for the purpose of making Cameron a partner. It was never signed, but it was freely enough discussed by Mr Hosie, and he mentioned Cameron as his partner on various occasions. On one occasion he mentioned the fact in responding to the toast of prosperity to the firm at a dinner; and in letters signed by Mr Hosie for the company he speaks of "our Mr Cameron." Then, was the defender Waddell aware of this? He swears he was, and so does Cameron. The defender had previously transacted with Cameron as the representative of the company. It can, therefore, hardly be doubted that the defender was entitled to deal with Cameron as a partner. It was once intended that he should be one, and there was no intimation of any change of intention that could possibly have reached the defender. The bills were taken on 20th October, Mr Hosie having died on the 13th. The works were carried on after Mr Hosie's death. Cameron and Haldane were both there. The defender goes and offers to Haldane, who had been in the habit of uplifting accounts due to the company, £25 in cash and the two bills. It was said that between the date of the bills and their acceptance there had been a surreptitious carrying off of the bills by Cameron. I see no evidence of that, and no reason to suppose anything of the kind. The two bills having been accepted by the defender, one of them is paid to Cameron, the other is not paid yet. In regard to the unpaid bill it is quite clear that the defender cannot be compelled to pay it without being guaranteed against claims by Cameron if he pays to Mrs Hosie. In regard to the other bill which was paid there is more difficulty, because the defender paid it before it was due in consequence of receiving a letter from Cameron asking him to cash it. Cameron says that the bill he meant to pay with the defender's money was not a foundry bill, but one of his own; but he did not tell this to the defender. If it had appeared that the defender knew that Cameron was asking premature payment of a bill due to the firm in order to pay off a private debt, that would be a serious circumstance against *bona fides*. There are just two other circumstances in the case. One is the *Gazette* notice, which I put entirely out of view, because it does not apply to the debtors of the company. The other is the evidence of Haldane, which is very peculiar. It is plain that his first statement was not that he communicated to the defender that Cameron was not a partner. He says—"I *think* I *would* tell him my *opinion* that Cameron was not a partner." That is a very peculiar expression and does not amount to much. Subsequently he is got with some pressure to extend his statement, and he ultimately says he did tell him that Cameron was not a partner. But looking to his evidence as a whole, I am of opinion that his subsequent statement must be taken with the qualification suggested by his first. If the defender had the belief that Cameron was a partner when he accepted the bills, the pursuer was bound to make out that that belief had been changed. This she has not done. I think, therefore, we must hold that the defender has made a *bona fide* payment of this bill. To set aside that payment now on the statement made by the pursuer would be to allow her to plead a latent defect against a *bona fide* payment, which is inconsistent with all rules of equity.

The judgment of the Court was to assoilzie the defender in regard to the amount of the paid bill, and to dismiss the action in regard to the amount of the other, with expenses.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agent for Defender—James Finlay, S.S.C.

Tuesday, Nov. 13.

FIRST DIVISION.

BROWN *v.* BROWNLEE.

Reparation—Wrongful Poinding—Relevancy. Averments in an action of damages for alleged wrongful poinding, which held irrelevant.

This was an action of damages for wrongful poinding of goods belonging to the pursuer, for payment of a debt not due by him, but by his father.

The pursuer's allegations were as follows:—On 22d September 1865, he had purchased from his father, who was tenant of a farm at Balerno, certain articles of farm stock and produce and household furniture, and he produced a deed of assignation thereto, executed by his father on that date, and bearing that the price, £398, had been "now and formerly advanced and paid." On 16th September 1865, six days before the assignation, the defender had charged the pursuer's father to pay £120, 16s., in virtue of an extract registered protest on a bill accepted by him; and on 16th October 1865, notwithstanding the assignation to the pursuer, he caused a portion of the effects thereby assigned to be poinded for payment. On 21st October he obtained a warrant to sell the poinded effects on 3d November. On 2d November the pursuer applied for and obtained from the Lord Ordinary an interdict of the sale on caution, which he was unable to find. There was no averment that a sale had taken place, but it appeared in the course of the discussion that it had. The effects assigned to the pursuer had never been delivered to him, but he founded upon section 1 of the Mercantile Law Amendment Act, 19 and 20 Vict., c. 60, which enacts that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller, by any process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same."

The defender pleaded that the action was irrelevant, and averred that the pretended assignation founded on was a collusive device betwixt the pursuer and his father to defeat the diligence of the latter's creditors, and that no *bona fide* sale ever took place.

The pursuer proposed an issue, which the Lord Ordinary (Barcaple) reported, with the following

"*Note.*—The defender maintains, on grounds which the Lord Ordinary inclines to think well founded, that the pursuer has not set forth a relevant case for damages, and is not entitled to an issue. The case of the pursuer is that the defender having given a charge to the pursuer's father for a debt due to him, the document printed in the appendix was executed on the sixth day after the charge. It bears to constitute a sale and conveyance by the pursuer's father to the pursuer of the farm stock, implements, and household furniture there enumerated, on the farm occupied by the former. Though this document was exhibited to the officer, and brought to the knowledge of the defender, the defender proceeded to poind the

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 poinding 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 t ink that this also is a good objection. If no *nexus*, hr none effectual against the pursuer, has been laidoupon the goods, he has suffered no loss by the po nding. The case is different from that of the oiwner of goods improperly poinded, whose right of property has been invaded, aud 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 poind 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, poinded 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 poinded 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 poinding, 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 poinding 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 poind, 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 it 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,