Tuesday, November 15.

SECOND DIVISION.

(Sheriff of Perthshire.

LAMOND (SHAW'S TRUSTEE) *v.* STEWART & BISSET.

Bankruptcy—Cash Payment by Notour Bankrupt—Fraud.

A notour bankrupt, against whom a petition for *cessio* had been presented by one of his creditors, sold a large portion of the stock and implements on his farm, and, with the proceeds of the sale, paid in cash a debt due to another creditor. An order had previously been pronounced in the process of *cessio*, which the bankrupt failed to obey, ordaining him to lodge a state of his affairs by a certain date, and the sale was effected the day before that on which the state should have been lodged. The creditor when he obtained payment had knowledge of the notour bankruptcy, the dependence of the process of *cessio*, and the order that had been pronounced. *Held*, in an action at the instance of the bankrupt's trustee against the creditor, that the payment was improperly made, and that the defender was not entitled to take benefit thereby.

Thomas v. *Thomson*, 3 Macph. 358, and *Coutts' Trustee* v. *Webster*, 13 R. 1112, *distinguished.*

This was an action, in the Sheriff Court at Perth, at the instance of James Lamond, trustee for behoof of the creditors of David Shaw, farmer, Mid-Derry, in the parish of Glenisla, against Stewart & Bisset, general merchants, Blairgowrie, for payment of the sum of £101, 9s. 11d., which the pursuer alleged had been illegally paid by Shaw to the defenders.

The circumstances of the case were as follows:—Shaw was charged on 15th September 1886 upon a protested bill at the instance of James Matthewson, his landlord. The days of charge expired upon 21st September, and Shaw, who had previously been insolvent, became notour bankrupt. Matthewson then presented, in the Sheriff Court at Forfar, a petition against Shaw under the Cessio Acts, and on 28th September 1886 the Sheriff-Substitute pronounced this deliverance—"Being satisfied from the productions that there is *prima facie* evidence of the notour bankruptcy of David Shaw, the debtor and defender—Appoints a copy of the said petition and of this deliverance to be served upon the said debtor, and appoints the pursuer to publish a notice in the *Edinburgh Gazette* at least eight days before the diet after mentioned, intimating that this petition has been presented, and requiring all the creditors of the said debtor to appear in Court within the Sheriff Court-house, Forfar, upon Tuesday, the 12th day of October next, at one o'clock afternoon: Ordains the said debtor to appear at said diet for public examination, and on or before the sixth lawful day prior thereto to lodge in the hands of the Clerk of Court, to be patent to all concerned, a state of his affairs, subscribed by himself, and all his books, papers, and documents relating to his affairs." On 12th October Shaw was examined before the Sheriff-Substitute, who ordained him to execute a disposition *omnium bonorum* in favour of Lamond. On 13th October the Sheriff-Substitute *ex proprio motu* reported the case to the Procurator-Fiscal under the Debtors (Scotland) Act 1880, sec. 13, sub-sec. 5, B. Shaw afterwards absconded. He had previously, upon 30th September, executed a trust-disposition of his whole estate for behoof of his creditors in favour of Lamond.

The averments of the pursuer in the present action were that after the deliverance of the Sheriff-Substitute of 28th September had been served on Shaw he culpably failed to lodge the required state of affairs; that on 7th October, by the advice and at the instigation of the defenders, Shaw removed from his farm the live stock and implements thereon, and sold the same to conjunct and confident parties; and also entered into a fraudulent and collusive arrangement with the defenders by which on that day he paid them the sum of £101, 9s. 11d. in satisfaction of an alleged account which was not legally due.

The pursuer pleaded—"(1) The payment of the foresaid sum of £101, 9s. 11d. to the defender having been fraudulent and collusive, the pursuer, as trustee for the creditors, is entitled to demand repetition thereof; *et separatim*, the said £101, 9s. 11d. not being legally resting owing to the defenders at the time, the same falls to be repaid. (2) The defenders being in the knowledge of the insolvency of Shaw, were barred by personal exception from taking payment of the foresaid money, and they are *in mala fide* and are bound to repeat. (4) The said payment by the bankrupt to the defenders was not in the ordinary course of business, but was made subsequent to the public insolvency of Shaw, which was within the knowledge of the defenders, and was therefore fraudulent and illegal under the Act 1696, c. 5, the Act 1621, c. 18, the Cessio Acts, and at common law, and repetition falls to be made."

The defender pleaded—"(1) The payment referred to having been made in the ordinary course of business, and in discharge of a *bona fide* debt due by Shaw to the defenders, the action should be dismissed."

Evidence was led before the Sheriff-Substitute, the principal witness being Mr Stewart, a partner of the defenders' firm, to whom the payment of £101, 9s. 11d. had been made, and whose evidence may be thus summarised:—On 7th October 1886 Shaw paid Stewart £101, 9s. 11d. in notes, gold, and silver, no discount being allowed, in discharge of a debt to that extent which the witness deponed was due to the firm. This debt consisted of a balance due by Shaw to the defenders of an advance of £100 made by them to him on 21st November 1883, and of the price of coal and other goods supplied by them to him at various dates between 29th August 1883 and 19th May 1884. The advance was made on the promise of the delivery of potatoes to that value by Shaw to the defenders, but the potatoes had never been delivered. Mr Stewart deponed—"For my advance of £100 I expected the produce of upwards of 10 acres of potatoes for the season of 1883 and the spring of 1884. When I did not get the potatoes I did not press Shaw. I got no potatoes from him at all. The season

was a bad one; potatoes were almost unsaleable . . . It came to my knowledge somewhere about the beginning of October or end of September 1886 that Shaw was in difficulties. I think the indication of it that I had was from Mr Panton, but I am not certain. Mr Lochhead called on me and spoke about Shaw. Mr Panton and Mr Lochhead act as my agents only in some cases. A day or two after Mr Panton indicated to me that Shaw was in difficulties Mr Lochhead called at my office and showed me a little jotting of Shaw's liabilities. That jotting showed that Shaw was insolvent." Mr Panton and Mr Lochhead were in business together, and had been consulted by Shaw in regard to his affairs. After learning what Shaw's position was Mr Stewart sent for him, and pressed him about the matter. I did not propose anything to Shaw about payment. I pressed him that he should do something to pay me. Shaw told me that he would try and make payment of his account. He indicated that he would try and dispose of some things, or do something, and pay me. He did not indicate plainly what actually he intended to do. Interrogated—What was your impression when he left you?—(Answer)—I cannot put that into words. I had the impression and always thought that Shaw was a very decent fellow, that he would make some effort in some shape to do something for me. I thought he would either go to his friends or dispose of part of his stock and raise money. He did not tell me that he intended to sell any of his stock, but he gave me to understand that he would raise something on his stock. He did not say anything about the implements." Mr Stewart further deponed—"I heard of the *cessio* first not very long before the beginning of October—some of these days previously. I heard it before payment was made to us. I know that a petition for *cessio* had been presented a few days before we were paid, and a few days before we sent for Shaw. I know James Moncur and George Grant, Tullyneddie. I don't recollect if these men told me they were to purchase stock and implements from Shaw. Perhaps they may have done so on the market day. Moncur indicated to me that he was going to see Shaw. He did not indicate anything particular. I do not know what led him to make the remark. I suppose that he had been aware that we had sent for Shaw. I think Shaw had made him aware. I cannot tell. I did not press Moncur to go and buy. I saw Grant in the market. I think I mentioned something to him about going to purchase at Mid-Derry. The gist of our conversation was—I told him that Shaw had been here, and if he needed anything I thought Shaw was wanting to sell some of his stock, or something to that effect. One reason for pressing Shaw in October was that I was anxious to get payment. Another reason was, I had a strong feeling that if Mr Matthewson and his agent got Shaw in his fingers there would be nothing got."

A receipt was produced, dated 7th October 1886, granted by Shaw to Moncur for £148, the price of stock and implements that day delivered to him; and a similar receipt for £28, 19s. 6d., dated 11th October 1886, granted by Shaw to Grant. The pursuer deponed that Moncur and Grant had acknowledged before the Sheriff that they had bought the stock and implements referred to in these receipts from Shaw.

On 29th March 1887 the Sheriff-Substitute (GRAHAME) pronounced this interlocutor:—"Having heard parties' procurators and advised the case, Finds that on 7th October 1886 David Shaw, farmer, Mid-Derry, made to the defenders a cash payment of £101, 9s., being the balance due upon an advance of £100, and the price of articles supplied to him by them; that at the date of this payment Shaw was insolvent; but Finds that it is not proved that said payment was made in collusion or fraudulently with the defenders: Finds that repetition of said payment cannot be claimed by the pursuer, Shaw's trustee, either under the statutes founded on or at common law: Therefore assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses, &c.

"*Note.*—This is a case in which repetition of payment is sought of a sum paid by an insolvent to one of his creditors, in respect of its having been the result of a collusive and fraudulent transaction. The action is founded both on statutes and on common law, but the real question, and the one which was the subject of argument at the hearing, is as to the effect of the circumstances proved, upon the validity of the transaction in question at common law. It is alleged by the pursuer, who is the trustee of the insolvent debtor, that the payment in question was not only made with the view of giving the defenders, as favoured creditors, an unjust preference, but that the defenders themselves were parties to a fraudulent method of effecting this purpose. What is specially alleged, is that when Shaw made a cash payment of his debt to the defenders, he was enabled to do so only by the improper sale of the stocking of his farm, and that this sale was carried out with the collusive and fraudulent connivance of the defenders, who, it is alleged, were not only in the knowledge of Shaw's solvency, but were parties to the sale of the stock from the proceeds of which their debt was paid; and that the transaction thus effected must therefore be held fraudulent and null. I do not think that this alleged collusive and fraudulent connivance of the defenders with Shaw has been established. The case seems to me to be just that of creditors who had reason to think that their debtor was in impecunious circumstances, and who accordingly pressed for payment of their debt and got it, no doubt to the disadvantage of other creditors, but not therefore fraudulently, and so as to afford ground for claim on the part of the debtor's trustee for repetition of the money so paid. What the defenders did may have been a sharp proceeding, involving inequitable consequences to the other creditors, but it was not one which the law regards as fraudulent, and will set aside on that ground. Cash payments of debts due by an insolvent are not null merely in respect of their having been made so as to cause an inequitable distribution of the insolvent's estate. If a creditor can get a cash payment of a debt due to him, he is in the general case secure of his money, and need not ask where the money came from; and though the intention of his debtor may have been to give him an unjust preference, and thus to deprive other creditors of the means of getting their just claims satisfied out of his estate, the payment, once made, is good, unless there are very clear grounds for holding that there has been a fraudulent conspiracy. In the present instance it is

not proved that the defenders were aware that Shaw was actually insolvent. What they knew was that he was in embarrassed circumstances, and that the payment of their debt could only be made through the realisation of the stock on Shaw's farm, and that if the stock was sold and applied to this purpose, there would be little left to pay the landlord or other creditors. Their taking the money in these circumstances does not seem to me to be such a fraudulent proceeding as to make the payment null.

"The law upon this matter was recently laid down in the case of *Coutts' Trustee* v. *Webster*, July 8, 1886, 13 R. p. 1112 (following upon the case of *Thomas* v. *Thomson*, January 13, 1865, 3 Macph. 358), in which it was held that cash payments by an insolvent debtor to a creditor are effectual if not made fraudulently, and fraud is not to be inferred from the mere fact that both the debtor and creditor are aware that the debtor is at the time insolvent. In giving his opinion, Lord Young stated the law to be, 'that a man, though he knows that he is insolvent and cannot pay all his creditors, may nevertheless prefer any of them whom he pleases, and pay their debts in full, provided the debts are due, and due in actual money.' And Lord M'Laren, in a note to Bell's Commentaries, vol. ii. p. 226, thus states the same principle more strongly:—'It is now understood that a payment in cash cannot be set aside by proof of insolvency and collusion. A debtor, until actual bankruptcy, is entitled to pay *primo venienti*. The law of bankruptcy has only a retrospective operation in relation to gratuitous payments and alienations, and alienations (as distinguished from payments) in satisfaction or security of prior debts.'

"On these authorities it seems to me impossible to hold that the pursuer is entitled to ask for repetition of the payment in question.

"The defenders do not appear to have done more than what the practice and exigencies of trade are held to entitle them to do. They pressed for payment of their debt, and took it without regard to the interests of their fellow-creditors; but there is no evidence of a fraudulent transaction. They had got in front of their fellow-creditors in the race for payment, but it cannot be held that the advantage they obtained was got by an infringement of the laws of the course."

The pursuer appealed.

On appeal the Sheriff (GLOAG) on 8th June 1887 recalled the Sheriff-Substitute's interlocutor and found:—"(1) That David Shaw, sometime farmer at Strone, thereafter at Mid-Derry, became notour bankrupt on or about 21st September 1886, in respect of his insolvency concurring with an expired charge for payment of a bill due to his landlord Mr James Mathewson: (2) That in a petition for decree of *cessio*, presented in the Sheriff Court at Forfar by the said James Mathewson against the said David Shaw, an interlocutor was pronounced, dated 28th September 1886, whereby, *inter alia*, the said David Shaw was ordained to lodge a state of his affairs in the hands of the Clerk of the Court on 6th October 1886, which order he failed to obey: (3) That on 7th October 1886 the said David Shaw sold a large part of the stock on his farm, and on the same day paid the defenders out of the proceeds of said sale the sum of £101, 9s. 11d., being the amount of an account alleged to be due to the defenders by the said David Shaw: (4) That when said payment was made, the defenders were aware that said petition for *cessio* had been presented some days previously, and that the money paid to them, or great part thereof, was part of the proceeds of said sale: (5) That when said payment was made, the said David Shaw was hopelessly insolvent, and was known by the defenders to be so: (6) That it is not proved that the said sum of £101, 9s. 11d., was due by Shaw to the defenders: Finds in law—(1) That the said sale by the said David Shaw was illegal, and in fraud of his creditors; (2) That the defenders, having been in knowledge thereof, were not entitled to take advantage thereof by accepting payment of the proceeds of said sale; (3) That the payment to the defenders was illegal, and in fraud of the creditors of the said David Shaw, and constituted an illegal preference in favour of the defenders: Therefore finds the pursuer, trustee appointed in said process of *cessio*, entitled to payment from the defenders of the said sum of £101, 9s. 11d., so paid to them, and decerns in terms of the conclusions of the petition: Finds the pursuer entitled to expenses, &c.

"*Note.*—I have found this to be an exceedingly difficult case, and am conscious that the above interlocutor may be open to a good deal of question. But I think the case very important, and have formed the opinion that it may be distinguished from the cases on which the judgment of the Sheriff-Substitute is rested, and that the pursuer is entitled to decree.

"The main facts are these: Some time ago David Shaw sold the potatoes on his farm of Strone to the defenders, and agreed to deliver the potatoes; the defenders paid him £100 in advance, the bargain apparently being that if the just price should prove more there should be an additional payment, if less, a repayment. The potatoes were never delivered. The market price fell so much that they were sold at a farina mill, and the price, £28, was paid to the defenders. The defenders also supplied Shaw with manure, and in October 1886 they had an account against him amounting to £101, 9s. 11d., one item being this £100, which the defenders seem to have thought themselves entitled to state as a debt against Shaw, on the ground that the transaction had not been completed. Shaw's affairs became hopelessly embarrassed, and after some negotiations his landlord presented a petition of *cessio* against him, in which the statutory first interlocutor was pronounced on 28th September, which, in compliance with the provisions of the 9th section of the Debtors Act 1880 (43 and 44 Vict. c. 34) appointed publication, and ordained the debtor to appear for examination on 12th October, and to lodge in Court a state of his affairs six days before that. Shaw did not lodge the state of affairs on that date, but, in violation of the order of the Court, he on 7th October sold a large part of the stock on the farm, and with the price he on the same day paid the defenders their account. The pursuer has stated no objection to any item of this account except the £100, which cannot, it is maintained, be stated as a debt against Shaw.

"I have formed the opinion that the defenders, or at least (which comes to the same thing) Mr Stewart, knew that Shaw was hopelessly insolvent when this payment was made. On this

point I differ to some extent from the Sheriff-Substitute, but I can hardly say more on the subject than that such is the decided impression which the evidence has made on me. There is no doubt that Stewart knew of the *cessio* and of the sale of Shaw's stock, and knew that he was paid out of the proceeds of that sale. I am inclined to think that Mr Stewart was more closely concerned with this sale, and I suspect he suggested it. But that is not quite clear, and I do not assume it.

"Now, these are the circumstances in which the trustee in Shaw's *cessio* seeks to recover this sum of £101, 9s. 11d. paid to the defenders, and his action is based on the Act 1696, c. 5, and subsequent Bankruptcy Statutes, and also on the common law. He is trying to set aside a preference, and to put the defenders on a footing of equality with the other creditors. It is one of his primary duties as trustee to do so if the preference is illegal. The preference, however, although undoubted, has been accomplished by a payment in cash, and I think it settled that the Act 1696 is not directed against cash payments of debts which are due. It must, further, I think, be admitted that (apart from the Bankruptcy Statutes) a creditor may lawfully take payment of his debt whenever he can get it, whether his debtor be insolvent or no, without any regard to the consequences to other creditors. That, I think, was decided in the case of *Coutts' Trustee* v. *Webster*, 13 R. 1112, quoted by the Sheriff-Substitute. Still further, a creditor does not need to inquire where the money with which he is paid has come from, but that rule, I think, is subject to this qualification, that he may not be able to take advantage of a fraud or illegality of which he is aware, and he may not by taking payment aid the bankrupt in effectuating his fraud. In the case of *Nicol* v. *M'Intyre*, 13th July 1882, 9 R. 1097, the general rule is forcibly expressed by Lord Young, who says 'that it makes no difference that the debtor may have stolen the cash.' But I think that that remark must have been made on the assumption that the creditor was not aware of the theft, otherwise his acceptance of the stolen money would be very like reset of theft.

"The rule that a payment by an insolvent in cash cannot be challenged, however general, has never been stated as universal or absolute, and the question is, whether there may not be in this special case an exception to that rule? In the first place, I think that the sale by Shaw of his stock was illegal, and in fraud of his creditors. Shaw himself seems to have thought his conduct not only illegal but criminal, for he has absconded. The illegality did not arise from any particular duty or obligation which Shaw owed to his landlord, for as the landlord had no right of hypothec, it may be doubted whether Shaw was under any special obligation to him as such, but I think the illegality arose simply from the fact that Shaw was under a judicial order to lodge in court a state of his affairs. It seems impossible to hold that a debtor, ordered to lodge a state of his affairs, could lawfully dispose of his effects, pay his creditors, and then lodge a state totally different from the state of his affairs at the date of the interlocutor. That would not be in compliance with the interlocutor. If Shaw had himself presented a petition for *cessio* it would have stated his readiness to surrender his affairs, and would have been accompanied by a list of his creditors, which list must have included the defenders; and it seems clear that he could not after that have disposed of his effects or paid his creditors. I think that the statutory order to lodge a state of affairs pronounced in a petition by a creditor put Shaw in exactly the same position as if the petition had been presented by himself (43 and 44 Vict. c. 34, sec. 9). I cannot doubt that after such an interlocutor the Court would, on cause shown, have interdicted the sale of Shaw's property, or have proceeded under section 12 of the Act 43 and 44 Vict. c. 34, and granted warrant to take possession of the debtor's money and moveables. The very power to do this seems to involve the illegality of the disposal by the debtor of his effects, and to show that the statute regards the debtor as disabled from dealing with his estate after he has been ordered to lodge a state of his affairs. It is true that there is no provision in the *Cessio* Acts corresponding to section 111 of the Bankruptcy Act 1856, declaring payments by bankrupts after sequestration null, but protecting *bona fide* purchasers and debtors; and it is also true that a debtor is not divested of his estate until he has granted, or has been ordered to grant, a disposition *omnium bonorum*. But I think that the order to produce a state of affairs contained in the statutory first interlocutor, read along with the provisions in section 12, produces practically the same effect, and is practically an interdict against disposal by the debtor of his estate. I hold therefore that the sale by Shaw was in direct violation of the order of the Court.

"It has next to be considered how that illegal character of this sale affects the payment to the defenders. The defender Stewart knew of the *cessio*, and although it is not expressly proved that he knew that Shaw had been ordered to lodge a state of affairs, yet I hold that such knowledge must be imputed to him, because that order followed necessarily on the presentation of a petition for *cessio* if the Sheriff was satisfied that there was *prima facie* evidence of notour bankruptcy. I think that certainly he was put on his inquiry as to this point, and must be dealt with as if he knew that that order had been pronounced. Holding that order to imply a prohibition of such a sale, the question comes to be—Can the defenders take advantage of Shaw's violation of that judicial order, and receive payment of the proceeds of that sale? I have come to be of opinion that they cannot, and that by taking payment they actively aided Shaw in carrying out and completing the violation of the order of the Court with which he was chargeable. Indeed, the payment to the defenders is just as much a violation of the order of Court to lodge a state of affairs as the sale of the stock was, and in that latter act the defenders were of course directly participant. The case seems much the same as if the money had been arrested funds, and as if the defenders had accepted payment of them in knowledge of the arrestment. The fact that the sale by Shaw was in violation of the order of the Court, and that the defenders knew of it, distinguishes this case from *Coutts' Trustee* v. *Webster*. On these grounds I hold this pay

ment falls to be disallowed as an illegal preference, effected by Shaw illegally and in fraud of his creditors, and in collusion with the defenders. I have not thought it necessary to go on the ground that the defenders were participants in the sale of Shaw's stock, holding it sufficient that they (that is, Stewart) were fully aware of it, and of its illegality.

"The pursuer further maintained that the payment falls to be disallowed because it has not been proved that it was made in satisfaction of a debt actually due. It is said that it has not been made out that there was any debt of £100 due by Shaw to the defenders, and it appears to me that that contention is sound. The defenders it is true paid Shaw £100, but I do not see that Shaw at any time was bound to repay it. The obligation which he incurred when he received the £100 was to deliver the potatoes on his farm at a certain rate. These potatoes fell in price and were never delivered, but it is by no means clearly made out how that circumstance affected the relations of Shaw and the defenders. It is not at all clear that the loss fell on Shaw and not on the defenders. I do not say that it is not also possible that the result may have been what the defenders said it was, namely, to make Shaw liable to repay the £100, but at all events I do not think that was so clear at the date of payment—as indeed it is not clear now—as to justify the payment as an ordinary transaction, and as implement of an ascertained obligation or payment of a liquid debt.

"There is just one other point to which I am bound to advert, but I will do so in a very few words. There was a correspondence between Mr Japp, as agent for the landlord, and Mr Panton, who was agent for Shaw, and also I think agent for the defenders. Now I cannot resist the impression that the letters of Mr Panton misled Mr Jaap, and that but for these letters Mr Jaap would or might have taken care to prevent the sale of Shaw's stock on the farm. I do not for a moment doubt that he could have got an interdict against such a sale, or could have protected his client in the manner provided in sec. 12, already referred to, had he suspected Shaw. But he was lulled into security by these letters, and I do not wonder at his surprise when he heard of the sale. I think it might be questioned whether this correspondence alone does not afford sufficient ground for maintaining that the defenders cannot be allowed to take advantage of this sale, and the payment which followed. I cannot read that correspondence and the evidence of Mr Stewart about his interviews with Shaw, and with the purchasers at Shaw's sale, without feeling that the whole transaction is questionable and suspicious, and not the kind of transaction which can sustain and protect a preference in bankruptcy."

The defenders appealed, and argued—This case was ruled by the cases of *Thomas* v. *Thomson*, Jan. 13, 1865, 3 Macph. 358; and *Coutts' Trustee* v. *Webster*, July 8, 1886, 13 R. 1112. There was here as in those cases a payment by an insolvent debtor to a creditor of a just debt, and the law would not inquire where the money came from. Shaw was able to give a good title to the defenders to whom he gave the cash, even if it was wrongly obtained by sale of his stock. The only difference between those cases and the present was that here the Sheriff-Substitute had pronounced a deliverance upon the petition for *cessio*, but that made no real difference. That first order had not the effect of divesting the debtor of the management of his estate. If the pursuer's argument was carried that length, then no debtor could settle with his creditor so as to get a *cessio* withdrawn. The process was a diligence as well as a method of division among creditors, and could be stopped by payment of the debt. There was no fraud on the part of Shaw, as the debt was justly due to the defenders. The result of the contention on the other side would be, that if a process of *cessio* was brought against any trader, however unjustly, he would be compelled to close his shop entirely—*Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097; Debtors Act 1880, sec. 18 (43 and 44 Vict. cap. 34); *Galbraith* v. *Campbell's Trustees*, March 7, 1885, 22 S.L.R. 602.

The respondents argued—As soon as the first order in a process of *cessio* was pronounced the administration of the debtor's estate was taken away from him, and he could not dispose of any part of his estate for the purpose of paying any of his creditors in preference to the others. Here the payment to the defenders was clearly illegal because the debtor was a notour bankrupt, and he had been ordered to give up an account of his estate. The defenders, however, encouraged him to pay them in preference to his landlord and other creditors, though they knew all the while that a process of *cessio* had been begun. Shaw knew that the payment was illegal, as he had fled the country to avoid the inquiry which followed on the report of the Sheriff-Substitute. There was no evidence that any debt was due by Shaw to the defenders, and in the cases cited the debt had been duly constituted—*Haldane* (*Speirs' Factor*) v. *Speirs*, March 7, 1872, 10 Macph. 537.

At advising—

LORD JUSTICE-CLERK—This case raises several important questions. It is a demand made by a trustee for behoof of creditors against a firm, for repetition of a sum said to have been paid to them by the bankrupt. It is not necessary for us to say whether the debt was due or not, although I have not much doubt on the subject.

The question is, whether the demand which is made in this case is in the same position as was the demand in the cases of *Thomas* v. *Thomson* and *Coutts' Trustee* v. *Webster*, to which we were referred. In these cases a principle was laid down which I think very important, and to which I entirely assent, and I adhere to every word I said in the last of these cases. That principle is, that although a person may be in insolvent circumstances, and his creditors know that he is insolvent, they are nevertheless entitled to take payment of their debts incurred in the ordinary course of business; in other words, that the debtor is not ousted from the administration of his estate although he is insolvent, and his creditors are entitled to receive payment of their just debts. In my opinion this case rests upon an entirely different principle, and it is necessary to attend to the particular circumstances connected with it. The bankrupt here had got into debt with his landlord, and had granted a bill to him. The bill was dishonoured,

and a petition for *cessio* was presented at the instance of the landlord, under the Cessio Act of 1880. The first interlocutor in that process was pronounced on 28th September 1886, and was, according to the terms of the Act, as follows:—"The Sheriff-Substitute having considered the foregoing petition, with the writs therewith produced, and being satisfied from the productions that there is *prima facie* evidence of the notour bankruptcy of David Shaw, the debtor and defender, Appoints a copy of the said petition and of this deliverance to be served upon the said debtor, and appoints the pursuer to publish a notice in the *Edinburgh Gazette* at least eight days before the diet after mentioned, intimating that this petition has been presented, and requiring all the creditors of the said debtor to appear in Court within the Sheriff Court-House, Forfar, upon Tuesday, the 12th day of October next, at one o'clock afternoon: Ordains the said debtor to appear at said diet for public examination, and on or before the sixth lawful day prior thereto to lodge in the hands of the Clerk of Court, to be patent to all concerned, a state of his affairs, subscribed by himself, and all his books, papers, and documents relating to his affairs."

That deliverance, I presume, appeared in the *Gazette*, and by it the debtor was called upon to lodge a state of his affairs by the 6th of October. He did not do this, but on the day after he ought to have obeyed this order, viz., on the 7th of October, he entered into negotiations with certain persons to sell his stock, and in point of fact he did sell stock to the value of £100, and, having received that sum, he paid off the defenders here, who were his creditors. The question now arises whether he was entitled to do that. I think he was not entitled to take any such step. I think that even before the 6th of October he would not have been entitled to take any such step; but it is too clear for argument that after the day on which he was to have lodged his state of affairs was past, he was not entitled to deal with any of the property which ought to have formed part of that state. He was doing what was contrary to the Act. Proceedings had been begun for the equal division of his estate among his creditors; the matter was in fact *sub judice*, and the Sheriff could have taken the whole estate out of the debtor's hands and appointed a trustee if he had thought that right.

The state of affairs might have been different if the creditor had been ignorant that a process of *cessio* had been begun against his debtor, but he knew that fact quite well, and even admits in his evidence that before he received the money he knew that an application for *cessio* had been made. That is quite a different case from one in which the Court is asked to interfere with a ready-money transaction. I think we should adhere to the Sheriff's interlocutor.

Lord Young—I think that the defender cannot retain this money. I cannot say, however, that I am prepared to assent to all the findings in the Sheriff's interlocutor. One of these findings is "that it is not proved that the said sum was due by Shaw to the defenders." I am not sure that it is necessary to decide that question, although if we found one way—that no debt was due—that would be an end of the case. My own inclination is that this debt was due, and I must decide the case on that assumption. Another finding is that the sale by the debtor was illegal, and in fraud of his creditors. But I am not prepared to say that the sale was illegal in the sense in which I understand it, and in which I presume the Sheriff uses it, that the seller was not in a position to give a good title to the buyer, for if a man sells goods and can give a good title with them, that cannot be pronounced an illegal sale. I think it would take a section of the Act to make such a sale illegal after the first order in a process of *cessio* had been pronounced. If that were illegal, then the debtor in a petition for *cessio* at the instance of a creditor could not make arrangements to pay off that creditor and bring the *cessio* to an end, which I suppose is an operation performed every day.

But I think this money must be paid back. The question is, whether this case comes within the rule that a notour bankrupt is not allowed to dispose of his estate to the prejudice of his creditors, or to give a preference to any of them, or within the exception which is recognised in the two cases quoted to us? I think it is a not unimportant thing to observe that the doctrine laid down there is an exception. The rule is as I have stated it, but the law as applied by the Court makes an exception in the cases of payment in cash of debts due. That view is intelligible on the ground that it would be impolitic and inexpedient to inquire into the history of cash which is the currency of the country, and there was perhaps more in a remark of mine in the case of *Coutts' Trustee* than at first meets the eye—that it would not matter if the money had been stolen. In such a case even a thief can give a better title than he himself possesses, and that proceeds upon the inexpediency of inquiring into the history of cash, and the same rule applies when a man receives payment in cash of a debt due to him. The Sheriff, in his note, says that in my observations I assumed ignorance on the part of the recipient that the cash was stolen. That goes without saying, as then the law of reset would apply; but that does not apply to the illegal disposal of a bankrupt estate to the prejudice of the creditors. If the owner of the stolen property can trace the actual *corpus* of the money stolen, then he may recover it, but there is nothing of that kind here. This is a proceeding by a trustee to recover money which the bankrupt has disposed of. The question is, does this case fall under the rule or the exception? I think it falls within the rule. I desire to say nothing to the contrary of the judgments in the cases quoted to us. I think they were right, and I think we ought to restrict our judgment to the facts of the present case. A notour bankrupt, against whom proceedings had been begun in a process of *cessio* by one of his creditors, proceeds, at the instigation of another of his creditors, to sell some of his property and pay him in full. I do not think such a proceeding can stand. I cannot say it is illegal, but I think it is improper, and I do not think that the creditor who aided and abetted the transaction can profit by it. The distinction between the rule and the exception is sometimes very nice. A payment in cash is not inquired into, but if goods of an equal value should be given to the creditor the matter

may be inquired into, and the goods ordered to be sent back. That is a difference between the rule and the exception, and I think there is enough to make a difference here. I think that the judgment may be confined to the very facts we have to deal with, and these lead to the conclusion that the defender ought to restore the money.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I have great difficulty in distinguishing this case from those quoted to us, but I dare say that the distinction pointed out by your Lordships is sound law, and certainly I think the judgment proposed meets the justice of the case.

LORD JUSTICE-CLERK—I would wish to say that I quite concur with Lord Young in thinking that our judgment ought to be confined to the circumstances of the case.

The Court pronounced this interlocutor :—

"Find in fact (1) that on 7th October 1886 David Shaw sold a large portion of the stock of his farm, and on the same day paid to the defenders one hundred and one pounds nine shillings and elevenpence out of the price thereof; (2) that at the date of the sale he was a notour bankrupt and defender in an action of *cessio bonorum*, in which an order had been pronounced ordaining him to lodge a state of his affairs by 6th October 1886, which order he failed to obey; (3) that his bankruptcy and the dependence of the said action and the order pronounced thereon were known to the defender when he took payment of the said sum: Find in law that the said payment was improperly made, and that the defenders are not entitled to take benefit thereby; therefore dismiss the appeal; of new decern in terms of the conclusions of the petition; find the petitioners entitled to expenses in this Court," &c.

Counsel for the Appellants—D.-F. Mackintosh—Law. Agents—Philip, Laing, & Trail, W.S.

Counsel for the Respondent—M'Kechnie—Craigie. Agents—Curror, Cowper, & Curror, W.S.

Tuesday, November 15.

SECOND DIVISION.

[Sheriff of Aberdeen.

SCOTT AND ANOTHER *v.* GRAY AND OTHERS.

Property—Waste and Uncultivated Ground—Drying Herring-Nets—11 *Geo. III. c.* 31, *sec.* 11.

The Act 11 Geo. III. c. 31, provides by sec. 11 that all persons employed in the herring-fisheries may dry their nets without paying dues on the shores and forelands "below the highest high-water mark for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land."

The proprietor of a piece of ground about 4 acres in extent, lying between a road and the sea, within 100 yards of high water-mark, brought an action against certain fishermen to have them interdicted from drying their nets there. The defenders founded on the above-mentioned statute. It was proved that the ground in question consisted of shingle and rock, partly bare and partly covered with rough grass and thorns; it was unenclosed towards the sea, and prior to 1868 had been undoubtedly waste and uncultivated. In 1869 and 1870 it was improved by the proprietor. It was levelled, the thorns removed, the bare parts covered or top-dressed with a coat of earth of an inch or two in thickness, and it was then sown out with grass seeds. The expenditure per acre was from £5 to £7. The principal use of the ground in question was for drying nets, and, both before and after the improvements, the fishermen made annual payments for the privilege. *Held* that the ground was not waste or uncultivated, and interdict *granted*.

Hercules Scott, heritable proprietor of the estates of Brotherton, at Stonehaven, and others, in the county of Kincardine, and David Legg, tenant of the farm of Whitehouse on these estates, presented a petition in the Sheriff Court of Aberdeen, Kincardine, and Banff, against William Gray, Alexander Lownie, and Alexander Gove, all fishermen residing in Gourdon, in the county of Kincardine, to have the defenders interdicted from entering upon a piece of ground upon the farm of Whitehouse, lying between a road leading from Gourdon to Johnshaven on the one side, and the sea-shore on the other, and from laying down and drying their herring-nets thereon.

The pursuers averred that the defenders had without leave, and against the remonstrances of Legg, entered upon the ground in question, and dried their nets upon it.

The defence to the action was founded on the Act 11 Geo. III., c. 31, entituled "an Act for the Encouragement of the White Herring Fishing," which provides by section 11—"That all and every person or persons employed in the said fisheries may fish in any part of the British seas, and shall have and exercise the free use of all ports, harbours, shores, and forelands in Great Britain, or the islands belonging to the Crown of Great Britain below the highest high-water mark, and for the space of 100 yards on any waste or uncultivated land beyond such mark, within the land, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, and reloading their fish, and in drying their nets, without paying any foreland or other dues, or any other sum or sums of money, or other consideration whatsoever for such liberty, any law, statute, or custom to the contrary notwithstanding."

The defenders pleaded that "the ground in question being waste or uncultivated, and on the sea-coast within the limits prescribed by the statute founded on, the defenders are entitled, in the exercise of their trade, to the free use and possession thereof, for the special purpose authorised by the statute."