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

they think it appropriate and expedient, to impose as a condition of authority to lay out a new street an obligation that the street shall not terminate in a *cul de sac*. And the Dean of Guild says that, as laid out on the plan, the proposed street does terminate in what he considers a *cul de sac*, and therefore he will not grant authority.

Now, I confess that I am quite unable to agree with the Dean of Guild in his construction of that clause. *Cul de sac* is a metaphorical phrase of the French language, but it has been shown to us that it has been recognised as an English term by English dictionaries, and it is a matter of common knowledge that it is familiar in the ordinary use of language as if it were English. We may therefore construe the words for ourselves, and I suppose that *cul de sac* in reference to a street means in English exactly what it means in French. It is a street which has only one issue. It is what is called in older English a blind alley. Now, I am of opinion very clearly that, whether it be inconvenient or not, a street 60 feet wide ending in a lane 20 feet wide, which again communicates with a public street, is not a *cul de sac* or a blind alley. It is a thoroughfare, because it has an issue in Clark Street at one end and in Greenhill Road at the other.

Whether it is convenient or inconvenient for the traffic of that part of Paisley that a street of this kind should be made without its being continued of one uniform width from one end to the other is a totally different question. It is a question with which we have nothing to do, and, so far as I see upon record, it is a question which was not raised in the Dean of Guild Court at all. The only question raised on the record between the parties is whether this is or is not an infringement of the statutory prohibition which the Paisley Police and Public Health Act of 1901 contains against forming a street which ends in a *cul de sac*. The respondent's plea-in-law is—"As the proposed new street ends in a *cul de sac*, warrant for lining ought not to be granted;" and the final interlocutor of the Dean of Guild Court is that ". . . . in respect that the petitioner has failed so to amend his plan as to prevent the proposed new street ending in a *cul de sac*, sustain the respondent's plea-in-law." The whole judgment, therefore, proceeds upon what appears upon the face of the plans of the petitioner's proposal, and upon the construction which the Dean of Guild puts upon that particular clause in the Act of Parliament.

I am accordingly of opinion that we ought to recal the interlocutor appealed against, and remit to the Dean of Guild to repel the plea-in-law for the respondent James Lee and to proceed. I think we ought to remit to the Dean of Guild to proceed as shall be just rather than decide for ourselves that the lining should be immediately granted, because we do not know what questions in which either the objector or the public may be interested may or may not arise before the Dean of Guild. We should interfere as little as possible with the procedure of the Dean of Guild Court, and the best way in which we can do that is to pronounce the interlocutor I have suggested.

LORD DUNDAS—I agree. With all respect to the Dean of Guild, I think he has erred in that he has misapprehended the meaning of the term *cul de sac*—a rather unfortunate one to find in a Scottish Act—which occurs in section 20 of the Paisley Police and Public Health Act of 1901. I think in popular language the idea of a *cul de sac* is, as your Lordship has put it, "no thoroughfare"—a place so formed that there is no egress from it except by the way of entrance,—and that certainly cannot be said of the proposed street shown on this plan, because it is to have egress to the west by a proposed lane 20 feet wide. But Mr Brown, and to some extent his learned senior, urged that that lane as shown on the plan is not a lane within the meaning of the definition of the local Act. That argument, upon the merits of which I express no opinion, might have formed an objection to the granting of the lining, at least so far as the lane is concerned, but that, as your Lordship has pointed out, is not raised on this record. The parties have joined issue upon a closed record, the respondent's only plea being that "As the proposed new street ends in a *cul de sac*, warrant for lining ought not to be granted." I am quite content to put my opinion on this, that the proposed street shown upon the plan is not a *cul de sac*, and that therefore the only plea stated for the respondent ought to be repelled.

LORD JOHNSTON—I am of the same opinion, on the very short ground that a street 60 feet wide which ends in a lane 20 feet wide does not end in a *cul de sac*. That is the only question raised upon the pleadings on which the record was formally closed. Were this case coming from any court of ordinary jurisdiction and not from the Dean of Guild Court, I think our only course would have been to sustain the appeal and direct the lining to be granted; but I agree with your Lordship that in such a court as that of the Dean of Guild it is right to send the case back to the Dean of Guild to proceed therein as may be just, because the public interest is, of course, involved. But in doing so I should like to say that Mr Blackburn has advanced considerations in this matter, and put them into the mouth of the Dean of Guild, which seem to me to be very questionably legitimate considerations for the Dean of Guild to entertain in determining this or any further question between these parties. I refer to the considerations, not of public health in relation to the width of the street which is being built, nor of traffic in the lane in which the proposed street ends, but what I may shortly term of "town planning," as if the Dean of Guild was entitled to stop a building until others are brought into line. I desire to reserve my opinion upon that, because I think that such questions are of very doubtful legitimacy.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court sustained the appeal, recalled the interlocutor of the Dean of Guild, and remitted to him to repel the plea-in-law for the respondent James Lee and to proceed as should be just, and decerned.

Counsel for Petitioner (Appellant) — Morison, K.C.—Hon. W. Watson. Agents —Webster, Will, & Company, S.S.C.

Counsel for Respondent—Blackburn, K.C. —Scott Brown. Agent — F. J. Martin, W.S.

Friday, October 22.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

GORDON'S TRUSTEES *v.* THOMPSON.

Servitude—Thirlage—Contract—Agreement to Pay Fixed Sum—Liability of Singular Successor—Discontinance of Mill.

In 1806 the proprietor of lands astricted to a thirlage mill and the proprietor of the mill entered into an agreement by which the proprietor of the thirled lands bound himself and his successors therein to pay certain sums annually in lieu of the multures and other dues, and it was further provided that the proprietor or occupier of the mill should not be bound to afford the use of his mill except of consent and at agreed-on rates. The agreement was recorded in the Register of Sasines and the payments so fixed continued to be made till 1908, when a singular successor in the thirled lands refused to continue the payments on the grounds (1) that the agreement was a personal one which was not binding on singular successors, and (2) that as the mill had been abandoned for more than forty years multures could not now be exacted.

Held that the defender was liable, and decree granted as craved.

On 10th December 1908 Henry Gordon, of Manar, Aberdeenshire, and another, surviving testamentary trustees of the late Alexander Gordon of Dyce in the County of Aberdeen, brought an action against Mrs Mary Stewart or Thompson, proprietrix of the estate of Pitmedden in the Parish of Dyce, for declarator that the defender, as proprietrix foresaid, was due certain sums as commuted multures under a servitude of thirlage and contract of commutation, and for payment thereof.

The defender pleaded, *inter alia* — "(3) The contract for the commutation of the said multures founded on by the pursuers being a personal contract between the parties thereto, and not being binding on the defender, she is entitled to absolvitor. . . . (4) The Mill of Dyce having been abandoned for more than the space of forty years, the pursuers are not entitled to claim any sum in respect of multures from the defender."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 25th March 1909 granted decree as craved.

Opinion.—"The pursuers are the trustees of the deceased Alexander Gordon of Pitlurg and Dyce; the defender is proprietrix of Pitmedden.

"The conclusions of the actions are—(*First*) that it should be declared that the defender, as proprietrix of the lands of Pitmedden in the sucken or thirl of the Mill of Dyce in the barony of Dyce, situated in the parish of Dyce and county of Aberdeen, and as a successor in the said lands of Pitmedden of the deceased Alexander Innes of Pitmedden, and the defender's successors in the said lands of Pitmedden, are bound to make payment on the 26th day of May yearly in all time coming to the pursuers, as trustees aforesaid, as heritable proprietors of the said Mill of Dyce, and to their successors in the said mill, of the money value according to the fiars' prices for the year of certain quantities of meal and bere, all under and in terms of a contract between Andrew Skene, sometime proprietor of the barony of Dyce, including the Mill of Dyce, and Alexander Innes, sometime proprietor of the said lands of Pitmedden, dated 24th May, and recorded in the Register of Sasines on 24th May, and registered in the Sheriff Court Books of the county of Aberdeen on 29th May, all in 1806; and (*Second*) that the defender should be ordained to pay the sum of £9, 12s. 9d., the amount due for the year 1908. Payments were duly made under the contract until 1907. The defender is a singular successor of Alexander Innes in the lands of Pitmedden, the estate having been purchased by her late husband in 1897. The question in the case is whether the contract of 1806 is a personal contract merely, and therefore not binding on the defender, a singular successor.

"The contract of 1806 proceeds on the narrative that the lands of Pitmedden had been from time immemorial thirled and astricted to the Mill of Dyce, and had paid and performed in consequence of such thirlage the multures, dues, sequels, and carriages therein set forth, and that Alexander Innes was desirous that the multures, &c., should be commuted into an annual payment in terms of the Act 39 Geo. III, cap. 55, whereby his lands of Pitmedden should be relieved of all future payments and services in kind to the Mill of Dyce. It then sets out that the parties had come to an amicable adjustment of the matters appointed by that Act to pass to the knowledge of a jury in respect of such thirlage, and provides that Alexander Innes, in consideration of Andrew Skene departing, on the conditions specified in the contract, from all claims of thirlage in kind over the lands of Pitmedden from and after 26th May 1807, binds and obliges himself and his successors in the lands of Pitmedden to pay to Andrew Skene and his successors in the Mill of Dyce, multures at the rate set forth in the contract in lieu of