other men are, with the same responsibility as they, or were his faculties so enfeebled that, while he cannot be exempted from responsibility, his responsibility must be held as diminished by the enfeeblement of his faculties—so diminished that his crime was not murder but culpable homicide? You have heard the views of doctors and lawyers; but what you have to do is, while giving due weight to these opinions, to look at the facts and to consider, as men of the world, whether as at the date of the crime, 19th February, the prisoner was a man with ordinary responsibility, or a man whose responsibility was diminished. Formerly the law knew only two classes of persons—those wholly irresponsible and those fully responsible; and apart from murder cases that is the view which is still acted upon in our criminal courts. But in cases of murder, where the unique element of human life comes in, the law, rightly or wrongly, is now settled that the jury are entitled, if the evidence warrants it, to deal with a prisoner as in a third class—those who, though responsible, are not fully responsible, and who are considered as liable in penalty but not a capital penalty. This is a recent doctrine, and must, in the public interest, be applied with great care. It is for you to say whether the present case falls under that category. There are about seven cases in the books on the subject, all of which, with one exception, the case of *M'Lean*, are cases of murder. The law has never countenanced the idea that persons with a diminished moral sense in consequence of having been brought up in bad surroundings can be dealt with differently from others. The man's mind must have been affected to such an extent at the date of the crime that his responsibility for crime is diminished from full responsibility to partial responsibility, and that is a question of fact in each case. You have heard in this case that the prisoner had a seizure, whether from sunstroke alone or from sunstroke inducing epilepsy, in the summer of 1908, when it is undoubted that he was first unconscious and then delirious, and you have heard also about seizures in January and on 1st February 1909. But epilepsy does not necessarily produce mental deterioration, unless it is long continued, and the question for you is whether, supposing there was some mental deterioration, it was such as to diminish his responsibility, so as to entitle him to be dealt with differently from other men. [*His Lordship then went over the facts of the case, and continued*]—You will ask yourselves whether in the way in which the deed was done, and in the prisoner's conduct which preceded and followed it, and in the way in which he was regarded and treated prior to 19th February by his relatives, his companions, and his employers, there is enough, or indeed anything, to show such a want of mental capacity as to warrant your dealing with the prisoner as not fully responsible for the deed. That is a matter of fact which it is for you to consider, and I have no doubt you will determine it according to your conscience.

The jury found the panel guilty of murder as libelled.

Counsel for the Crown—A. M. Anderson, K.C., A.-D.—J. Smith Clark. Agents—W. S. Haldane, W.S., Crown Agent.

Counsel for the Panel—J. A. Christie—Armit. Agent—David Carswell, Solicitor, Leven.

COURT OF SESSION.

Wednesday, October 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

SMART & COMPANY *v.* STEWART AND ANOTHER.

Bankruptcy — Illegal Preference — Alleged Appropriation by Creditor of Debtor's Estate — Action by Other Creditor for Restoration of Estate Appropriated or for Payment of Debt — Competency — Averments—Relevancy.

A creditor of an insolvent firm brought an action against S, another creditor of the firm, in which he averred that S had obtained possession of the firm's business at his own hand for the purpose of securing his debt; that having done so he proceeded to carry on the business on his own behalf under the name of S. & Company; that he sent out the stock to firms who had ordered the same; that he interviewed the firm's customers and procured their custom for himself; that he used the firm's business books and papers; that he issued a business card representing that S. & Company were the successors of the insolvent firm; and that in this way he appropriated to himself the goodwill of the business, which, as the pursuer alleged, was of substantial value. It was not averred, however, that the defender acted as he did without the knowledge and consent of the firm's trustee. The conclusions of the action were for restoration of the estate, or otherwise for payment of the pursuer's debt, or for damages.

Held—rev. judgment of Lord Ordinary (Skerrington)—that the pursuer's averments were relevant, and proof before answer *allowed*. *Crawford* v. *Black and Others*, December 2, 1829, 8 S. 158, *approved*.

On 18th December 1908 J. Smart & Company, iron, tinplate, and metal merchants, Sunderland, brought an action against (1) George D. Stewart, tea merchant, Edinburgh, carrying on business under the name of Stewart & Company, iron and tinplate workers, 6 Gilmore Place, Edinburgh,

defender, and (2) A. L. Kennaway, W.S., Edinburgh, trustee under a trust deed granted by the late Miss Falconer, as sole partner of the insolvent firm of Falconer & Company, who was called for his interest but who did not lodge defences.

The conclusions of the action were for decree "(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 until payment." There were also conclusions for payment of the pursuer's debt, or alternatively for damages.

The nature of the action and of the pursuers' averments sufficiently appear from the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 12th March 1909 sustained the defender's pleas of incompetency and irrelevancy and dismissed the action.

Opinion.—"The pursuers are creditors to the extent of £189, 10s. 3d. of the firm of Falconer & Company, which until 17th October 1908 carried on business as tinplate workers at 6 Gilmore Place, Edinburgh. The defender is a tea merchant in Edinburgh, and he has since the date above mentioned carried on business as an iron and tinplate worker under the name of 'Stewart & Company' in the premises formerly occupied by Falconer & Company. The last-mentioned firm is insolvent, and on 17th October 1908 Miss Falconer, as its sole partner, granted a trust deed in favour of Mr Kennaway, W.S., Edinburgh, as trustee for its creditors. Mr Kennaway has been called for his interest in the present action, but as there are no operative conclusions directed against him he has not lodged defences. The pursuers allege (Cond. 11) that Miss Falconer was not in a state of health to appreciate the import and effect of the trust deed, and that her hand was guided in signing it, but they do not conclude for its reduction or plead that it should be set aside by way of exception. Accordingly I assume that this trust deed is valid.

"Shortly stated, the conclusions of the summons are to the effect that the defender Stewart having illegally and without payment appropriated to himself *brevi manu* the business and goodwill of Falconer & Company, he has made himself liable to the pursuers for the debt due to them by that firm, or, alternatively, that he is liable to the pursuers in damages.

"As was pointed out by the Lord Justice-Clerk (Inglis) in his opinion in the case of *Arnot* v. *Dowie*, 1863, 2 Macph. 119, pp. 122-123, an action brought for the purpose of compelling a defender to pay a debt due by a third party is peculiar although not unprecedented in our law. Such an action is not properly one of damages, seeing that the pursuer is not bound to prove the *quantum* of the damage which in the special circumstances the law presumes to be equal to the debt. It is, however, similar to an action of damages in respect that it is founded upon a breach of some duty which the defender owed to the pursuers. In other words, the action must be founded either upon breach of contract or upon delict or quasi-delict. An example of such an action founded upon breach of contract is one brought by an employer against a law agent or messenger-at-arms in respect of failure to take the proper steps to recover a debt; an example of liability *ex delicto* is that incurred by magistrates of a burgh who allowed a debtor to escape from jail. To the latter category there may probably be relegated the case of *Stewart* v. *Peddie*, 1874, 2 R. 94, where a person who was not the tenant of a farm was held liable to the landlord for a whole year's rent in respect that he had intromitted with the crop and stock which were subject to the landlord's hypothec.

"The pursuers' averments are somewhat long and complicated, but they may be summarised as follows:—The defender being a creditor of the firm of Falconer & Company, the sole partner of which was seriously ill, conceived the scheme of taking possession of the business at his own hand for the purpose of securing his debt. With this object he induced the landlord to terminate the firm's lease of the premises, in terms of a clause to that effect in the lease, and to grant a new lease in his own favour with immediate entry. He also bought the machinery in the premises from the persons who had supplied it to the firm, but who had 'reserved proprietary rights' therein. He further obtained a lease from Mr Kennaway, the trustee, of the plant and tools in the premises, and he secured for himself the services of Mr Falconer, a former employee of the firm. Whatever may be said as to the defender's motives, it does not appear that up to this

point he did anything illegal. But the pursuers go on to aver that the defender, having obtained possession of the premises, proceeded to carry on the business on his own behalf as a going concern under the name of 'Stewart & Company'; that he sent out the stock to firms in Edinburgh who had ordered the same; that he interviewed the firm's customers and procured their custom for himself; that he used the firm's business books and papers; and that he issued a business card representing that 'Stewart & Company' were 'successors to Falconer & Company.' In this way, according to the pursuers, the defender appropriated to himself the goodwill of the business, which, as they allege, was of substantial value. But they do not allege that the defender acted as he did without the knowledge and consent of the firm's trustee.

"It is unnecessary to consider whether these averments would have justified an action at the instance of the pursuers against the trustee for failing to sell the goodwill (see *Donald* v. *Hodgart's Trustees*, 1893, 21 R. 246), or whether they would have been relevant in an action at the instance of the firm or its trustee against the defender. The only question which I have to consider is whether they are relevant to infer a breach by the defender of some duty which he owed to the pursuers, and the consequent loss by the pursuers of the whole or a part of their debt. The pursuers' counsel founded upon the case of *Crawford* v. *Black and Others*, December 2, 1829, 8 S. 158, as deciding this question in his favour. In that case the Lord Ordinary (Corehouse) found 'that the defenders, 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: Finds 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' (a creditor who was no party to the arrangement), 'to replace the effects so carried off or their value; and failing their doing so within fourteen days, decerns against them' for payment of the full debt due to the pursuer by Carfrae. On a reclaiming note this judgment was affirmed by the First Division.

"In view of the eminence of the Judges who took part in this decision I confess with reluctance that I do not understand the grounds upon which they proceeded; various grounds occur to me, but not one which is satisfactory to my mind. It may be conjectured from a passage in the opinion of Lord Balgray that he took the view that the creditors who were parties to the arrangement had in fact, though not in intention, constituted themselves trustees for all the creditors, including those who were absent. In this view the case must be assimilated to that of *Ogilvie & Son* v. *Taylor*, 1887, 14 R. 399, where, in order to avoid circuity of action, the Court held that a trust deed granted expressly for behoof of acceding creditors might be taken advantage of by a non-acceding creditor. Again, it may be suggested that the Court proceeded upon a literal application of the principle laid down by Mr Bell (1 Com. p. 8), to the effect that from the moment of failure an insolvent's property belongs to his creditors. In this view the case might be assimilated to that of *Steuart* v. *Peddie* above referred to. Probably, however, the Court proceeded upon the view that the defenders had acted illegally, and that the pursuer had thereby suffered damage which might in the circumstances be measured by his debt. The difficulty is that Carfrae himself was the person primarily entitled to complain of the defender's illegal actings, and that a claim of damages at the instance of his creditors seems to be somewhat remote. See *Allan* v. *Barclay*, 1864, 2 Macph. 873. Carfrae could have compelled the wrongdoers either to return his goods, or to pay damages, and they could not have taken advantage of their wrongdoing by pleading compensation. The same remedy was open to Carfrae's creditors by the use of arrestments to attach his claim against the wrongdoers. In the cases of *Cook* v. *Sinclair & Company*, 1896, 23 R. 925, and *M'Laren's Trustee* v. *National Bank of Scotland*, 1897, 24 R. 920, it was decided, that although a creditor has a title to reduce an assignation as being in violation of the Act 1696, cap. 5, he has no title to recover the subject of the assignation for behoof of himself and the other creditors—his proper remedy being to use diligence against the fund. In these cases the debtor had consented to the illegal preference, whereas in *Crawford's* case he gave no consent; but this difference does not seem to me to be material so far as regards the present question. As I have been unable to discover the principle underlying the decision in *Crawford's* case, I do not think that it would be safe for me to attempt to follow that decision in the present case, the circumstances of which are in many respects different. I accordingly sustain the first and second pleas-in-law for the defender and dismiss the action. I could not allow the pursuer the proof which he asks without inferentially deciding that a person who injures or intromits with the estate of one whom he knows to be insolvent exposes himself to an action at the instance of all or any of the insolvent's creditors."

The pursuers reclaimed, and argued—The pursuers were entitled to a proof of their averments—*Crawford* v. *Black and Others*, December 2, 1829, 8 S. 158. The pursuers alleged that the defender had intromitted with their debtor's estate and appropriated it, and if so, he was liable either to restore it or to pay their debt—*Crawford, cit. supra*. An insolvent's property belonged to his creditors, and he could not gratuitously dispose of it to their detriment—Bell's Com., i, 8, and ii, 170.

Argued for respondent—The Lord Ordinary was right. The defender was admittedly in possession with consent of the trustee, so that the alleged illegal possession could only refer to the goodwill, which was of no value. The action was incompetent, for a creditor could not sue for recovery of a subject assigned, his remedy being to reduce the assignation—*Cook* v. *Sinclair & Company*, July 2, 1896, 23 R. 925, 33 S.L.R. 691. *Esto* that vitious intromitters were liable *in solidum*—*Wilson* v. *Taylor*, July 4, 1865, 3 Macph. 1060—the respondent was not a vitious intromitter, for he had a good title. In any event a creditor of an insolvent could not recover the full amount of his debt irrespective of the claims of the other creditors—*Mackenzie* v. *Thomson*, November 12, 1846, 9 D. 35.

LORD KINNEAR—It appears to me that the Lord Ordinary has proceeded rather hastily in this case, and that we ought to allow a proof before answer. In this view I think it is undesirable to express any opinion upon the various questions which have been discussed at the bar, because I think they cannot be satisfactorily decided until the facts are ascertained.

I shall only say with regard to the case of *Crawford* v. *Black* (1829, 8 S. 158), which was discussed, that I am unable to assent to the criticism, which appeared to challenge the soundness of that decision. It is the unanimous judgment of the First Division affirming a decision of Lord Corehouse, and is therefore of the highest authority; and it seems to me to be entirely consistent with the settled principles of the law of bankruptcy.

LORD DUNDAS and LORD JOHNSTON concurred.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to allow a proof before answer, and decerned.

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

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

Wednesday, October 20.

FIRST DIVISION.

[Dean of Guild Court at Paisley.

STEVENSON *v.* LEE.

Burgh—Dean of Guild—Street—Building Regulations—"Cul de sac"—Paisley Police and Public Health Act 1901 (1 *Edw. VII, c. cciv*), *sec.* 20.

A proposed street of 60 feet in width from the bottom of which there would be egress by a lane 20 feet wide to another street, does not terminate in a *cul de sac.*

The Paisley Police and Public Health Act 1901 (1 Edw. VII, c. cciv), sec. 20, enacts—"In every case where an application is made to the Dean of Guild Court for authority to form and lay out any new street, the Court shall have power, if in the circumstances of the case they think it proper and expedient to do so, to impose all or any of the following conditions, viz.—(1) That the street shall not terminate in a *cul de sac.* . . ."

On 29th January 1909 Thomas Stevenson, builder, Paisley, presented a petition to the Dean of Guild, Paisley, for warrant to form (1) a street 60 feet wide running from Clark Street through his ground to a point about 59 yards from an existing street known as Greenhill Road, and (2) a lane 20 feet wide connecting the proposed street with Greenhill Road.

The application was opposed by James Lee, Master of Works for the burgh of Paisley, who pleaded that the warrant craved should be refused in respect that the proposed street ended in a *cul de sac.*

On 24th March 1909 the Dean of Guild sustained the respondent's contention and refused to grant a warrant.

The petitioner appealed, and argued that he was entitled to the warrant craved, as the street in question would not end in a *cul de sac.* The considerations based on public expediency now urged by the respondent were not *hujus loci*, as they were not raised by the pleadings.

Argued for respondent—The Dean of Guild was right. A street in order to be a street in the sense of the Act must be of a minimum width of 50 feet—Paisley Police and Public Health Act 1901 (1 Ed. VII, c. cciv), sec. 16. The proposed street *qua* street ended in a *cul de sac.* It was not enough that there would be an exit from the bottom of the street. It was for the public advantage that the whole of the street should be of the minimum width prescribed by the Act.

LORD KINNEAR—I think there is only one question properly raised for the decision of this Court. The petitioner applied to the Dean of Guild Court for authority to form a new street running from a point in an existing street called Clark Street to a point about 59 yards from another existing public street called Greenhill Road, and to form what he describes as a lane from that point, 59 yards from Greenhill Road, to Greenhill Road itself, which lane, instead of being 60 feet wide, as the street was intended to be, should be 20 feet wide. There is, according to the plans, to be a street running between Clark Street and Greenhill Road, which for the greater part of its distance is to be 60 feet wide. When it comes within 59 yards from Greenhill Road it is to be 20 feet wide only. The Dean of Guild has refused to grant a warrant on one ground only, namely, that the statute says that the Dean of Guild Court shall have power, if