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

had been made between the deceased and Mrs James Richmond, the wife of the curator in these proceedings, that Mrs Richmond (who had no children of her own) should take over the child when born, for payment, if it should prove to be a boy, and without payment and to be adopted as her own if it should be found to be a girl; that on its birth the said child was in accordance with said arrangement given over to Mrs James Richmond, was named after her, and thereafter has since remained with her. (4) That the deceased, while willing to hand over the child to the care of Mrs Richmond, stated that she would contribute something to its support, or in her own words, 'give it a minding,' every half-year. (5) That the clothes in which the child was clad when it was given to Mrs Richmond were supplied by the deceased, and that the deceased before her death, which occurred two months after the child's birth, had made a contribution to the extent of 3s. 6d., including materials for a shawl for the child. (6) That apart from this the child was maintained by the said Mrs Richmond and her husband. (7) That the deceased signed a document in the following terms at Hurlford on 14th May 1910—'I hereby certify that I have handed over my child to Mr and Mrs Richmond, and that I will have no further claim on it'; that the said document was neither holograph nor tested nor stamped, and that following on her taking over of the child the said Mrs Richmond gave notice in writing to the local authority in terms of section 2 of the Children Act 1908. In said notice the following words, *inter alia*, occur—'Terms agreed upon. No allowance. Child adopted, and no after claim.' (8) That after its mother's death Mrs Richmond refused to hand over the child to certain of the mother's relatives, who desired to have the custody of it. . . . (10) That no sufficient proof was adduced to fix the paternity of the said child, and that no proceedings had been taken by the said Catherine Briggs for that purpose."

The Case further stated—"On these facts I found that the said child Elizabeth Young Richmond Briggs was wholly dependent on the deceased Catherine Briggs, and that in respect of the death by accident while in his employment of the deceased Catherine Briggs, the defender was liable in compensation to the said child, and assessed the amount thereof at £150. I therefore decerned against the defender for payment to the pursuer or her curator *ad litem* for her behoof of the said sum of £150. . . ."

The following *questions of law* were submitted for the opinion of the Court—"(1) Was the pursuer, the said Elizabeth Young Richmond Briggs, wholly dependent on the earnings of the deceased Catherine Briggs at the time of the death of the said Catherine Briggs? (2) If not, was she partially dependent?"

Argued for the appellant—The child was not a dependant of its mother. Dependency was a question of fact, and as matter of fact this child was supported by Mrs Richmond and her husband and not by the mother—*Moyes* v. *William Dixon, Limited*, January 13, 1905, 7 F. 386 (Lord M'Laren at 388, and Lord Ardwall at 389), 42 S.L.R. 319; *Turners Limited* v. *Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631; *Lindsay* v. *Stewart M'Glashen & Son, Limited*, 1908 S.C. 762, 45 S.L.R. 559. These Scots cases followed the House of Lords case of *Main Colliery Company* v. *Davies*, [1900] A.C. 358. Accordingly the proposition that dependency was a question of fact was indisputably established. It was, moreover, reaffirmed by the House of Lords in *Hodgson* v. *Owners of West Stanley Colliery*, [1910] A.C. 229. *Cunningham* v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574, was also referred to. The obligation at law on the mother to support did not affect the question of dependency. No legal presumption in favour of dependency resulted from such obligation—*Baird & Company, Limited* v. *Birsztan*, February 2, 1906, 8 F. 438 (Lord President at 441), 43 S.L.R. 300.

Argued for respondent—The child in this case was dependent. An illegitimate child had been held to be a dependant although it had not in fact been maintained by the parent—*Bowhill Coal Company, Limited* v. *Smith*, 1909 S.C. 252, 46 S.L.R. 250. A posthumous illegitimate child of a workman who had admitted the paternity had also been held to be a dependant. It, of course, had not been *de facto* maintained by its parent—*Schofield* v. *Orrell Colliery Company, Limited*, [1909] A.C. 433, [1909] 1 K.B. 178. It had been very recently held in England that a wife, in virtue of the legal presumption in favour of her dependency, was dependent on her husband even although she was supporting herself at the date of his death and receiving nothing from him—*Keeling* v. *New Monkton Collieries, Limited*, [1911] 1 K.B. 250. There was a similar presumption of dependency in favour of a child.

At advising—

LORD DUNDAS—The material facts found by the Sheriff-Substitute in this Stated Case may be summarised as follows:—On 12th July 1910 Catherine Briggs, then a farm servant in the employment of the appellant, died from an injury sustained by her through an accident on the previous day arising out of and in the course of her employment. On 11th May 1910 she had been delivered of an illegitimate female child, as to whose paternity we have no evidence. Before the birth the mother had arranged with Mrs Richmond (who had no children of her own) that the latter should take over the child, when born, without payment, if (as it happened) it was a girl, to be adopted as her own; and the child was accordingly given over to Mrs Richmond, was named after her, and has since remained with her. The fourth and fifth findings are not well stated, but they seem to amount to no more than this, that the mother said she would give the child "a minding" every half-year; that she gave it over to Mrs

Richmond clothed and not naked; and that before her death she had given that lady 3s. 6d., including materials for a shawl for the child. Apart from this trifle, the child has been entirely maintained by Mrs Richmond and her husband. I need not refer specially to the document or the notice mentioned in the seventh finding, as they do not seem to be of much importance in the case.

The questions for our decision are whether or not this child was (1) wholly, or (2) partially, dependent on the earnings of her deceased mother at the time of her death? The Sheriff-Substitute has held that she was wholly so dependent. I think the Sheriff-Substitute's decision is wrong, and that both questions ought to be answered in the negative.

By section 13 of the Workmen's Compensation Act 1906, "'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. . . ." Looking to the words just quoted, and to the facts above summarised, apart altogether from decided cases, it seems to me impossible to affirm in any reasonable sense that this child was wholly or partially dependent upon its mother's earnings at the time of her death, or that the mother left the child so dependent; and I think that when one turns to the cases the great weight of authority is in support of this view, though some of the decisions in the English Court of Appeal seem to point to a contrary conclusion.

It is well settled that dependency is a question of fact. This proposition must not, of course, be taken in too rigid a sense. The Court may no doubt consider the arbiter's findings read together as a whole, and judge whether his inference in law from the combined facts was justifiable, *e.g. per* Lord President Dunedin in *Bowhill Coal Company, Limited*, v. *Smith*, 1909 S.C. 252. But the general proposition is established beyond the possibility of dispute. It was laid down by the House of Lords in *Main Colliery Company* v. *Davies*, [1900] A.C. 358, and again very explicitly in *Hodgson*, [1910] A.C. 229. In the latter case the Lord Chancellor (Loreburn) said—"It is for the arbitrator or County Court judge to ascertain, purely as a question of fact, who are dependent, and to what extent. . . . There is no room that I can see for legal presumptions." Lord Macnaghten said—"The question of dependency is not a question of law at all. It is purely a question of fact. If authority is wanted for a proposition so self-evident, there is the case of *Main Colliery Company* v. *Davies*, a decision of this House in which there is an explicit statement to that effect." Lord Shaw said—"It seems late in the day to reiterate that the question of dependency is one of fact"; and after referring to the statute, and citing certain English decisions in support of that proposition, his Lordship added—"According to the judgment of the Court of Appeal in these cases, whether dependency exists, whether it is whole or whether it is partial, all these are questions of fact." The respondents' counsel, however, maintained that the issue here was not whether in fact this child was being supported by its mother at her death, but depended upon legal presumptions, particularly that of a mother's obligation at law to maintain her illegitimate child. I think this view is scarcely maintainable in face of the authorities, but in any case I consider that the facts here present are sufficient to rebut the presumption, if it were necessary to rebut it. Counsel relied on *Bowhill Coal Company, Limited* (*sup. cit.*), as showing that the question of dependency was not solved by reference to actual receipt of the earnings of the deceased by the alleged dependant. The case does not really help the respondents. The mother of an illegitimate child obtained decree for a sum of aliment against the father; she subsequently arrested his wages in the hands of his employers; and the man agreed that these, to the extent of £2, should be uplifted for behoof of the child. He died from an accident arising out of and in the course of his employment before this was actually done. It was argued that, as his wages had not in fact been applied to the child's behoof, the child was not a "dependant." The argument was rejected, the Lord President observing that though the question was one of fact, the argument was much too strict, and pointing out that the situation was just as if the £2 had been "deposited in the Savings Bank or put into a jar in a corner of the room." The respondents further pressed very strongly upon our attention the case of *Orrell Colliery Company* v. *Schofield*, [1909] A.C. 433, affirming decision of the Court of Appeal, [1909] 1 K.B. 178. I am unable to see that the respondents can derive any support from that case. The point with which the decision was apparently most concerned was that a posthumous illegitimate child of a workman may be a dependant within the meaning of the Act of 1906—a matter outside the present case altogether. The Court so far stretched the language of the statute as to hold that a child *in utero* might *fictione juris* be taken to be already born, and "was" dependent read as "would have been." But the Lord Chancellor (Loreburn), who delivered the only opinion in the House of Lords said (and the respondents sought to found upon the passage)—"In nearly all cases the practical question will be that which was put by Mr Russell, namely, whether or not assistance of one kind or another has been given out of the earnings of the deceased workman, but it may be that a person so situated that he might reasonably count upon assistance from those earnings and probably would need it, ought in the circumstances of the case to be included among the dependants referred to in the statute." The passage cited includes a

statement of what is "in nearly all cases the practical question" and an exception to or extension of the general case. So far as the general case is concerned, the Lord Chancellor's statement appears to be in entire accord with the observations (already quoted) which his Lordship and the other noble and learned Lords made in the following year in *Hodgson's* case. So far as any exception is dealt with, I read the Lord Chancellor's words as referring to the particular circumstances of the case before him, or to other analogous circumstances which are not here present. The only other case to which the respondent's counsel referred was that of *Keeling*, [1911] 1 K.B. 250, a very recent decision by the Court of Appeal in England, the rubric of which bears that "in questions of dependency under the Workmen's Compensation Act 1906 *Hodgson* v. *West Stanley Colliery*, [1910] A.C. 229, in no way impeaches or affects *Coulthard* v. *Consett Iron Company*, [1905] 2 K.B. 869, and *Williams* v. *Ocean Coal Company*, [1907] 2 K.B. 422, as to the implied dependency of the wife on her husband, even when separated from him and not actually dependent upon his earnings." *Keeling's* case is not of course an authority binding upon us, though I need hardly say that I regard the decision and the opinions of the learned Judges with unfeigned respect. But it deals with what is, I think, a vexed question, and one upon which the Scots and English cases are not in harmony. I gather that the English Court of Appeal has laid it down, in a series of cases of which *Keeling* is the latest example, that there is a legal presumption in favour of the dependency of a wife on her husband which it is difficult to rebut, and which (in particular) is not rebutted by the fact that at the date of his death he was not contributing to her support, and that she was being supported by herself or others. A similar presumption is, I apprehend, held to exist in favour of a child's dependency on its father. In our Courts, on the other hand, I think it has been held by a series of decisions (*e.g.*, *Turners Limited*, 1904, 6 F. 822; *Moyes*, 1905, 7 F. 386; *Baird & Company, Limited*, 1906, 8 F. 438; *Lindsay*, 1908 S.C. 762) that dependency is in each case to be decided upon a broad view of the facts—Was the applicant in fact supported by the earnings of the deceased at the date of his death or from other sources?—and that if the facts disclose the latter state of matters the existence of a legal obligation of support by the deceased is irrelevant and does not establish the applicant's claim, there being no legal presumption (to be displaced in each case) arising from such obligation. The Scots cases are binding upon this Court, and must continue to be our guides until they are pronounced by the House of Lords to be erroneous; and I must therefore, with all respect, decline to follow *Keeling's* case in so far as it differs from the Scots decisions.

If, then, as I hold, this case must be decided upon a proper consideration of its own facts and the legal inferences to be drawn from them, I am clearly of opinion that the Sheriff-Substitute was wrong in deciding that the child was wholly dependent upon the earnings of her mother.

The respondent's argument in favour of partial dependency was of a somewhat perfunctory character, based solely (as I understood it) upon the fourth and fifth findings in the Stated Case, which are to my mind quite insufficient to support it. In my opinion, therefore, the second question as well as the first ought to be answered in the negative.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD SALVESEN was absent.

The Court answered the first and second questions of law in the negative.

Counsel for Appellant—Horne, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondents—Crabb Watt, K.C.—J. A. T. Robertson. Agent—J. M'Kie Thomson, S.S.C.

Thursday, March 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

CHIENE *v.* TAIT'S TRUSTEES.

Succession — Writ — Testament — Codicil — Holograph Writing.

In the repositories of a deceased person there were found (1) a formal trust-disposition and settlement, dated 29th October 1910, signed by the deceased and formally attested, which bore to revoke all previous testamentary writings, (2) a draft of the trust-disposition and settlement, signed by the deceased and dated 27th October 1910, and (3) an informal writing, holograph of the deceased, consisting of a list of names with sums of money placed opposite to them and headed legacies, dated 28th October 1910, signed by the deceased and bearing the words "in terms of my last will of even date." No will of the deceased dated 28th October 1910 was found.

Circumstances in which *held*, after a proof, that the informal writing was a valid and operative testamentary writing of the deceased and a codicil to his trust-disposition and settlement.

On 8th August 1910 William Brown Dunlop, sometime residing at Seton Castle, Longniddry, and others, trustees of the late John Scott Tait, C.A., Edinburgh, acting under his trust-disposition and settlement dated 29th October 1909, brought an action of multiplepoinding and exoneration in order to have ascertained the rights of parties in the residue of the trust estate, which formed the fund *in medio*.

The following narrative is taken from the opinion of the Lord Ordinary—"Mr