

goods, and afterwards obtained a warrant to sell them. It is not averred that they were sold.

"The pursuer founds upon the 1st section of the Mercantile Amendment Act 19 and 20 Vict., c. 60, but it does not enact that a sale without delivery passes the property of the goods sold (Wyper v. Harvey, 23 D. 606), nor does it prohibit the attachment of such goods by the creditors of the seller. It only makes it incompetent for him to attach them 'to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same.' This is not in terms a prohibition of the use of diligence. It is merely a limitation of its effects, leaving it, as the Lord Ordinary is disposed to think, to the creditor to attach the goods of his debtor, in his debtor's possession, *valeat quantum*, and subject to the preferable right of a prior *bona fide* purchaser. There may be a question as to the validity and *bona fide* character of the alleged sale, and in that case the pouncing creditor has an interest to secure an immediate preference over other creditors, and to prevent his debtor putting away the goods. In the case of Wyper, above referred to, it was held that, notwithstanding a *bona fide* sale, the seller's right of retention defeated the right of the bankrupt purchaser and his creditors, so that the goods remained with the seller, subject, it must be presumed, to the effect of any diligence used by his creditors.

"The defender further objects that, as it is not averred that the goods were sold, there has been no damage to the pursuer. The Lord Ordinary is disposed to think that this also is a good objection. If no *nexus*, or none effectual against the pursuer, has been laid upon the goods, he has suffered no loss by the pouncing. The case is different from that of the owner of goods improperly pounced, whose right of property has been invaded, and possibly his credit seriously injured."

W. N. M'LAREN, for the pursuer—According to a correct reading of the 1st section of the Mercantile Law Amendment Act, it was incompetent for a creditor of the seller, when goods had been sold but not delivered to the purchaser, to pounce these goods. It was the intention of the Legislature that the purchaser should have it in his power to obtain delivery of the goods at his own hand, and it prohibited the seller's creditors from taking any step which should prevent him from doing so. In the present case it is averred that the respondent, in the full knowledge of the deed of sale, pounced the goods purchased by the pursuer, and so prevented the pursuer from taking delivery at his own hand, in consequence of which he was forced to apply for delivery to the Court by a note of suspension and interdict, which he did in November following. The pounced goods were ultimately sold by the defender, but as the pursuer was not aware of that fact until after the record in the present action had been closed, there was nothing said about that circumstance on record. The record, however, contains an averment that, in consequence of the illegal pouncing, the pursuer was unable to obtain delivery of the goods until after he had obtained his note of suspension and interdict passed on caution. The pursuer claims reparation for the loss he has suffered in consequence of his not being able to obtain possession of his goods before. The circumstance as to the deed of sale having been granted by a father to his son only six days after the father had been charged by the defender for payment of the debt for which the pouncing was executed, though suspicious, was not sufficient *per se* to establish that the deed of sale was a fraudulent transaction.

JOHNSTONE, for the defender, replied—There is no averment that the goods were sold. Whatever might have been the result had there been a *bona fide* sale, the circumstances of the present case clearly showed the transaction to be collusive. The 1st section of the Mercantile Law Amendment Act does not render it illegal for a creditor of the seller to pounce, particularly as the seller's creditors have an interest in doing so, in order to prevent the goods, in the event of the sale being collusive, from being put out of the way by the purchaser after he has obtained delivery.

The LORD PRESIDENT—I don't think this case will do. I think it is clearly defective. I don't adopt the view of the statute which was insisted in by Mr M'Laren, that it entitles a purchaser to enforce delivery at his own hand; but it does not appear that the seller was ever asked to give delivery or that he refused. Then it is said the pursuer took steps to prevent the sale, but he did not do so for a considerable time. He seems then to have got an interdict passed on caution, but he did not find caution. I therefore think we must dismiss the action.

The other Judges concurred.

Action dismissed, with expenses.

Agent for Pursuer—A. Hill, W.S.

Agents for Defender—Scott, Bruce, & Glover, W.S.

Wednesday, Nov. 14.

FIRST DIVISION.

STEWART v. FOULDS.

Bankruptcy—Section 104 of Bankruptcy Act—Construction. Is a person who only alleges an interest in an estate entitled to present a petition under section 104 of the Bankruptcy Act?

By section 104 of the Bankruptcy (Scotland) Act, 1856, it is provided that "Any person claiming right to any estate included in the sequestration may present a petition to the Lord Ordinary praying to have such estate taken out of the sequestration, and the Lord Ordinary shall order the trustee to answer within a certain time, and on expiration of such time he shall proceed to dispose of the application."

The estates of A. W. Crichton, writer in Glasgow, were sequestrated on 5th February 1861, and the respondent John Christie Foulds was appointed trustee. As such he received payment of a sum of £900, the contents of a policy of insurance, on Mr Crichton's life. The petitioner alleged in regard to this policy that it was effected under an arrangement for the purpose of securing payment of certain accounts due by a person named Guthrie to the firm of Reddie and Crichton, of which Crichton was a partner, and that it was really held by Crichton for behoof of Guthrie. The petitioner also averred that he was a creditor of Reddie and Crichton, and in this way he maintained that he had an interest in having the amount of the policy taken out of Mr Crichton's estate. There were other two sums of £150 and £102, said to be in a somewhat similar situation. He prayed the Lord Ordinary to ordain the three "sums to be taken out of the sequestration of Alexander William Crichton's estate as not forming a portion of the said sequestrated estate, but belonging to Guthrie, and held for behoof of his creditors, Reddie and Crichton, and for the said Reddie and Crichton's creditors,

of whom the petitioner is one to the aforesaid extent."

The trustee lodged answers, in which he pleaded, *inter alia*—1. The petitioner has no right or title to raise or insist in the present application, in respect that he does not claim right to the funds therein specified in the sense of the 104th section of the Bankruptcy (Scotland) Act, 1856. 2. The petition should be dismissed, in respect that it is incompetent as laid, or at all events, in respect that the petitioner has not set forth facts and circumstances sufficient or relevant to support the prayer thereof.

The Lord Ordinary (Mure) repelled these two pleas *hoc statu*, and added to his interlocutor the following

"*Note*.—Had this been an application at the instance of Reddie and Crichton to take the £900, £150, and £102 in question out of the sequestration, upon the ground that they were in right to these sums as creditors of Guthrie, and that they belonged to them and not to the bankrupt, there could, it is thought, have been little doubt as to the title of Reddie and Crichton as creditors of Guthrie to make that claim. And although the position of the petitioners is attended with more difficulty, inasmuch as he claims as a creditor holding a decree against Reddie and Crichton, and as thus having right through them; still, having regard to the very broad terms of the provision in section 104 of the statute, which makes it competent for 'any person claiming right to any estate included in a sequestration' to avail himself of its provisions, the Lord Ordinary does not consider he would be warranted in holding that the petitioner was not *in titulo* to insist in this application upon the facts on which it is rested being established."

The trustee reclaimed.

GIFFORD, for him, argued—The petitioner does not aver a right to the estate in question, but only a remote interest in it. He is, therefore, not *in titulo* to make this statutory application.

THOMS, for the petitioner, was not called on.

The Court adhered. They thought that the facts should be ascertained. The pleas were only repelled in so far as preliminary.

Expenses reserved.

Agent for Petitioner—William Officer, S.S.C.

Agents for Respondent—Graham & Johnston, W.S.

Thursday, Nov. 15.

FIRST DIVISION.

BISHOP *v.* RUSSELL AND OTHERS
(*ante*, vol. i. p. 254).

New Trial. Motion for a rule on the ground that a verdict was contrary to evidence, refused.

This was a motion for a rule. The trial took place before Lord Ormisdale and a jury on 2d April last, upon issues in conjoined actions of damages and reduction-improbation framed in the following terms:—

I. Issue for Bishop—

"Whether, on or about 29th April 1851, the late Thomas Russell let to the said John Bishop and the now deceased John Weir, residing at Govan, the coal of the Benhar seam on the farm of Fauldhouse Hills, under exception of the part thereof which belongs to the Duke of Hamilton; and whether the lease, of date 2d June 1859, granted by the said William Russell and others,

the representatives of the said deceased Thomas Russell, to George Simpson, residing at Hartfield, and the possession had by him thereon down to 30th March 1864, was to the loss, injury, and damage of the said John Bishop."
Damages laid at £3000 sterling.

II. Counter-issues for William Russell and others—

"1. Whether the name 'Thomas Russell,' adhibited to the document No. 34 of process, is not the genuine signature of the late Thomas Russell, Esq., of Fauldhouse? 2. Whether the names 'George Clark' and 'William Storry,' adhibited to the document No. 34 of process, as attesting witnesses, or either of them, are not the genuine signatures of George Clark, writer in Bathgate, and William Storry, apprentice to the said George Clark, respectively? 3. Whether the document No. 34 of process is not the deed of the late Thomas Russell, Esq., of Fauldhouse?"

The jury returned a verdict for the defenders, Russell and others, upon all the issues.

The pursuer having moved for a rule,

J. CAMPBELL SMITH was heard in support of the motion.

The motion was refused.

The opinion of the Court was delivered by the

LORD PRESIDENT—This is a motion for a rule to show cause why a verdict should not be set aside as contrary to evidence. The case was tried before Lord Ormisdale and a jury, upon issues framed in conjoined actions—the first issue concluding for damages from Mr Russell for having allowed a coal mine to be worked during the currency of Mr Bishop's lease of the same; and the others being counter-issues for the defenders, in order to try the genuineness of the signatures to this lease to Bishop, the defenders alleging forgery. The jury have returned a verdict in favour of Russell and others upon all these issues. That is to say, they find against Bishop upon his claim of damages, and against him also upon the question whether the name of Russell is forged, and also upon the issue whether the names of George Clark and William Storry are forged. There has been a great deal of evidence led upon both sides. Parties are agreed that before the date of the lease (29th April 1851) there had been a previous lease of this coal mine to Bishop and another person of the name of Weir, granted in 1850, for a certain lordship, and an obligation to work so as to produce a certain rent. And they are also agreed that in the spring of 1851 that lease was renounced, and certain events took place which are established in evidence. It appears that there was power to renounce this lease in 1850, and that notice of renunciation was given on 3d April 1851, and that by the terms of the lease renunciation could not take place till six months after intimation. Mr Russell, then proprietor, accepted intimation. It further appears that none of the stipulated rent had been paid. On the 20th April 1851 application was made by Russell for sequestration, and warrant to sell the gear of the colliery for rent due. On 23d April the Sheriff granted sequestration, and appointed service of the petition; and on the 29th April service was made, and no answers having been lodged, the Sheriff granted warrant to sell on the 27th June 1851. On the 1st of July intimation of that interlocutor was made to the tenants, Bishop and Weir, and the sequestered estates were sold, and the roup roll is produced. The effects were purchased by