impropriety of proceedings of this kind.

I should like to add that I put my judgment on the general question, and not on the specialities of this sequestration. There may be little, if any, estate for division amongst unsecured creditors, but I can understand that the heritable creditors may find the sequestration valuable in enabling them to give a title. In cases of sale it is notorious that a title by the trustee in a sequestration is a valuable title, for it is generally free from exception, and I can understand why creditors should resort to sequestration in order to be able to give such a title. But if they do so they must comply with the provisions of the statute, which in this case I am satisfied has not been done.

LORD ADAM—In my opinion the difference between *ex facie* objections and latent objections is perfectly sound, and well established in law, and I think it is also quite clear that the latter class, namely, latent objections which must be a subject of proof and inquiry as to whether they are established, will take place probably in nine out of ten cases in applications for recal of sequestration, for if they are not *ex facie* the sequestration will be granted, and therefore inquiries into latent objections will take place in the sequestration. And that being so, I have no doubt that it has been held in such cases that when the latent objection is established it is entirely in the discretion of the Court whether the sequestration be recalled. It occurs to me that where the truth of the latent objection has been established the sequestration should be recalled, unless it can be shown that there are interests involved which should lead to a different result, and accordingly I think the question is—Is it or is it not established as against the recal of the sequestration that other creditors have acquired rights which would be prejudicially affected by a recal? I think that would be the proper inquiry. If that be not shown, then I think that it should be recalled. Now, in the present case it has not been established, certainly it has not been so to my satisfaction, that any other creditor would be prejudiced. No preference has been acquired, no preference has been cut down, and so far as we can ascertain, nothing has been done whereby the interests of other creditors would he affected by the recal of this sequestration. If the affidavit is a bad one I do not know that the fact that it is a particularly bad one, as it is in this case, would affect the question whether the sequestration should be withdrawn as affecting the interests of the other creditors. In this case, though there is really no oath at all, if I had been satisfied that the other creditors would be prejudicially affected I would hesitate to recal, but being satisfied that they are not prejudicially affected, I concur with your Lordships that the sequestration should be recalled.

The Court recalled the sequestration.

Counsel for the Petitioner—Watt. Agent—William Officer, S.S.C.

Connsel for the Respondents—Balfour, Q.C.—Low—Maconochie. Agents—J. & F. Anderson, W.S.

Saturday, January 12.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

THOMSON *v.* M'BAIN (THOMSON'S TRUSTEE).

Bankruptcy — Master and Servant — Implied Agreement—Claim for Wages for which there had been no Agreement—Presumption—Proof.

A long period of service raises a presumption that remuneration therefor was intended even although there was no agreement for wages.

A father lodged a claim in his son's sequestration, averring that he had served his son as vanman for seven years without receiving wages. It was admitted that there had been no agreement for wages. The trustee rejected the claim as collusive. On appeal, the Court *recalled* the trustee's deliverance, and allowed the claimant a proof of his averments as to the circumstances connected with the constitution of his alleged debt.

On 16th January 1888 Donald Thomson, merchant, Fearn, Ross-shire, granted a trust-deed for behoof of his creditors, and on the same day he granted a promissory-note for £160 in favour of his father Donald Thomson senior, and also a holograph acknowledgment that he was indebted to his father in this sum, being the amount of eight years' wages for his services as vanman. Donald Thomson senior lodged no claim under this trust-deed.

The attempted settlement under the trust-deed having fallen through, sequestration of the estates of Donald Thomson junior was obtained on 13th April 1888, and George M'Bain junior, C.A., Aberdeen, was appointed trustee.

Donald Thomson senior claimed in the sequestration. The trustee, on the ground that it was a collusive claim, rejected it.

Against this deliverance Donald Thomson senior appealed to the Sheriff of the Lothians and Peebles.

In his examination the bankrupt said—"I assisted in maintaining my father since I started business; my sister also contributed. My father lived with me till about three or four months ago. He acted as my vanman, but I gave him no wages, merely his meat and clothing. I never agreed to give my father wages."

In the minute lodged in the appeal the appellant averred, *inter alia*, that he was employed for eight years by the bankrupt as his vanman. Had he not so acted the bankrupt would have required to employ another assistant, and to pay him wages. He had rendered the service, but had received no wages, and long prior to February 1888 the present claim had not only been made, but had been admitted and arranged by the bankrupt.

The respondent (the trustee) averred that the claim was not lodged until sequestration proceedings were commenced. The appellant was just in the natural position of being maintained by his son, and partly in return for such maintenance, and partly to occupy his leisure time, he drove the van.

The appellant pleaded—(1) That as he had rendered services he was entitled to recompense, and this not having been given him, he was entitled to claim for the same.

The respondent pleaded—"(1) The respondent having already fully examined the documents and circumstances, which very clearly disclose the facts of the case, further proof is unnecessary. (2) The claim of the appellant being a collusive one, the appeal should be dismissed with expenses."

The Sheriff-Substitute (HAMILTON) on 3rd December 1888 dismissed the appeal, and affirmed the deliverance of the trustee.

Donald Thomson senior appealed to the Court of Session, and argued—That the trustee had throughout acted without due deliberation, and in the absence of any evidence he had decided that the appellant was a conjunct and confident person. Before the present claim was rejected there ought to be inquiry—*Anderson* v. *Halley*, June 11, 1847, 9 D. 1222; *M'Naughton* v. *M'Naughton*, 1813, Hume's Dec. 396; Fraser on Master and Servant, p. 44; *Ritchie* v. *Balgarnie*, January 14, 1875, 2 R. 297; *Jones* v. *Jones*, January 25, 1888, 15 R. 328.

Argued for the respondent—There was nothing incompetent in what the trustee had done. A contract of hiring had been averred. Wages were claimed as due, but no effort had been made to prove the contract, and looking to the relationship of the parties, the trustee had done rightly in rejecting this claim as collusive—*Ritchie* v. *Ferguson*, November 16, 1849, 12 D. 119. A contract of employment did not necessarily involve a contract of wages. Here food and clothing were given for services rendered, and this was accordingly a case of presumed discharge —*Russell's Trustees* v. *Russell*, December 11, 1885, 13 R. 331.

At advising—

LORD PRESIDENT—I think your Lordships are all agreed that in the present case it is impossible to take any notice of the documents which have been put in in support of this claim, for the reason that instead of supporting it they rather tell against it.

The question, however, remains, whether enough has not been averred in this record to entitle the appellant to a proof. The appellant is the father of the bankrupt, and for seven years he alleges that he has acted as vanman to the bankrupt without receiving any wages. Now, the law in such cases is, I think, very correctly laid down by the Lord President in the case of *Anderson* v. *Halley*, 9 D. 1222, and following upon that decision it is quite clear that if the averments of the claimant are made out he will be entitled to wages. I am therefore for allowing the appellant a proof of his averments, the proof to take place before the Sheriff.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. I see that Lord Fraser in his work on Master and Servant (p. 44), under the heading of "Implied Contracts," and dealing with the result of the Scottish cases as to whether wages are due if there is no contract, makes the following observations—"The case of *Ritchie* v. *Ferguson*, 12 D. 119, shows that when the acts for which remuneration is claimed may fairly be referred rather to good feeling, self-interest, or some other cause than to service for hire, there is no ground in equity or in law for any presumption in favour of the servant. The question of remuneration seems rather to depend not upon any general presumption, but upon a consideration of the whole circumstances under which the services were performed." Now, that expresses exactly my opinion on the merits of a case such as this after we have, as the result of inquiry, the facts fully before us. But then Lord Fraser goes on to say—"If any general presumption in favour of the servant exist, it is at best a weak one, and easily rebutted by circumstances indicating that the services were intended to be gratuitous." Now, I think that this last sentence hardly brings out the result of the decisions, and that it should not be expressed quite in this way. To my mind the principle of the decisions seems to be that when there is a long extended period of service, though nothing is said about wages, a presumption arises that remuneration was intended to be given at some time or other. This presumption may no doubt be easily rebutted on evidence, and therefore I am of opinion that in all such cases there ought to be inquiry.

Under section 126 of the Bankruptcy Act the trustee might in so small a matter have taken the evidence himself. He has not done so, and the case has already been before the Sheriff, and accordingly I agree with your Lordship that any inquiry which is to take place should be taken in the Sheriff Court.

LORD ADAM concurred.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to allow a proof.

Counsel for the Appellant—Goudy. Agent—T. M'Naught, S.S.C.

Counsel for the Respondent—G. W. Burnet. Agents—Waugh & M'Lachlan, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 14.

(Before the Lord-Justice Clerk, Lord Adam, and Lord Trayner.)

GALLOWAY *v.* WEBER.

Justiciary Cases—Hotel—Breach of Certificate—Sunday Traveller.

A man who had arrived by steamer in the town where he lived between 12·30 a.m. and 2 a.m. on Sunday, and had gone home and slept at home, was supplied with liquor at a hotel in the town between 11 a.m. and 12 noon on the same day. He was unknown to the servant who supplied him, and stated that he had come by steamer, and was a *bona fide* traveller. The hour of the steamer's arrival was known to the servant, who made no further inquiry.