agreements which were dated after the bankruptcy of the tenant. Therefore the debt which the landlord incurred for the price of these things is a debt which could not have existed at the date of the bankruptcy. That leads me to conclude that there is no room for a balancing of accounts. The landlord owes this debt to the trustee personally. I therefore think that the Sheriff-Substitute has mistaken the principle of the case, and has applied the rule of balancing of accounts to a case to which it cannot apply.

Lord Mure—The question is whether from the sum of £328, 14s. the landlord can deduct £108, which he has undertaken to pay to the trustee, and rank for the balance. At the date of the *cessio* there were several years of the lease to run. The trustee and the landlord came to an agreement which your Lordship has quoted, and it is quite plain that the claim for the £108 did not exist at the date of the *cessio*, but emerged afterwards in consequence of the agreements.

Lord Adam—The question is whether the £108 is a debt due to the bankrupt or a debt due to the trustee arising after the bankruptcy? If it is a debt due to the trustee there is no *concursus debiti et crediti*. I think it is plain that the debt is due to the trustee, and that it arises from the very reasonable agreements entered into between him and the landlords.

Lord Shand was absent from illness.

The Court recalled the interlocutor of the Sheriff-Substitute and affirmed the deliverance of the trustee.

Counsel for the Appellant—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Balfour, Q.C.—Ferguson. Agents—Gordon, Pringle, & Dallas, W.S.

Wednesday, January 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

TAYLOR (JONES' TRUSTEE) *v.* JONES.

Bankruptcy—Cash Payment—Fraudulent Preference at Common Law.

The trustee in a sequestration raised an action for repetition of sums retained by the bankrupt's daughter out of payments made to her as saleswoman in her father's shop, when she knew he was insolvent, and within sixty days of his bankruptcy. The defence was that these were cash payments of arrears of wages for two years due to her. The Court *held* that the trustee was entitled to repetition, the Lord Justice-Clerk and Lord Craighill being of opinion the payment was in the circumstances a fraudulent preference over the other creditors, Lord Craighill being further of opinion, with Lord Rutherfurd Clark, that there was no sufficient proof of the existence of the debt

On 10th March 1886 Robert Jones, hardware merchant, 104 Gallowgate, Glasgow, was sequestrated, and James Taylor, chartered accountant, Glasgow, was appointed trustee on his estate. Taylor raised this action against Maria Borland Jones, the bankrupt's daughter, for the sum of £69, which he averred the bankrupt had paid her at different dates between 27th February and 30th March 1886 as wages said to be due to her for services as assistant and saleswoman in his shop. He averred—"(Cond. 5) The defender by reason of her near relationship and knowledge of the bankrupt's business was conjunct and confident with him, and the said sums were received by her, well knowing that her father was insolvent and that his creditors were thereby defrauded thereof. (Cond. 6) The said bankrupt was at the time and still is insolvent, and the transfer of funds above mentioned was an alienation struck at by the Act 1621, cap. 18, and also reducible at common law."

The defender stated that her father had engaged her as assistant saleswoman at a salary of 15s. per week, over and above her board, from 27th December 1883 till 22nd December 1885. In December 1885 a composition arrangement had been unsuccessfully attempted, and the defender stated that at that time her claims as well as those of her brother were tabled and considered by a committee of creditors, and were admitted to be correct, and that her father continued thereafter to carry on his business until his sequestration. She explained "that said salary was not paid to her as it fell due; that she did not press her father for same as she knew he was scarce of money for the requirements of the business, and as she did not actually need the money at the time, and knew that it was sure. Explained further, that defender, after the private settlement of her father's affairs fell through, demanded payment from her father of her salary up to date, and received from him in part payment thereof the sums sued for."

The pursuer pleaded—"(1) The defender being a daughter of, resident with, and helper in business to, the bankrupt, is a conjunct and confident person with him. (2) The said sums having been handed over by the bankrupt and received by the defender in the knowledge of the bankrupt's insolvency within sixty days of bankruptcy, and having been handed over gratuitously, and without just, true, and necessary cause, and the bankrupt being still insolvent, the transaction constitutes an alienation struck at by the Act 1621, c. 18, and a fraud against Robert Jones' creditors reducible at common law."

The defender pleaded—"(1) The bankrupt having been justly indebted to the defender in said sums as wages due to her for services rendered, he was entitled to pay same on receiving a discharge thereof. (2) The sums paid to defender being for value, and for a true, just, and necessary cause, the transaction in question is not struck by the Act 1621, cap. 18, and is not reducible at common law."

Proof was led, in which parole evidence alone was tendered of the alleged debt, the witnesses being the bankrupt himself, the defender, and her brother. It was proved that the pursuer knew that her father's sequestration in bankruptcy could be delayed only for a few weeks after she received the payments in question. The import of the proof

fully appears in the notes of the Sheriffs, and in the opinions of the Judges.

The Sheriff-Substitute (GUTHRIE) on 12th January 1887 pronounced this interlocutor:—"Finds that it is not proved that the defender's wages during the whole period of her employment in the bankrupt's shop were unpaid and resting-owing when these sums respectively were paid to her, and *separatim*, and on the assumption that the defender's wages were unpaid, that these payments were made fraudulently, either for the purpose of giving the defender a preference over the bankrupt's other creditors, or of defeating their just claims, and that the pursuer is at common law entitled to repetition thereof: Therefore decerns as craved.

"*Note.*—This case involves points of law of some nicety not very clearly apprehended by the procurators of the parties, who did not refer to the more important authorities. I have therefore been obliged to consider the proof and the law for myself with a good deal of trouble and anxiety, and I feel that it is very possible that the Supreme Court may, if it has to review my judgment, alter it or put it upon different grounds.

"I do not think that the first branch of the Act 1621, c. 18, on which the pursuer mainly relied, applies to the facts. It is not plainly stated by Professor Bell in regard to the first branch of the statute, as he states in regard to the second branch (2 Com. 201, 188, M'Laren's ed.), and in regard to the Act 1696, c. 5 (2 Com. 215, 201, M'Laren's ed.), that it does not apply to cash payments. But (1) the words of the Act itself are still less adapted to include payments *in pecunia numerata* than those of the second part which it has been expressly decided does not touch them; (2) no case has occurred in which such payments have been set aside under the Act; and (3) the *ratio* given by Lord Kilkerran in reporting the leading case on the subject, applies with equal force to all the statutory enactments as to fraudulent preferences. Lord Kilkerran says (*Forbes* v. *Brebner*, 1751, M. 1128), not only that 'there is no instance where a payment *in pecunia numerata* has been found to be affected by any of the statutes concerning bankrupts, nor has any of our lawyers ever said so; but also that the subjects which the statute supposes to be affected are only the debtor's lands or his goods, or the price thereof, none of which comprehended his ready money, and as none of the statutes do restrain him from spending or squandering his ready money, it would have been strange to have restrained him from giving it to his creditors.' Comp. *Stirling*, 1752, 5 B. Sup. 800; *Bean* v. *Strachan*, 1760, M. 907, and other cases in Bell's Comm. ll. cc., and Burton on Bankruptcy, pp. 141, 249.

"There can be no higher authority than Kilkerran, and it seems therefore that the pursuer can derive no aid from the Act of 1621, on which he chiefly relied.

"There has long been a difficulty or obscurity about the setting aside of cash payments for fraud at common law. Professor Bell (ii. Comm. 243, 245; in M'Laren's ed. 226, 228) leaves the door open for setting such payments aside at common law in circumstances manifestly indicating an advantage gained over the other creditors, as, *e.g.*, where a debt is paid before its due date. The case of *Thomas* v. *Thomson*, 1865, 3 Macph. 358 (which was not referred to at the debate) has been understood to lay down the rule (see M' Laren's note, ii Bell's Comm. 226) that 'a payment in cash cannot be set aside by proof of insolvency and collusion.' But this case is reported without any detail of the grounds of judgment, and left the law in a somewhat vague condition. The rule of law is made rather more distinct by the last decision on the subject (*Coutts' Trustees* v. *Webster*, 1886, 13 R. 1112), although there it seems still to be doubted whether as a matter of fact there can be a fraudulent payment in cash of a due debt. At all events, Sheriff Campbell Smith, in his clear and able judgment, which Mr Rettie's reporter has not given, but which may be found in 2 Sh. C. Reports 227, and which is adopted by Lord Young, has clearly brought out the result of the existing case law on the subject, viz., that a fraudulent cash payment to a true creditor is possible, or at least conceivable, and if it occurs will be set aside; but that the creditor's mere knowledge of the debtor's insolvency is not conclusive evidence of collusion. This approaches very nearly to a negation of the reducibility of any cash payment for collusion, for if a man knows that his debtor is insolvent, *i.e.*, that he cannot pay all his debts in full, and yet accepts payment of his own debt, it is difficult to say that he is not participant in the insolvent's fraudulent (2 Bell's Comm. 170 and 226, M'Laren's ed.) design of deceiving and defeating his other creditors. In this view payment in cash is an exception to the general rule that fraudulent preferences are reducible, and it has some appearance of being illogical and contradictory to ingraft on it a sub-exception of cash payments which are fraudulent and collusive. I take it, however, that Lord Young's remark that insolvency is merely impecuniosity, and may pass over a man like a summer cloud, points to the true solution of such questions as we have here, and that cash payments like other preferences must be set aside whenever the creditor is not merely affected with a suspicion or knowledge of his debtor's embarrassed affairs, or even insolvency; but when he has a full and certain knowledge that the debtor is immediately to become openly bankrupt, and in that knowledge not only connives, but actively concerts with him a plan for diverting to himself the funds that truly belong to the whole body of creditors. The facts we have here humbly appear to me to come up to this, which is perhaps the case which the Sheriff-Substitute and Lord Young, in *Coutts' Trustees* v. *Webster*, 'leave to the imagination.' We have the defender in the position of a creditor for wages not drawn for two years, fully acquainted with all her father's circumstances, knowing of his failure to settle with his creditors for a small composition, knowing also that his sequestration in bankruptcy could be delayed (as it was) only for a few days or weeks, and in this state of affairs concerting with him, or, as she says, compelling him, to hand over to her all the money they were able to collect from customers while still carrying on the business, in payment of her own debt. It is not unimportant to notice that this money was applied in setting up a new business in her own name, by which the bank-

rupt and his family are now supported, and that in the same way a preference was also given to the defender's brother for a loan due to him. I own that I have some doubt whether the Court will not eventually come to say practically that cash payments are absolutely excluded from reduction at common law as well as under the statutes, but it seems difficult to 'imagine' a case in which there could be circumstances more clearly indicative of *malæ fides* in the person favoured, in which case Professor Bell (2 Com. 245, 228, M'Laren's ed.) holds that even a cash payment must be set aside.

"If, however, this ground be thought insufficient to justify the pursuer's claim, I have come to think that he must succeed on this other ground, that there is not sufficient evidence that the defender had any just claim to the extent alleged against the bankrupt. The claim rests entirely upon the parole evidence of the bankrupt, the defender (his daughter), and his son. There is little or no corroboration from the other witnesses, who had no means of knowing whether the defender got payment of her wages in the usual and natural way, or indeed what arrangement as to the amount of her wages had been made. The proper evidence of a debt such as the defender alleges should have been found in the books of a trader such as the bankrupt was, if such books had existed. But no such books were kept, and the want of them is a 'crime and offence,' for which the debtor is punishable under the Debtors (Scotland) Act 1880. I would not press hardly on the defender because her father has neglected to keep books that would explain his transactions, but I am bound to require clearer evidence than is offered in this case of a claim *inter conjunctos*, which is in itself of an unusual character, and which if the law had been observed would have been evidenced more or less conclusively by the bankrupt's books."

On appeal the Sheriff (Berry) on 7th November 1887 adhered.

"*Note.*—If I felt myself shut up by the evidence to the view that the defender in this case was a true creditor of her father to an amount equal to or exceeding the sum of £69, which was paid to her at or about the time of her father's sequestration, I should have difficulty in deciding the case in favour of the pursuer. Whether the rule of law be an expedient one or not, it seems to me that the decisions do establish it as a rule that a payment in cash by an insolvent person to a creditor is a valid payment which cannot be set aside, although both debtor and creditor are aware at the time of the payment that the debtor is insolvent. Undoubtedly the circumstances here make it a strong case in which to allow such a rule of law to be applied in the creditor's favour. It is obvious that the daughter knew that sequestration was unavoidable, and that it was impossible that her father could retrieve his position, but in the absence of authority for the proposition that knowledge of the debtor's circumstances being so hopeless justifies an exception to the rule which I have stated, and is sufficient to make the payment fraudulent and reducible at law, I do not think I am free to recognise such an exception. The decision in *Thomas* v. *Thomson*, 3 R. 358, seems to me to lead to that conclusion. On a consideration of the evidence, however, I do not feel myself shut up to the conclusion that it has been proved on the part of the defender that a valid debt to the amount of £69 was resting-owing to her by her father as she alleges. I think in the circumstances that the burden of proof lies upon her to establish the existence of the alleged debt, and she has in my opinion failed to sustain that burden. There can be no doubt that she acted in the shop as her father's saleswoman. What her remuneration was to be is spoken to only by herself, her father, and her brother, and whether any part of her remuneration or wages was paid to her during the period of two years for which the agreement is said to have subsisted depends on the evidence of her father and herself, the alleged debtor and creditor. No doubt her brother also speaks of his being 'aware' that his sister never got any wages during the two years, but he did not live in family with his father and his sister, and it is plain that his evidence on that point cannot be of any weight. At the best it can only be hearsay evidence, for he cannot possibly know whether his father did or did not make any payment to his sister. Taking, then, the case of the alleged non-payment as depending upon the evidence of the alleged debtor and creditor, I cannot regard it as proved that no payment during the whole period of two years was made of the wages which are said to have been agreed upon. There is strong improbability in face of the allegation to that effect. It is hardly credible that, if the daughter was entitled to wages in cash at the rate of 15s. per week, she would have remained for two years without making any demand for payment. The practice in the father's business seems to have been to pay all other wages or salary weekly or at short intervals, and no sufficient explanation is given for a similar course not having been followed in regard to the defender. No doubt she boarded with her father, and had not to pay for board and lodging, but she must have required articles of clothing, although it is said that she was well provided in that way, for during a period of two years' clothing which she had at the comencement of it can hardly have been sufficient. The story is attended with such suspicion that I cannot regard it as proved. I think therefore that the pursuer is entitled to succeed, on the ground that it is not shown that a just debt to the amount of £69 was owing to the defender at the time of the bankruptcy. In considering the law of the case, I have confined myself to the rules of common law, and have avoided considering the question under the first branch of the Act of 1621. The language of that statute is not favourable to its being applicable to the case of payment in cash, and although there are obvious dangers in allowing such payments not to be included within its operation, I do not feel justified, in the absence of authority, in holding that such a case falls within the scope of the statute."

The defender appealed, and argued—(1) She had discharged the *onus* of proving that a just debt to the amount sued for was owing to her as wages at the time of her father's bankruptcy. This she had done by the only evidence available for the purpose, viz., that of her father, brother, and herself. (2) This well-established debt could not be set aside either under the statutes

1696, c. 5, 1621, c. 18, or at common law. The debt was just such a cash payment by an insolvent debtor to a creditor as was held effectual in spite of the creditor's knowledge at the time of his debtor's insolvency—*Thomas* v. *Thomson*, January 13, 1865, 3 Macph. 358, 37 Scot. Jur. 166; *Coutt's Trustee and Doe* v. *Webster*, July 8, 1886, 13 R. 1112; *vide* also Bell's Comm. (7th ed.) ii. 226.

The pursuer replied—(1) The defender had failed to prove the existence of the debt. The only evidence adduced was that of the alleged debtor and creditor and the hearsay evidence of her brother. The story was otherwise highly improbable. On this ground she must fail in her case. But (2) assuming she had a well-established debt against her father for her unpaid wages, it was proved that she was aware of her father's insolvent condition, and had control over the proceeds of the business, and the payment was therefore fraudulent, and reducible at common law as an attempted creation of a preference over her father's other creditors. It was not correct to say that the cases of *Thomas* and *Coutt's Trustee* absolutely established the rule that a payment in cash could not be set aside by proof of insolvency and collusion. It was clear that in both those cases the element of fraud was wanting, and in the latter case it was hinted that if there had been fraudulent collusion it would have been dealt with differently—indeed, it might be said that in that case there was an element of honesty which did not exist here at all. Professor Bell's dictum on p. 226 of his Commentaries, vol. ii. (7th ed.), as to the setting aside of such a payment as the present, was untouched by these cases. The case of *Shaw's Trustee* v. *Stewart and Bisset*, Nov. 15, 1885, 13 R. 32, showed that the cases established no general rule, and indeed with the exception of the element of the *cessio* proceedings this case was on all fours with it.

At advising—

Lord Justice-Clerk—The question relates to a payment of a sum of money made to and retained by a daughter, said to be the amount of two years' wages due to her by her father, who has become bankrupt.

It appears that the daughter succeeded in the management of the business of her father to a regular shopman who had left the employment. She says it was agreed that she was to have wages at 15s. per week. There is no evidence to the contrary, and the father and brother concur in her statement. The first question is, whether the statement is true that she was entitled, at the dates at which she obtained the payments in question as her father's creditor, to a sum in respect of unpaid wages at 15s. per week. In ordinary circumstances that is a simple issue. She was the shopwoman actually conducting the business in her father's shop in the face of the public. *Prima facie*, if she had been a stranger she must have had wages. Now being a daughter does not disentitle her to wages, and the only persons who could give evidence to the effect that she was so entitled were examined.

But it is said that even if she had a right against her father she was not entitled to receive the payment in question in the circumstances in which it was made. At that point the case assumes a very different aspect. The simple narrative of the facts is this:—The father was in difficulties in December 1885. A meeting of creditors was called at which the various claims were discussed, and a proposal for a composition settlement was entertained for consideration. I attach for my part some importance to the fact that the claims of this daughter and her brother were then tabled, and as there is no denial of the averment upon record I assume that they were considered and admitted. It is said that that may be true enough but that a fraud was committed upon the other creditors, because in the full knowledge of the father's insolvency the daughter retained the amount of her own debt out of the money she drew in carrying on the business. Now, holding, as I do, that the claim for wages is sufficiently made out, which I see no reason to doubt, I am still of opinion that for the daughter to take full payment as a creditor in the knowledge of her father's insolvency, and while acting as his servant, was an illegal preference, and was a fraud upon the other creditors. A creditor obtaining a preference in such circumstances does that which comes within the common law rule. There is here no case under the Act 1696, and I doubt if there is a case under the Act 1621. But I think it is a simple case of a fraud at common law. I think that after what took place, and the knowledge she had of her father's insolvency, she was not entitled to take payment as she did.

Lord Craighill—I am of the same opinion. The case is peculiar, and I know of none in which a payment has been sustained in such circumstances. There was not here a cash payment by the father to the son and daughter. On the contrary, the truth of the case is that once the compromise fell through the daughter decided to get at all hazards payment of her alleged claims. She insisted upon getting payment, and threatened to leave if it were not made. So we see there was an unwillingness on the father's part to pay her. What occurred after that was that the father seems to have consented that the money drawn, partly by sales, and partly by the collection of the accounts in his business which his son and daughter were managing, should be applied by them in payment of their demands. That is what took place according to the way in which I read the evidence of the son and daughter. That is not a cash payment by the father, but, on the contrary, a taking payment by the son and daughter out of the drawings of the business which they managed. The business was just handed over to one creditor to the prejudice of the others. To say that that transaction cannot be impugned at common law is to state a proposition which I cannot accept. The business seems to have been really carried on for the benefit of the son and daughter (the world knowing nothing about it), and to accomplish a preference for them. That preference, I think, cannot stand.

Further, while I put my judgment on the same ground as your Lordship, I doubt the constitution of the debt. The evidence of the parties interested is inconsistent with their conduct. I agree with the Sheriff-Substitute in thinking that if week by week a debt of 15s. had become owing and payable to the daughter, it is hardly

credible that she should have been paid nothing although all the other persons connected with the business were paid.

Lord Rutherfurd Clark—I agree in thinking that the judgment should be affirmed on the grounds which the Sheriff has assigned. If I thought that this was a just debt due by the father to his daughter I should hold that the case of *Thomas* v. *Thomson* applied, and I should feel myself bound to give effect to it, not only out of respect to the decision, but out of respect to the repeated approval of it in subsequent cases. Nor do I see in any of the circumstances of this case any fraud on the other creditors beyond what was there held not to be fraud. But while that is so, I think that in a case of this kind it is incumbent on the person who has received payment of the alleged debt in such circumstances to show clearly that the debt is due. I mean that a person who has received payment of a sum from an insolvent person, knowing him to be insolvent, must show clearly that the debt is an honest one, otherwise the payment will not be sustained. We have not here anything like sufficient proof. We have the statement by the father of his daughter's employment, and that is corroborated by the son. But it is necessary to prove more than that the debt subsisted at the time. It must also be proved that although the daughter was hired she never received a farthing in payment of wages. It is impossible to believe that if this relation was indeed ever established it was ever acted on. I am therefore very clearly of opinion that there is no sufficient proof of the existence of the debt in respect to which the payment was made. I therefore think that the Sheriff should be affirmed. I can see that I am bound to follow the case of *Thomas*, but I am not sorry to see your Lordships inclined to depart from it.

Lord Young was absent.

The Court affirmed the judgment of the Sheriff.

Counsel for the Appellant—Goudy—A. S. D. Thomson. Agent—Walter R. Patrick.

Counsel for the Respondent—Sir C. Pearson—Kennedy. Agent—Gregor Macgregor, W.S.

Thursday, January 26.

FIRST DIVISION.

[Exchequer Cause—Lord Fraser.

THE LORD ADVOCATE *v.* DUKE OF BUCCLEUCH.

Revenue—Succession Duty Act 1853 (16 *and* 17 *Vict. c.* 51), *sec.* 21—*Value of Unlet Shootings.*

The Succession Duty Act of 1853 provides, by sec. 21, that "the interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property." *Held* that under this section succession duty was payable upon the value of unlet shootings.

This was an action at the instance of the Lord Advocate, on behalf of the Commissioners of Inland Revenue, against the Duke of Buccleuch and Queensberry, concluding for payment of £606, 1s 4d., the amount of the first, second, third, fourth, fifth, and sixth instalments of the succession duty alleged to be payable by the defender in respect of the value of unlet shootings on landed estates in Scotland to which, or the income thereof, the defender became beneficially entitled as successor on the death of his father on 16th April 1884, with interest at the rate of 4 per cent. on each of the said six instalments of succession duty from the dates at which they respectively fell due.

The pursuer averred that the annual value of these shootings, as shown by the valuation roll at the date when the defender succeeded, was £6815, 5s. 7d., and that they formed part of the value of his succession. The pursuer further averred—"By section 21 of the Succession Duty Act of 1853 (16 and 17 Vict. c. 51) it is provided that the interest of every successor in real property shall be considered to be of the value of an annuity equal to the annual value of such property, payable from the date of his becoming entitled thereto, and every such annuity shall be valued according to the tables in the schedule annexed to the Act. The defender was fifty-two years old at the time the succession opened to him, and according to Table I annexed to the Act the value of an annuity of £6815, 5s. 7d. sterling, for the life of a person of that age is £80,808, 15s. 3d. sterling. The succession duty thereon, at the rate chargeable, 1 per cent., is £808, 1s. 9d. sterling. That duty, in terms of section 21, is payable by eight half-yearly instalments, the first being payable at the expiration of twelve months next after the date of the late Duke's death, and the remaining instalments at intervals of six months each thereafter. The first six instalments are already past due, having been respectively payable at the dates mentioned in the summons."

The defender averred that the shootings of the Buccleuch and Queensberry estates had never been let prior to his succession, and that consequently they had yielded no income or profits, and that this was the first claim which had been made for payment of succession duty upon the value of unlet shootings.

The pursuer pleaded—"(1) The annual value of the unlet shootings ought to be taken into account in ascertaining the value of the interest to which the defender became entitled on succeeding to his father in the said estates."

The defender pleaded—"(1) The pursuer's statements are irrelevant and insufficient in law to support the conclusions of the summons. (2) The defender should be assoilzied, in respect that the said shootings were yielding no annual income when he succeeded, and had not previously been let."

On 12th January 1888 the Lord Ordinary (Fraser) repelled the first and second pleas for the defender, and granted leave to reclaim.

"*Opinion.*—It was stated at the debate that this is the first case in which a claim for succession duty on unlet shootings has been made the subject of judicial discussion in Scotland, though the Revenue Department have been in use to make the claim and have exacted the