provision for the Commissioners causing them to be properly levelled, &c., in practically the same terms as the section in the Act of 1892 as amended by the Act of 1903. This section 150 makes it therefore perfectly plain that it applies to streets which have been laid out and formed by persons who have neglected, &c.; and taking these Acts altogether the question is whether the area of ground in question in the present case can be said to have been laid out and formed by any person whatever. In my opinion it cannot, and accordingly I am of opinion that this is not a private street to which the sections founded on by the appellants apply, or, to put it more shortly, is not a street or road at all, but simply a piece of waste ground which no person either now or formerly has attempted to form or lay out as a road or street. The fact that the appellants made some alterations on it without interference by the

owners of property abutting on the streets so that a casual empty cart could struggle over it, cannot in my opinion have the effect of bringing it within the category of a private street. I think it would be an unsafe extension of the powers conferred on town councils under the Acts in question to hold that if within burgh a proprietor of a piece of waste ground has allowed carts, say, to cross it as a shortcut or for other purposes, they can thereupon claim that it is a private street, and proceed to compel the proprietor or proprietors on each side of it to lay out and form for the first time a street over such piece of ground. That might be in many cases, and I think would be in this case, a considerable hardship, because the proper formation and laying out of a street over the area in question would be a matter entailing considerable difficulties and consequent expense—such expense as I think the Acts did not intend should be laid upon owners of ground in the position of the respondent. It is a totally different matter where a road or street has been formed or laid out even roughly for the purpose of being used as such, and it is in such cases as, I think, that for the benefit of the inhabitants the Town Council are entitled to step in and insist that the road or street so formed shall be put into proper condition.

It is noticeable in this case that there has always been a footpath along the side of the area in question which undoubtedly comes under the care of the appellants; but this I think serves to emphasise the difference between the ground occupied by the footpath and the ground which the appellants maintain forms a private road.

I am of opinion on the whole matter that the Sheriff-Substitute has rightly decided the case.

LORD SALVESEN—The circumstances of this case are so special that I think our decision in it can scarcely be treated as a precedent in any other case which is likely to arise. Your Lordship in the Chair has stated the material facts, and all I need say is that I entirely concur in the conclusion at which you have arrived.

LORD DUNDAS, who was present at the advising, delivered no opinion, not having heard the case.

The Court answered the question of law in the negative.

Counsel for Appellants—Wilson, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondent — Constable, K.C.—Hon. Wm. Watson. Agent—John Stewart, S.S.C.

Thursday, March 16.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

BRIGGS *v.* MITCHELL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—*Dependant—Illegitimate Child Living Apart from Mother.*

B died on 12th July 1910 as the result of an injury sustained by her in the course of her employment. On 11th May 1910 she had been delivered of an illegitimate female child. Prior to the birth an arrangement had been made between her and Mrs R. that the latter should take over the child when born, if a girl without payment and to be adopted as her own. The child was accordingly, on its birth, given over to Mrs R., was named after her, and thereafter remained with her. B had stated that she would "give the child a minding" every half-year; she had handed it over to Mrs R. clothed, and had given the latter 3s. 6d., including materials for a shawl for the child. Apart from this, the child had been wholly maintained by Mrs R. and her husband.

Held that the child was not a dependant of the mother in the sense of the Workmen's Compensation Act 1906. Authorities *reviewed*, and *Keeling* v. *New Monkton Collieries, Limited*, [1911] 1 K.B. 250 *disregarded*.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, enacts—"'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . . and where the workman, being the parent . . . . of an illegitimate child, leaves such a child so dependent upon his earnings . . . . shall include such an illegitimate child . . . ."

This was an appeal upon a Stated Case from the Sheriff Court at Kilmarnock between Matthew Mitchell, farmer, Galston, *appellant*, and Elizabeth Young Richmond Briggs, residing with James Richmond, carter, Hurlford, and the said James Richmond as her curator *ad litem*, *pursuers* and *respondents*.

The pursuers claimed from the appellant £150 as compensation in respect of the death of the female pursuer's mother.

The *facts* which the Sheriff-Substitute (D. J. MACKENZIE) found admitted or proved were as follows — "(1) That Catherine Briggs, a farm servant in the employment of the defender, was injured while engaged at her employment with the defender on 11th July 1910, by an accident arising out of and in the course of her said employment, and on 12th July 1910 died from said injury. (2) That the deceased on 11th May 1910 was delivered of an illegitimate child, the principal pursuer in the arbitration. (3) That prior to the birth an arrangement