tion of fat and a certain proportion of water and of solids other than fat, that the milk contained that amount of water and that amount of milk solids, and I think there is confirmation of that to be found in the fact that numerous cases have arisen as to which there is a large number of reports, and they are all exactly in the terms stated here, and it never occurred to anybody to object to them.

I intended to say a word also as regards the setting forth of the word "skimmed" milk in the complaint which is raised here, but Lord Dundas has dealt with that, and I entirely concur in what he has said. The question must therefore be answered in the affirmative.

The Court sustained the appeal, answered the question in the case in the affirmative, and found the complainer (appellant) entitled to expenses, modified to ten guineas and one pound as the dues of extract.

Counsel for Complainer (Appellant)—W. J. Robertson. Agents—R. H. Miller & Co., S.S.C.

Counsel for Accused (Respondent)—MacRobert. Agents—Mackay & Young, W.S.

COURT OF SESSION.

Friday, March 10.

EXTRA DIVISION.

[Lord Skerrington, Ordinary.

SMART & COMPANY *v.* STEWART.

(See *ante*, October 20, 1909, 47 S.L.R. 8, 1910 S.C. 18.)

Bankruptcy — Insolvency — Vitious Intromission by Creditor—Restitution—Action by Another Creditor.

S., the creditor of an insolvent firm, obtained a lease of the firm's premises from the landlord, together with an assignation of the landlord's hypothec, on his paying the past-due rent. He purchased the machinery on the premises, which was unpaid, from the vendors, and a trust deed having been granted by the only partner of the insolvent firm, obtained a hire from the trustee of the firm's plant which had been valued. He appropriated the stock of the firm which had also been valued and which he subsequently replaced by stock of equivalent value. He then proceeded to carry on the firm's business under the name of S. & Co., canvassing the customers and representing his firm to be the successors of the insolvent firm. He subsequently did diligence against the plant and replaced stock, (1) by sequestration in virtue of his assignation to the landlord's rights, and (2) by poinding in virtue of a charge on a protested cheque. Another creditor having brought an action against S. for restoration of the estate, or otherwise for payment of the pursuer's debt or for damages, *held* (*aff.* judgment of Lord Ordinary (Skerrington)) that the defender was bound to restore the value of the estate, but (*rev.* judgment of Lord Ordinary) in respect that the stock and plant had been valued and an estimate of the goodwill arrived at which brought out a total less than pursuer's debt, that decree of payment should not be pronounced against him.

Crawford v. *Black and Others*, December 2, 1829, 8 S. 158, *followed*.

J. Smart & Company, iron, tinplate, and metal merchants, Sunderland, *pursuers*, brought an action against George Deans Stewart, tea merchant, Edinburgh, carrying on business under the style or name of Stewart & Company, iron and tinplate workers, 6 Gilmore Place, Edinburgh, *defender*, in which he sought declarator—"(1) That the defender, on or about 17th October 1908, while a creditor of the firm of Falconer & Company, tinplate workers, 6 Gilmore Place, Edinburgh, and in the full knowledge that the said firm of Falconer & Company was insolvent, illegally and unwarrantably, without intimation to the creditors of said Falconer & Company, and without price or other consideration paid therefor, took possession *brevi manu* of the said business of Falconer & Company, including the goodwill thereof, and the machinery, plant, stock, fittings, and other assets of the said firm, and simultaneously removed the name of the said firm and substituted therefor the style or name of 'Stewart & Company,' and that he has thenceforth carried on and is still carrying on the said business as a going concern under the said new style or name for his own behoof; (2) that by said illegal and unwarrantable actings the defender has prejudiced the interests of the pursuers as creditors at the said date of the said firm of Falconer & Company to the extent of £189, 10s. 3d., which remains unpaid, and has prevented the pursuers recovering the same; and (3) that by his said illegal and unwarrantable actings the defender has rendered himself liable either to restore the said business *in integrum* as it stood upon the said 17th October 1908, within such period as to our said Lords shall seem proper, or, failing his so doing, to make payment to the pursuers of the said sum of £189, 10s. 3d., with interest thereon at the rate of five per centum per annum from the date of citation to follow hereon till payment." There were (2 and 3) relative conclusions for payment.

A. Lawrie Kennaway, W.S., Edinburgh, trustee under a trust deed granted by the late Miss Joanna Falconer, who was alleged in the trust deed to be the sole partner of the firm of Falconer & Company, was also called for any interest competent to him as such trustee, but as there were no operative conclusions against him he did not appear.

The pursuers pleaded, *inter alia*—"(1)

The defender having acted illegally and unwarrantably in seizing and maintaining possession of the business of Falconer & Company as condescended on, decree should be pronounced in terms of the first conclusion of the summons. (2) The pursuers having, by the said illegal and unwarrantable actings of the defender, suffered prejudice in the recovery of their claim as condescended on, decree should be pronounced in terms of the first and second conclusions of the summons. (3) *Separatim*—The pursuers having suffered loss, injury, and damage through the said illegal and unwarrantable actings of the defender as condescended on, decree should be pronounced in terms of the third conclusion of the summons."

The defender pleaded, *inter alia* — "(1) The action as laid is incompetent. (2) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. . . . (5) The defender's whole actings having been legal and regular and in good faith, he is entitled to absolvitor."

On 12th March 1909 the Lord Ordinary (SKERRINGTON) sustained the defender's first two pleas-in-law and dismissed the action. The pursuers reclaimed, and on 20th October 1909 the First Division recalled the Lord Ordinary's interlocutor and remitted to him to allow a proof before answer (1910 S.C. 18, 47 S.L.R. 8).

The *facts* of the case appear from the opinions of the Lord Ordinary and Lord Mackenzie.

On 30th March 1910, after a proof, the Lord Ordinary pronounced the following interlocutor:—"Finds that on or about the 17th day of October 1908 the defender illegally took possession of the business of the firm of Falconer & Company, mentioned in the summons, and also the plant and stock of said firm, and that said stock and plant were of the value of £135, 19s. 6d., per inventory and valuation, but that there falls to be deducted therefrom £29 for rent of premises, and added thereto £50 for goodwill of business, making in all £156, 19s. 6d.; appoints the defender to consign said sum of £156, 19s. 6d., with interest from said 17th October 1908 at five per cent. in the Bank of Scotland, Edinburgh, in name of the Accountant of Court and his successors in office, on or before 28th April 1910, with certification that if he fails to make consignation as aforesaid, decree will be pronounced against him for £189, 10s. 3d. (being the amount of the pursuers' debt mentioned in the summons), with interest thereon at five per cent. from 18th December 1908 till paid, and with expenses: Grants leave to reclaim."

Opinion. — "The defender, Mr Stewart, who is a wholesale tea merchant in Edinburgh, for many years bought tin boxes from a firm, and afterwards from a limited company managed by a Mr Falconer. The latter had a good reputation in the trade for the quality of his work and was also popular with his customers, but he was not successful as a financial manager. The company lost money, and it went into liquidation in November 1906. No offer was made for the goodwill and nothing was paid to the creditors. The machinery belonged to a money-lender, and it was acquired by a Mr Drummond. He and Mr Falconer carried on a similar business for seven months, when it failed. In October 1907 the defender, out of kindness, agreed to help Mr Falconer to a fresh start by advancing £150. As Mr Falconer was an undischarged bankrupt, it was arranged that the business should belong to his sister Miss Joanna Falconer, and should be carried on under the name of Falconer & Company, and that Mr Falconer should act as her manager at £2 a-week, with power to sign cheques and transact ordinary business. Though the so-called firm of Falconer & Company came into existence entirely for the benefit of Mr Falconer, there was nothing simulate about the arrangement that Miss Falconer should own the business. She had the sole legal title to it, and she was alone responsible for its debts. She had some estate, but she did not in fact put any money into the business. That privilege was reserved exclusively for the defender, who during the eleven months from November 1907 to September 1808 inclusive advanced to or on behalf of the firm £339 in all. The advances in so far as exceeding £150 were not voluntary, but were made in order to obviate disaster, as when one of the firm's cheques was dishonoured or when money was otherwise urgently wanted.

"In the beginning of October 1908 the defender came to the conclusion that matters could no longer continue on the existing footing—he doing all the paying and Mr Falconer having the uncontrolled management. The defender had known for some time that the business was insolvent, but he did not suspect that the deficiency was so serious as afterwards appeared. On 6th October 1908 he prepared notes as to a proposed transfer of the business from Miss Falconer to himself. She was to make over the assets to him, including the 'goodwill of the business' and the lease of the premises, and was also to sign a will bequeathing to him two small properties in Bonnyrigg. The defender on his part was to pay the whole debts of the firm, as also the interest of the bond on the Bonnyrigg properties and the feu-duty. The defender was further to engage Mr Falconer to act as manager of the business under his (the defender's) direction. In a few days, however, it became clear to the defender that this scheme was unworkable—first, because the financial position of the firm was such that it was impossible for him to undertake to pay the debts in full; and second, because Mr Falconer objected to being reduced to what would be practically the position of a foreman under the defender, and accordingly used his influence with his sister to induce her to refuse her consent. The brother and sister lived together. She was dying of a painful disease, and it was impossible for a stranger to approach her on business.

"In this state of matters I hold it proved that the defender formed the design of acquiring for himself the firm's business at his own hand and without obtaining the consent of Miss Falconer, and that he carried out this design to a successful conclusion. If I am right in this view of the evidence the defender acted illegally, even though the business which he so acquired was insolvent, and may also have possessed no saleable goodwill or profit-earning capacity. It is only fair to say that in my opinion the defender acted in the belief that he was doing the best for all the creditors. His counsel strenuously maintained that he had done nothing which he was not legally entitled to do, and the defender doubtless entertained this belief. Of course the defender does not admit that he formed and carried out the design which I attribute to him. His case is that he started under the name of Stewart & Company a new and independent business similar to but different from that formerly carried on by Falconer & Company.

"The defender's first overt act towards acquiring the old business or starting a new one (as the case may be) was (without consulting either Miss Falconer or her brother) to call upon the landlord of the premises in which the firm carried on business, and to induce him to take advantage of a clause in Miss Falconer's lease entitling him to terminate it if the rent was in arrear for more than three weeks. He at the same time agreed with the landlord for a new lease in his own favour. It was part of the bargain that the defender should pay the arrears of rent (£29) and should have an assignation of the landlord's rights. This happened on 13th October, and formal intimation terminating her lease was sent to Miss Falconer on the same day. The lease in favour of the defender was signed on 16th October and was for five years from its date. The subjects were described as 'recently occupied by Messrs Falconer & Company,' though that firm was actually in possession. About the same time the defender approached two merchants who had sold machines to the firm but had not received payment. In one case the machines had not yet been delivered; in the other case they had been delivered on condition that the property should remain with the sellers until payment of the price. The defender induced these merchants to sell the machines to him, thus impliedly rescinding their contracts with the firm. The landlord and the merchants acted within their rights, but I doubt whether the defender acted legally in procuring the termination or rescission of these contracts, especially in view of the fact that the whole business and books of the firm had been disclosed to him as its leading creditor. It is often in the interest of a debtor to make a full disclosure to his creditor of the whole details of his business, and the debtor cannot complain if his creditor takes advantage of his knowledge for the purpose of securing or recovering his debt in the ordinary way; but I do not think that a creditor is entitled to use this knowledge in order to negotiate behind the back of the debtor for the acquisition of rights prejudicial to the debtor. The next matter which engaged the defender's attention was the stock and plant, which were the property of the firm and were in their premises. He had these articles inventoried and valued on 16th October 1908. The valuation came to £135, 19s. 5d., and appended to the valuation there is a statement by the defender of the firm's liabilities and assets, showing liabilities £591, assets (less preferential claims) £145, the deficiency being £446, and the dividend 4s. 9d. per £1. This statement does not include Miss Falconer's private estate if that was of any value, nor does it disclose that the greater part of the defender's claim of £339 was on bills which had not yet matured. With the exception of the pursuers, who had a claim for £189 for materials supplied to the firm, and of the machinery merchants already referred to, the remaining claims were only five in number and for small sums. The defender offered the creditors a composition of 4s. 6d. in the £1, and this offer would have been accepted if the pursuers had not refused to concur. The defender was very anxious to get this composition arrangement carried through. On Saturday, 17th October, he called upon the pursuers at Sunderland and tried unsuccessfully to obtain their consent. I can explain this anxiety only on the theory that it was essential to the defender's plans to acquire the firm's stock and plant. With the same object, as it appears to me, the defender used pressure on Mr Falconer to persuade his sister to sign a trust deed for behoof of her creditors in favour of her law agent. The trust deed was signed and delivered to the trustee on the forenoon of 17th October, but the trustee took no steps to protect the interests of the creditors either on that date or at any other time. On the same day a cheque for £89, 7s. by Falconer & Company in favour of the defender, dated 7th August 1908, was protested for non-payment at the instance of the defender, and shortly afterwards he arrested the largest debt due to the firm. It is, I think, apparent that the defender never intended to accede to the trust deed. On his return from Sunderland on 17th October, and in the knowledge that the trust deed had been signed and delivered, the defender got the keys from Mr Falconer and took possession of the firm's business premises. Mr Falconer had no authority to deliver the keys or to cede possession, and the defender's entry was, in my opinion, illegal. On Monday, 19th October, the defender took possession of the firm's business as completely as if he had bought and paid for it. He took into his service Mr Falconer and the other employees; he used the firm's machinery and plant; he manufactured the firm's tinplate into boxes; he carried out its current orders; and he visited the firm's customers, informing them that he was to carry on the business, and asking for their patronage. He also made use of

the firm's books and stationery, deleting the name 'Falconer & Co.' from the invoices and substituting 'Stewart & Co.' In some of the business cards he described his firm as 'successors to Falconer & Co.'

"I have already referred to the trust deed, and have suggested that its sole purpose was to enable the defender to get a title to the moveables. The trustee declined to take the responsibility of selling the plant, but on 21st October, the day before a meeting of the creditors was to be held, he did what served the defender's purpose equally well. He hired out to the defender the plant, machinery, tools, &c., belonging to Falconer & Company at a rent of 10s. per week for three months. This agreement and the collection of eight weekly payments of 10s. were the sole acts of management by the trustee. The defender's counsel argued that this agreement legalised the defender's possession of the plant, and he further argued that it implied that the trustee approved of the defender carrying on business in the firm's former premises. I do not agree. The hiring agreement for three months was *ultra vires*. Further, the trustee's duty was to ingather the estate and not to condone illegalities. The defender omitted to obtain even an apparent title to the firm's stock-in-trade, but he afterwards substituted other stock of a similar kind, which he laid aside and then poinded as the property of the firm.

"To complete this strange story, the defender on 21st October caused Falconer & Company to be charged for payment of the amount of the protested cheque. The execution bears that the messenger-at-arms affixed a copy of the charge upon the gate of the firm's business premises, because after giving six audible knocks he could not gain access. The defender had locked out his own messenger. Miss Falconer died on 9th November, leaving, as I understand, no estate over and above that of the 'firm.' On 12th November the pursuers' agent intimated to the defender that he held him liable for the pursuers' debt in respect of his having illegally taken possession of Falconer & Company's business and assets. The pursuers' decree against Falconer & Company is dated 14th November. On 20th November the defender presented in name of the landlord a petition for sequestration for rent against Miss Falconer's representatives. He himself bought in the whole of the sequestrated effects, which were valued at £62. The remaining moveables of the firm to the value of £23 were poinded by the defender in December in virtue of the charge already referred to, and were bought in by the defender. These two sales under Sheriff's warrants disposed of the whole articles in the inventory and valuation No. 110 of process. The defender's counsel placed great reliance upon these purchases as giving his client an unchallengeable title to the articles. The defender's liability (whatever it was) camein to existence on 17th October, when he illegally took possession, and he did not in my opinion improve his position by sequestrating and poinding what he already unlawfully possessed.

"I am accordingly of opinion that the pursuers have proved what they promised on record to prove, and that they are entitled to some remedy on the authority of *Crawford* v. *Black, &c.*, 1829, 8 S. 158. I have done my best to understand this judgment and will try to apply it. The Lord Ordinary (Corehouse) gave no opinion. In the Inner house Lord Craigie dissented, but Lord Balgray and Lord Gillies gave opinions in favour of the Lord Ordinary's interlocutor. The opinions of Lords Balgray and Gillies indicate that there is a heavy burden of proof on an illegal intromitter, but the interlocutor assumes that the wrongdoer is entitled to replace either the subjects wrongfully taken possession of or their value. As regards the stock and plant, I see no reason to doubt that No. 110 of process was a full and complete inventory and valuation of the articles of which the defender took possession. These articles cannot be restored completely and in their original condition, so the defender must consign the value, £135, 19s. 6d., under deduction of the rent, £29, or £106, 19s. 6d., with interest at 5 per cent. from 17th October 1908. The pursuers do not claim that the business as it now stands should be treated as belonging to Falconer & Company, and should be sold or wound up for the benefit of that firm's creditors. The only alternative is that the defender should consign the value of the goodwill as in October 1908. There are difficulties in the way of holding that the business had any pecuniary value—(1) It was insolvent and had made no profits, but on the contrary a considerable loss, during the eleven months of its existence, and former and similar businesses had failed; (2) the trade connection was to a large extent personal to Mr Falconer; and (3) the customers were few in number, and the bulk of the orders came from one customer. Still the burden of proof and the presumptions are against a wrongdoer, and it is not impossible that either the defender or a stranger might have been willing to pay (say) £50 in order to secure the continuity of the business. I shall, accordingly, find that on or about 17th October 1908 the defender illegally took possession of Falconer & Company's business, and also its plant and stock, which were of the value of £156, 19s. 6d., and allow him to consign this sum, with interest from said date at 5 per cent., on or before the second box-day; with certification that, failing such consignation, decree will be pronounced against him for the amount of the pursuers' debt, viz., £189, 10s. 3d., with interest thereon at 5 per cent. from the date of citation. The defender may possibly have a preferential claim to part of the consigned fund, but I cannot decide that question now."

The defender reclaimed, and argued — The defender's actings had been perfectly legal. The defender had obtained a valid lease of the premises from the landlord, and his title was unchallengeable—*Dobie, &c.* v. *Marquis of Lothian*, March 2, 1864,

2 Macph. 788. By doing so he had really benefited the estate. Further, it was perfectly settled law that a landlord had a right, and in certain circumstances was bound, to assign his right of hypothec to a third party if he paid, *e.g.*, a cautioner—*Stewart* v. *Bell*, May 31, 1814, 17 F.C. 638; *Guthrie & M'Connachy* v. *Smith*, November 19, 1880, 8 R. 107 (*per* L. P. Inglis at p. 111), 18 S.L.R. 75. Defender had equally obtained an unchallengeable title to the machinery, having bought it from the proprietors—*Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936 (*per* L.J.-C. Moncreiff at p. 946), 7 S.L.R. 625. As to the moveables, he had originally taken them over under a contract of hire from the trustee under the trust deed. This was a proper act of administration on the part of the trustee, as he could not have sold before sixty days—*Nicolson & Johnston* v. *Wright*, December 6, 1872, 11 Macph. 179, 10 S.L.R. 104; *Ogilvie & Son* v. *Taylor*, January 27, 1887, 14 R. 399, 24 S.L.R. 284. By this hiring agreement the trustee held civil possession—*Mitchell's Trustees* v. *Gladstone*, February 27, 1894, 21 R. 586, 31 S.L.R. 480. As at 19th October defender had all the legal requisites to carry on the business except the stock. Defender had endeavoured to purchase that stock at a valuation, which pursuers conceded was a fair one. When he found the offer was not to be accepted he at once replaced the value of what he had used, and in doing so he complied fully with the principle of *Crawford* v. *Black*, *&c.*, December 2, 1829, 8 S. 158, more fully reported in 5 F.C. 143, founded on by the Lord Ordinary. Long before the sixty days were up, when he found that the creditors were not to accede to a composition, he took diligence, and that diligence was effective to complete the title to the property. If the diligence was irregular it might have been set aside by a reduction, but this had not been done. Goodwill, further, was always a question of circumstances and depended largely on the nature of the business. It was clear from the evidence that there was no goodwill here. The case of *Crawford* v. *Black*, *&c.*, *cit. sup.*, was a very flagrant one and was authority only for the proposition that the value of property illegally taken should be restored. In the present case the defender had accounted for everything that had come into his hands.

Argued for the respondents—Defender had unlawfully taken possession of or converted to his own use the trust estate. The law was clear on the matter—Bell's Com. (7th ed.) vi, i, cap. 2, vol. ii, 170. From the moment of insolvency the insolvent was *negotiorum gestor* for his creditors. Ordinary creditors were entitled to an equal ranking on the estate, and every transaction which gave an undue preference to anyone, whether directly or indirectly, was struck at. The Act of 1621, c. 18, illustrated this. Bell's principle was applicable in all its force to a case where one creditor *brevi manu* took possession of what did not belong to him. Defender might have got a valid transfer of the lease, but all that this gave him was a right to the vacated premises. Instead of that, however, he had taken possession of the whole business. The trust deed did not entitle the trustee to let the plant out on hire, and no contract of hire could make the plant defender's property. This trust deed was not binding on anyone, and neither trustee nor creditors had acted on it. The rule as to sixty days only applied to equalising diligences cut down by sequestration. The rights of hypothec were only available so far as the landlord's right still existed, and this had come to an end. The poinding and sequestration could not possibly give defender a right to goods which he unlawfully possessed, and he could not poind his own goods even if it were competent for him to do summary diligence on a cheque. With regard to goodwill, the *onus* was on the defender of showing that there was none, and he had not discharged it. It was impossible to say that there was not some advantage which amounted to goodwill, or that a purchaser could not have been found who would have given value for it. The present case came well within the rule of *Crawford* v. *Black*, *&c.*, *cit. sup.*

At advising—

LORD MACKENZIE—The pursuers, Smart & Company, are creditors of the firm of Falconer & Company for £189, 10s. 3d.; the defender Stewart is a creditor for £339. The case against the defender is that, in the knowledge of Falconer & Company's insolvency, he illegally took possession of the stock, plant, and goodwill of their business to the prejudice of their other creditors. The Lord Ordinary has held this case proved, with the result that the defender has been ordained to consign the sum of £156, 19s. 6d. in bank, with certification that if he fails, decree will be pronounced against him for the amount of the pursuers' debt. The object of ordering consignation is that the fund may be available for distribution among the firm's creditors, for which purpose, failing agreement, sequestration would probably be necessary. The creditors other than the pursuers and defender have only a small interest in the estate.

The firm of Falconer & Company carried on business as tinplate workers in Edinburgh. Nominally the business belonged to Miss Falconer, who however put no money into it. The reason for the legal title being vested in her was that her brother William Taylor Falconer, who had previously managed the business, had got into difficulties and was an undischarged bankrupt. The defender, a tea merchant in Edinburgh, had advanced to the firm during the years 1907 and 1908 the sum of £339. The pursuers' firm are iron, tinplate, and metal merchants in Sunderland. The debt of £189, 10s. 3d. was due to them for goods supplied to the firm in August and September 1908.

There is no question upon the evidence that the defender entered into the premises and took possession of the business of Falconer & Company. The question is

whether under the circumstances he was entitled to do so.

When the defender realised that Falconer & Company were insolvent he made up (apparently on 6th October 1908) notes *re* transfer of the business from Miss Falconer to himself. In these notes the business is entered as having a goodwill. His first idea was to take over the business and pay other creditors 20s. in the £. This would, of course, have been unobjectionable. He discovered, however, that affairs were worse than he had supposed and abandoned this notion. Next he proposed that he should be appointed manager of Falconer & Company, but this had to be dropped owing to William Falconer's opposition. Then he conceived the plan (he says it occurred to him on the night of 12th October) the execution of which has caused all the trouble. He saw the landlord of the premises in which the firm carried on business, got the landlord to terminate their lease under the clause of irritancy contained in it, and to agree to give him a fresh lease for five years. It was arranged that Stewart should pay £29, the arrears of rent, and should get an assignation to the landlord's rights. This was the first move in a policy which ended in his acquiring everything for himself. One point which was urged by counsel on his behalf was that the pursuer Smart knew about it, but the terms of the letter Stewart wrote to Smart, on 13th October 1908, contained no indication that Stewart was acting solely in his own interest. Smart says his understanding was that Stewart was then acting in the interest of all the creditors. The passage in Stewart's letter of 13th October, that "the next move is to sequestrate the estates," was, if Stewart intended only to recoup himself, certainly calculated to mislead Smart. On 15th October a meeting was held of Falconer & Company's creditors which was attended by Smart. Mr Stewart then offered to pay a composition of 4s. 6d. in the £, provided Mr Maclean, his own agent, was appointed trustee. The pursuer was not inclined to accept this offer. The way it struck him was that the defender would be paying himself 4s. 6d. in the £ on his debt and would also be getting some hold of the business, which he (Smart) thought should be sold for the benefit of the creditors. The defender was unable to persuade him to agree, and on 19th October Mr Smart's law agent, Mr Croft Gray, S.S.C., intimated his client would not accept this offer and that action was to be taken for the amount of their claim.

Meantime Stewart had entered into possession of the premises. The lease in his favour was signed on 16th October 1908, and bore that the subjects "have recently been occupied by Messrs Falconer & Company." The same day Stewart had a valuation prepared of the firm's stock and plant which brought out the figure of £135, 19s. 5d. mentioned in the Lord Ordinary's interlocutor. The fairness of the valuation is not challenged by the pursuers. Adding outstanding accounts to this, and taking the firm's liabilities at £591, 17s. 3d. the estate was in a position to pay 4s. 9d. per £. Possession of the premises in the lease was obtained on 17th October by Stewart getting the keys from Falconer on the former's return from Sunderland, where he had failed to get Smart to agree to his proposal about the dividend of 4s. 6d. On the same day, 17th October, a trust deed was granted by Miss Falconer in favour of A. L. Kennaway, W.S. Averments are made against the validity of this deed, but it was not suggested it should be set aside. It must accordingly be regarded as an incident in the history of the business. It served one purpose which was this—it enabled Mr Stewart to transact with the trustee for the hire of the firm's plant at 10s. per week. Beyond collecting this rent for eight weeks there seems to have been no act of possession on the part of the trustee at all. There is a conflict of evidence as to whether this hiring of the plant was mentioned at the meeting of creditors held on 22nd October. It is difficult to see how, if it was distinctly stated as a fact, Mr Croft Gray, who attended the meeting in order to watch the interests of Mr Smart, should not have heard it. Two others who were present did not hear it mentioned, and though three witnesses say it was, I do not think it can be held to be proved. The contract of hire, however, did not and could not confer any title of property upon the defender, and what he is seeking to do in this action is to defend his right to retain this plant or its equivalent value. The fact that the trustee hired it out to him will not enable him to do this even if (contrary to the opinion of the Lord Ordinary) the trustee, whose duty under the trust deed was to realise and distribute the estate, had any right to hire out the plant for a period of three months. The defender then made arrangements for the purchase of machines which had been sold to Falconer & Company for the purposes of their business, but which had not been paid for. Apparently the defender got the benefit of £20 which had been paid to account of the price of some of the machines. The stock that was in the premises at the date of his entry he took possession of without making any payment. Miss Falconer never got anything.

I think it is clearly proved that the defender, having thus obtained possession of the premises, machinery, plant, and stock of Falconer & Company, proceeded to carry on their business. It was an organised business, with business books which he admits he used. He got the names of the customers from the books. They were of good standing. There were going contracts being executed, and the defender got permission from those who had given the orders to have them transferred to him. He carried on the business without interruption. He canvassed the customers and executed the orders. William Falconer was continued as manager. Invoices were used which described the business as that of Stewart & Company, successors to Falconer & Company, and

later on the name of Falconer & Company was dropped. In spite of this Mr Stewart's agent writes on 13th November that his client denies that he has taken possession of Falconer's business; that the firm is due a large amount of money to Stewart, who is now taking appropriate proceedings for recovery thereof; and that the business his client is carrying on is an entirely independent business. This, in my opinion, was an untenable position. The defender in his evidence says that the justification for his entering into possession was that he was under the impression that the arrangement would be carried through with Mr Croft Gray. The latter denies that Mr Stewart was entitled to think this. The weight of the evidence is to the effect that Stewart thought he was entitled to act as he did because he was the largest creditor. The trustee, Mr A. L. Kennaway, whose position in regard to the matter is a strange one, thought he was carrying on the business to obtain payment of his debt.

It was contended that the business was of no value and that there was no goodwill attached to it. If this were the case it is difficult to see what reason the defender had for taking possession of it. He had been willing to pay a composition of 4s. 6d. to the other creditors in consideration of getting the business, and this shows that he thought there was some value in it. The truth as disclosed in the evidence is that the business had been suffering from want of capital. I think Mr Stewart must have realised that with adequate financial support it was capable of improvement. This belief was justified by the results, because a loss of £203 from the period from 1st November 1907 to 17th October 1908 was converted into a profit of £97 for the year from 18th October 1908 to 20th October 1909. No doubt the latter figure was reached without allowing for any remuneration, interest on capital, or wear and tear of machinery and plant, but we were informed that the former figure of £203 was arrived at in the same way. A comparison between the two is therefore quite legitimate, and shows that the business had a great recuperative power. The trustee in one of his letters states that Falconer's business ought to pay, and pay well, which he explained to mean that if Falconer had had capital he could have made the business pay. In my opinion there was a goodwill and this was not merely personal to Falconer. I think the value of £50 put on it by the Lord Ordinary is not excessive.

The defender further maintains his right to resist the present demand because of diligence used, which, according to the argument, vested the plant and stock in him. As regards this, the first point is that on 20th November he had, in virtue of the assignation he had got to the landlord's rights, sequestrated effects of the firm to the value of £62. At this date, however, Miss Falconer was dead, the firm was dissolved, the lease was cancelled, and the landlord had been paid his rent. In these circumstances the sequestration was incompetent, and affords no title to the defender. The next point sought to be made for the defender is that the remaining articles which were contained in the valuation of the firm's effects above referred to were poinded by him in virtue of a charge upon a protested cheque, and were bought in by him at the value of £23. The answer to this, apart from the question whether the cheque was a proper foundation for diligence, is that the poinded effects were the property of the defender himself. They were not the goods in the valuation which had been the property of the firm. Those had been used, and the goods poinded which the defender had substituted for them belonged to him.

The Lord Ordinary's view is that the defender's liability was fixed when he illegally took possession on 17th October. Even if regard is had to the subsequent sequestration and poinding, these do not in my opinion aid the defender.

The net result is that assets, including goodwill of the value of £156, 19s. 6d., which should have been made available for the payment of all the creditors, have gone to satisfy the defender's claim alone. In these circumstances the case of *Crawford* v. *Black* (8 S. 158) is directly applicable. The principle of the case is contained in the interlocutor of the Lord Ordinary (Lord Corehouse), who found that the defenders, certain of the creditors of Andrew Carfrae, "when they knew him to be in a state of insolvency, intromitted with and distributed amongst themselves a portion of his effects, without warrant of law or intimation to his other creditors; found it not alleged that before doing so they made up a state of Carfrae's debts or an inventory or valuation of the effects of which they took possession; that by this illegal and improper conduct they have rendered themselves liable, in a question with the pursuer (who was one of the other creditors), to replace the effects so carried off, or their value; and failing their doing so within fourteen days, decerned against them in terms of the libel." The only difference between *Crawford* v. *Black* and the present case is that here the stock and plant have been valued, and an estimate of the goodwill has been arrived at. This, however, does not affect the question of the defender's obligation to replace the value of what he got, and then to hold it, to use Lord Balgray's expression, as common stock for equal division among all the creditors. I am therefore of opinion that the interlocutor of the Lord Ordinary, in so far as it ordains the defender to consign, is well founded. As, however, it appears that what the defender got is less than is sufficient to pay the pursuers' debt, I do not think that decree should be pronounced against him for the sum of £189, 10s. 3d. if he fails to consign. The ground upon which in *Crawford* v. *Black* decree was pronounced against the defender for pursuers' debt if they failed to replace, was because no inventory had been taken of the abstracted goods. In that case Lord Balgray said the presumption of the law is that the value of

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