planation of the mistake was somewhat confused, but the Lord Ordinary has accepted it as sufficient. Neither party examined Miller, who is now in London, but a letter from him is in process, dated 17th December 1880, in which he intimated that he had not given value for the note; that it belonged to Littlejohn, and requested Littlejohn to write to the pursuers to deliver it up, which Littlejohn did, but instead of receiving delivery he was served with the present action."

The pursuers reclaimed, and the Second Division being of a different opinion from the Lord Ordinary as to the proof of the theft of the note by Miller, recalled his Lordship's interlocutor, and proceeding on grounds entirely special, dismissed the action and found neither party entitled to expenses.

Counsel for Pursuers — Trayner — Rhind. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders — Guthrie Smith — M'Kechnie. Agent—John Gill, S.S.C.

Wednesday, January 18.

SECOND DIVISION.

[Sheriff of Fife.

THOMSON *v.* SCOULAR.

Poinding of the Ground — Possession — Sale — Bankruptcy.

A party from motives of friendship to a bankrupt purchased from the trustee in his sequestration his household furniture, and allowed the bankrupt to remove it to a house belonging to him with respect to which a petition for poinding the ground had been served prior to the sequestration. In an action at the instance of the purchaser to interdict the heritable creditor in the poinding from attaching the furniture, the Court being satisfied on the proof that the sale was an honest one, *granted decree* as craved, on the ground that the furniture was the property of a third party, viz., of the purchaser of it.

On 17th November 1879 James Rignall, machine and implement maker, Cupar, borrowed from John Scoular, implement maker, Crook, near Stirling, the sum of £300, in security of which he granted in favour of the latter a bond and disposition in security over certain subjects situated at West Braes, Cupar, and which in May 1880 were occupied by him. On the 29th May 1880, founding on this bond, Scoular raised and executed against Rignall, in the Sheriff Court at Cupar, a petition of poinding of the said subjects, on which a decree of poinding of the ground and subjects situated thereon was granted on 1st December 1881, and thereafter on 17th February 1881 the said decree was carried into execution, the whole effects being inventoried and appraised.

In these circumstances the present action was raised in the Sheriff Court of Fifeshire at Cupar, by Peter Thomson, commission agent, near Abernethy, for the purpose of interdicting Scoular from selling or in any way interfering with or disposing of the household furniture, implements of husbandry, and other effects which the pursuer averred belonged to him, and which had been poinded as above by the defender in the dwelling-house erected on the lands of West Braes. The grounds on which the action was based were these:—On 1st June 1880 Rignall's estates had been sequestrated, and on 23d June thereafter George Wallace, accountant, Cupar, was confirmed trustee on the said estates. On 7th September 1880, Wallace, at the request of the bankrupt's creditors, sold to the pursuer, for the sum of £44, 5s. 9d., the household furniture and implements of husbandry which had belonged to the bankrupt, and for this sum the pursuer granted his bill, payable at two months' date, which was retired at maturity.

The pursuer pleaded—"(1) The household furniture, implements of husbandry, and other effects specified in the prayer of the petition being the property of the pursuer, and the defender having poinded and applied for warrant to sell the same, the pursuer is entitled to interdict as prayed for, with expenses."

The defender pleaded—"(2) The effects claimed by pursuer being the property of the said James Rignall, are completely poinded by the defender. (3) The articles poinded being in the possession of and used by the said James Rignall, and being found upon the subjects contained under the defender's bond, fall to be dealt with as forming part of his security."

In the proof which was held the following facts appeared:—The trustee on Rignall's sequestrated estate was authorised by the creditors to dispose, either publicly or privately, of the bankrupt's estate, which for the most part was lying in an uninhabited house of which the trustee kept the key. The commissioners had a feeling that if Rignall had a friend who would purchase the furniture, it would be better that the latter should get the first offer. They were desirous that the bankrupt should have an opportunity of continuing his business pending the sequestration. Accordingly Thomson offered to purchase the furniture and other effects, and they were sold to him by the trustee, between the raising of the summons and the execution of the poinding of the ground by Scoular. The price was duly divided amongst the rest of the creditors. Thereafter the furniture was removed under Thomson's sanction to the house at West Braes with reference to which Scoular had raised his summons of poinding.

The Sheriff-Substitute (LAMOND) granted *interim* interdict, and thereafter found that it was not proved that the articles specified in the petition, with the exception of the chaff-cutter and oil-cake breaker, were on the lands of Gladstone Cottage, disponed in security to the defender, on 29th May 1880, when the defender executed the summons of poinding of the ground against the bankrupt Rignall: Found that said articles were bought by the pursuer, and were, with the exception aforesaid, his property: Therefore continued the interdict, except as regards said chaff-cutter and oil-cake breaker, and decerned.

On appeal the Sheriff-Principal (CRICHTON) recalled the interlocutor of the Sheriff-Substitute, and found "in point of fact—(1) that on 17th November 1879, James Rignall, machine and implement maker, Cupar, granted in favour of the defender a bond and disposition in security for

the sum of £300 over certain subjects situated at West Braes, Cupar, and which were in May 1880 occupied by the said James Rignall; (2) that on 29th May 1880 the defender raised in the Sheriff Court at Cupar, and executed against the said James Rignall, a petition of poinding of the ground of the said subjects; (3) that at said date none of the articles in the prayer of the petition, except the chaff-cutter and oilcake breaker, were on the said lands; (4) that upon 1st June 1880, the estates of the said James Rignall were sequestrated, and upon 23d June 1880 George Wallace, accountant, Cupar, was confirmed trustee on the said estates; (5) that the said George Wallace was authorised by the creditors of the said James Rignall to dispose of the bankrupt's estate either publicly or privately; (6) that on 7th September 1880 the pursuer purchased from the said George Wallace, for the sum of £44, 5s. 9d., the household furniture and implements of husbandry specified in the prayer of the petition, which had belonged to the said James Rignall; (7) that the pursuer granted his bill for this sum, payable at two months' date, which was retired at maturity; (8) that on 1st December 1880, decree was pronounced in said action of poinding of the ground; (9) that on 17th February 1881 the said decree of poinding of the ground was carried into execution, and the whole effects then situated on the subjects at West Braes were inventoried and appraised; (10) that all the articles mentioned in the prayer of the petition were contained in the said inventory and appraisement; (11) found that, in the circumstances above set forth, the articles in the prayer of the petition, with the exceptions above mentioned, being the property of the pursuer, were not attached by the defender's poinding of the ground: Therefore granted interdict as craved, except as regards the said chaff-cutter and oilcake breaker, and decerned."

He added this note—"The Sheriff is of opinion that the only articles proved to have been on the subjects at West Braes on 29th May 1880 were the chaff-cutter and oilcake breaker. These articles, according to the decision in *Lyons* v. *Anderson*, 21st October 1880, 8 Ret. 24, must be held to fall under the defender's diligence, and he is entitled to them or to their value.

"It was contended, however, that the other articles mentioned in the prayer of the petition having been on the subjects at West Braes when the poinding was carried into execution, must be held to have been attached by it. Had the articles remained the property of the bankrupt or of his trustee, the Sheriff is inclined to think that this contention would be well founded. But the articles mentioned were sold by the trustee to the pursuer between the raising of the summons and execution of the poinding by inventory and appraisement. No doubt the pursuer allowed the bankrupt to take the articles to West Braes, but they still remained the pursuer's property, and in these circumstances it appears to the Sheriff that they were not affected by the proceedings of the defender. There is no evidence of any collusion between the bankrupt or his trustee and the pursuer in entering into the transaction with regard to the purchase of the articles in question."

The defender appealed, and argued—The sale of the furniture to Thomson was never completed by delivery to him as purchaser at the hands of the trustee. That being so, the heritable creditor was entitled to prevail against him in virtue of his summons of poinding of the ground, which from the date of its service not only attached the goods on the ground, but also attached property subsequently bought on the ground.

The pursuer replied—The contract of sale was completed. Delivery was given to the pursuer by the trustee, who kept the key where the bankrupt's furniture was lying. It was not sound law to say that articles which were at West Braes when the poinding was carried into execution were to be held as attached by it. The case of *Lyons* only applied to articles which were on the ground at the time when the summons of the poinding was served. It was with the pursuer's sanction only that the articles were allowed to be removed to West Braes, and this indulgence did not divest the pursuer of his right of property in them.

Authorities—*Keir* v. *Hepburn*, June 30, 1624, M. 10,544; *Campbell's Trustees* v. *Paul*, January 13, 1836, 13 S. 237, Bell's Prin. 1314; *Anderson* v. *Buchanan*, December 22, 1848, 11 D. 270; *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936; *Bain* v. *The Royal Bank*, July 6, 1877, 4 R. 985; *Dick's Trustee* v. *White's Trustees*, January 28, 1879, 6 R. 586; *Lyons* v. *Anderson*, *&c.*, October 21, 1880, 8 R. 24.

At advising—

Lord Justice-Clerk—This subject has often been the subject of discussion, and doubtless embraces a somewhat intricate chapter of the law. But on most of the questions which have been raised I do not think it necessary to give a decision. In the first place, I do not think that it is necessary to decide whether a singular successor who has purchased the lands after the heritable creditor has begun his diligence of poinding the ground is liable to have the goods brought on the land subsequently affected by the poinding when decree is given. That is a question, and while I think there is authority to the affirmative effect, I doubt whether it would be followed at the present day. In the second place, it is not necessary to give a decision as to what character the trustee would hold here—whether he is to be held as having full title to the land as owner, or only to be held as being an encumbrance on the bankrupt's title for purposes of sequestration.

Now, assuming that the heritable creditor cannot poind the ground so as to attach moveable property belonging to third parties, the real question is as to the effect of the decree attaching the moveables on the ground.

Now, it is laid down on authority that property belonging to third parties is not, *prima facie* at all events, attachable by the heritable creditor who has raised the summons of poinding of the ground. That being the state of the law, the next question is, was the furniture the property of a third party? I think that it clearly was so. I am of opinion that it was not only in the right of a third party, but that the right of property had been completed before the subjects were on the ground to which the poinding applied. The circumstances of the case are these—The heritable creditor served a petition of poinding of the ground on the 29th May 1880. He took decree in December, and in the beginning of 1881 he executed the decree. In the meantime, sequestration of Rignall's affairs had been awarded in

June 1880, and the trustee on the estate completed his title before the decree in the poinding of the ground was executed. But in the course of September, and before the decree, a transaction took place between the trustee and Thomson, by which he sold to the latter articles of furniture, not on the ground which was the subject of the poinding, but which were in a separate residence belonging to the bankrupt and his trustee. The trustee kept the key and was in the full possession of the moveables. It seems that the commissioners were anxious that the bankrupt should have the means of continuing his business pending the sequestration, and they thought that if he had a friend who would purchase the furniture it would be better that he should get the first offer. Thomson accordingly became the purchaser and paid the price, the creditors getting the benefit of it. From that time, then, the trustee had no right whatever to interfere. The property belonged to Thomson. Whether if it had been from the first in the house, it could be said there was no delivery after the price was paid, is doubtful. But the fact was, that it was not allowed to remain where it was because it was by Thomson's order that the bankrupt was allowed to take the furniture to his residence, which was on the ground which was the subject of the poinding. Therefore the object of the purchase was accomplished, and I have no doubt whatever that the furniture was out of the control of the trustee and in the control of the purchaser, and therefore there is no more to be said.

Lord Young—I am of the same opinion, and base it on the same grounds. The case appears a very simple one on the view on which your Lordship proposes to frame the judgment. Rignall, the debtor, was a sequestrated bankrupt. The furniture in question was, at the date of the sale to the pursuer, not in the bankrupt's custody, but in an uninhabited house which was kept locked, the key remaining with the trustee. That is a circumstance which makes the case more conspicuously clear than it would otherwise have been. However, I may say that I should adopt the same opinion had the furniture been from the first in the house then occupied by the bankrupt, and in daily use by him, because the effect of the sequestration would have been to divest him even of the furniture of the house in which he was living, and to invest the trustee with the property in the same manner as if it had been delivered into the possession of the trustee. Now, there is no doubt that the sale was an honest one. Cases of sale *retenta possessione*, and of reputed ownership, are valuable in enabling the Court to avoid collusive sales or proceedings whereby the property of a person who is really bankrupt might be taken away to the disappointment of creditors, and where he is found actually in possession of the goods. An allegation that the goods are the property of someone else is regarded with suspicion, as an attempt to remove the bankrupt's state to the disappointment of creditors. The Court will not readily receive such, and there may be other more suspicious transactions still. In the case of *Anderson* v. *Buchanan* there was really an appearance of honesty, but the purchase was made many years before by a friend to relieve the debtor from the troubles which were pressing upon him then. He got out of his troubles, but incurred other debts, and his furniture was attached by diligence of a new creditor. He then said—"The furniture is the property of my friend." The Court said—"There is no evidence of that, and the Court must assume that the purchaser meant the bankrupt to receive a gift of the furniture, and consequently it will be liable to be attached for his subsequent debt." But in the present case everything is most recent. The furniture, so far from there being any motive to disappoint the creditors, is converted into money by the trustee for the creditors' benefit, and they would get their share, and I assume, in the absence of evidence to the contrary, that the sale was made and the property given over with the authority of the purchaser to the bankrupt. This is not a sale *retenta possessione*. It is a sale followed by delivery by the seller to serve the ends for which the purchase was made. But it is sent to the house where the bankrupt resides, which is on land with respect to which a petition for poinding the ground had been served prior to the sequestration; and the creditor says—"You have brought it within my diligence as property of the trustee." No. He has sold it, and got the price. Has he retained possession? No. Has he given it over to the bankrupt in accordance with the order of the purchaser as the property of the bankrupt? No. He is divested by sequestration, and has never been reinvested, unless it can be shown that the creditor made him a present of the goods, and that, according to the case of *Anderson*, would not have protected him against the diligence of creditors. But even if there had been a gift, I should have been of opinion that the diligence did not attach it, because the furniture had been sold and the price received by the trustee for all the creditors, one of whom was the appellant. It would be extravagant, however, to hold that a gift was intended. I therefore concur in the view of the law laid down by your Lordship, and on which you propose to decide the case.

Lord Craighill—I am of opinion that the property in the furniture was not in the debtor, but was truly vested in a third party, Thomson, who merely allowed it to be transferred to West Braes as an act of indulgence to the bankrupt. In these circumstances the interdict must be sustained.

Lord Rutherfurd Clark—I concur.

The Lords therefore dismissed the appeal, and affirmed the judgment.

Counsel for Appellant—J. P. B. Robertson – Strachan. Agent—James Wilson, Solicitor.

Counsel for Respondent—Thorburn—Rhind. Agent—Andrew Wallace, Solicitor.