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 Ormidale 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 Ormidale 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 sequestrated estates were sold, and the roup roll is produced. The effects were purchased by

Mr Russell. The sale was reported, and an interlocutor pronounced, finding what the proceeds were, and finding a balance due. These proceedings occupied till the end of July 1851. It seems while these proceedings were going on—in the midst of these proceedings—and soon after their commencement, that this lease of 29th April 1851, if granted at all, is said to have been granted. It bears to be a lease granted by Russell to his previous tenants, Bishop and Weir, upon terms rather peculiar. It was granted for a lordship alone. There was no fixed rent. It appears that soon after this lease was got by Bishop, he removed to somewhere else. No workings took place after May 1851. After that time Bishop and Weir did not work the colliery at all. Bishop removed to some other place and engaged in other occupations. Weir died in 1852. It appears that after this Russell died, and subsequently his representatives granted a lease to Simpson in 1859. When Bishop first made a claim for damages under the lease of 1851 is not distinctly proved. He says he made an observation to that effect at the time the lease was granted to Simpson. That is not corroborated. The earliest authentic evidence we have is in January 1864. Bishop hears that Simpson was working the pit; and in these circumstances he claims damages, and says it was to his great loss and injury that Simpson worked the coal. It is remarkable that he did not do anything previously. He admits that he had not means to work the coal in 1852. But, on the one hand, it is singular that Bishop should have made no use of the lease; and it is singular, on the other, that Russell should have granted a lease for fifty years to a person who was under no obligation to work the coal. It is also a singular circumstance that in May 1851 there is a letter from Weir, the partner of Bishop, asking for a lease from Russell, and asking it to be granted on more favourable terms than the first lease—not a thing very consistent with the existence of the lease granted in 1851. But Bishop explains this. He says that he and Weir had taken into their partnership a person named M'Kean, and that they were desirous of getting rid of him; and in order to do this there was a pretended quarrel got up as to their lease—viz., that of 1850—and that one was to pretend to carry on the work while the other was objecting, and so matters were to get into a state of confusion; that Russell was a party to this; and that all this was a concoction to get rid of M'Kean. That was apparently not a very honest proceeding. I think in his examination Bishop admits this; and it is under the circumstances of having been suggester and actor in this concoction that Bishop now comes forward to support this lease of April 1851. It was said that no work had been done under the new lease, and that the letter of renunciation of 3d April 1851 was an exercise of the right to renounce under the old lease, and that any work up to that time was under the old lease. But Russell accepted the renunciation immediately and at once. It would have been desirable to have seen Mr Russell's letter. Russell says that he accepted on the express condition that it was to take effect in six months after intimation, in terms of the stipulation of the lease. Bishop, who is in possession of the document, is called on to produce it, and does produce it; but it is torn and mutilated, except the last words, "in terms of the stipulation in the lease," and that provision about the six months does not appear. The statement of the pursuer about this lease of 1851 is that it is not the original lease, but a copy of the lease for the tenant upon unstamped paper; that it was signed by all parties; and that this was done in Bathgate on the date the lease bears, in a certain tavern. Bishop himself was there and says that he saw all the parties adhibit their signatures. Other witnesses were examined, who said that the parties mentioned in the lease were all there, and that a document was exhibited and signed by them. The document so signed has not been very well identified. It bears to be a copy of the lease, and states that it is written "on this and the preceding page of stamped paper by William Storry," but it is upon three pages of paper not stamped, or stamped since, as the date is April 1866 on the stamp. These people don't profess to identify the document except as to its tenor. In addition to this, persons are adduced who know the handwriting of Russell and Storry, and swear that it bears their signatures. There are also produced documents that are genuine signatures, and these parties say as to them, that they see no difference between them and the challenged signatures. In further corroboration, there is produced the original, or, at least, duplicate lease of 1850. The defenders say that also is a forgery; and a curious circumstance about it is that the testing clause is said to be written by the brother of Clark, who wrote the testing clause in the deed of 1851; but he says he never wrote it. It may be a copy of something he wrote, but he never wrote it. But the question here is not as to the authenticity of that lease. On the other side, there is the evidence of the relations of Russell and of persons acquainted with the handwriting of Clark, and they say that it is not their writing. In like manner there is evidence as to the signature of Storry. It appears to me that the means of knowledge of these parties are superior to those of the witnesses adduced by the pursuer. There is another kind of evidence which has been somewhat resorted to, but not much. I mean the evidence arising from the comparison of the genuine signatures with the signatures said to be forged. In some cases this may be very important; but I have gone through that matter; I have compared all the challenged signatures with those admitted to be genuine, and I must say I have no doubt or hesitation in concluding that all the three signatures are not genuine signatures.

It is said William Storry filled up the testing clause, but that testing clause seems to be written with the same pen and in the same ink as the body of the deed; and I further think that the man who wrote the words, "William Storry, witness," and the man who wrote "George Clark, witness," are one and the same person.

The DEAN OF FACULTY, for the defenders, moved that the Court should ordain the clerk to retain the deed in his custody, and not to deliver it to the pursuer or anyone else; and an order to this effect was pronounced.

Agents for Bishop—Ferguson & Junner, W.S.

Agents for Russell and Others—J. & A. Peddie, W.S.

Thursday, Nov. 15.

SECOND DIVISION.

ANDERSON *v.* KERR.

Title to Sue—Next of Kin—Co-executors—Factor.

Held that a survivor of two co-executors was entitled to call a factor appointed by them and the next of kin of a deceased party to account, he having intromitted with the estate.