

it has been the pursuers' fault that it has not. Mr Cunninghame rendered an account before this action was raised, in which he included a sum which he was not entitled to charge. It was a sum which he had paid away without any legal obligation or right to do so, but which he paid in perfect *bona fides*, and from his knowledge of the testator's own real intention. On the first opportunity he has after this, he says at once, I don't mean to insist in this charge, and had rather give it up than dispute about it. That tender he undoubtedly made in his defences to this action, and if that tender had been accepted by the pursuers, the result would have been to leave them in 1869 with a sum in their hands £18 or £20 greater than that which they have now actually got, excluding interest. But instead of accepting that tender the pursuers have gone on since, opening up every contentious point, and of course driving the defender to contest each point. Under these circumstances, I do not think that the question of expenses should depend at all upon the preponderance of success in these different disputes. The question of expenses should rather depend upon whether the suit was a justifiable one or not in its origin, and whether it ought to have been brought. I think that the pursuers ought to have accepted the offer made in the defences, and that their proceedings since then have been nimious and vexatious. The conclusion to which these considerations lead me is, that the defender should be found entitled to the whole expenses of the cause.

The other Judges concurred.

The Court decreed in terms of the accountant's supplementary report, and found the defender entitled to the whole expenses in the cause.

Agent for Pursuers—William Kelso Thwaites, S.S.C.

Agents for Defender—A. & A. Campbell, W.S.

Wednesday, March 13.

JAMES HUTTON, PETITIONER.

Bankruptcy—Trustee—Discharge—New Trustee—19 and 20 V^{ict.} c. 79, § 74.

Where the trustee in a sequestration had been discharged, and thereafter new funds were discovered before the bankrupt himself obtained his discharge,—*Held* that the Court could not recognise the title of a new trustee, appointed by warrant of the Sheriff under § 74 of the Bankruptcy Act, but that the procedure adopted in the case of *Thomson*, Dec. 17, 1863, should have been followed.

The estates of Thomas Robertson were sequestrated on March 10, 1864, and George Macfarlane, accountant in Glasgow, was appointed trustee. Having realised and distributed the estate, he was discharged on June 28, 1870, and, prior to his discharge, he transmitted the sederunt book of the trust to the Accountant in Bankruptcy, in terms of § 79 of the Act. Additional funds having become available, and the bankrupt himself not having been discharged, warrant was craved from the Sheriff, at the instance of one of the creditors, to cite a new meeting of creditors for the election of a trustee. Under this petition and the Sheriff's warrant, the present petitioner was appointed trustee, and now applied to the Court for warrant to obtain delivery of the sederunt book of the trust,

which had been transferred in due course from the office of the Accountant in Bankruptcy to that of the Deputy-keeper of the Records.

HARPER for the petitioner.

At advising—

LORD PRESIDENT—The circumstances in this case at once present the question as to the position and character of the trustee. Now, the 74th section of the Bankruptcy Act is the only one under which the proceedings alleged to have been held could take place. That section provides—(reads the section referred to). Now the former trustee has neither died, resigned, nor been removed. The case does not therefore come within the words of the section. Such was held to be the case in *Thomson*, Dec. 17, 1863, 2 Macph. 325. For in that case the Court, on an application by the old trustee, interfered in the exercise of its *nobile officium*, holding that the case was not within the 74th section of the statute. If that be a sound decision, it follows that the petitioner's appointment is not a good one. But the matter has received farther consideration in the case of *Gentles*, Nov. 22, 1870, 9 Macph. 176. After that case, it seems to me quite impossible for the Court to recognise such an appointment as here made by the Sheriff to be of any avail whatever. We must therefore refuse the application of the petitioner, until he is appointed in the form followed in the previous cases of *Thomson* and *Gentles*.

The other Judges concurred.

Agents for the Petitioner—Duncan & Black, W.S.

Wednesday, March 13.

SPECIAL CASE—FORSYTH'S TRUSTEES AND OTHERS.

Succession—Testament—Draft of Codicil.

Circumstances in which it was held that a writing, holograph of and signed by a deceased, but headed, also in his own handwriting, "Draft of Codicil," was not a valid testamentary writing.

William Forsyth, spirit merchant in Glasgow, died on 25th December 1870, leaving a widow and three daughters. The eldest daughter, Annie, was never married, and always resided with her parents. The other two daughters, Mrs Currie and Mrs Lindsay, were respectively married on 6th August 1867, and 10th August 1869. Each of them received an outfit, in the way of plenshing, at the time of her marriage, but no money provision.

Mr Forsyth left property to the value of £10,480, besides household furniture, &c., valued at £174.

After his death there was found put up, along with other valuable papers, in a private drawer in his house in Glasgow, a trust-disposition and settlement, dated 25th October, with two codicils, dated 9th August 1848 and 21st March 1867. Each of these deeds was formal and tested, and drawn by different firms of law agents in Glasgow.

By the trust-disposition and settlement he provided a liferent of his estate to his widow, the capital to be divided equally among his children. The codicils did not effect any alteration on the general principle of the trust-deed.

A short time after Mr Forsyth's death, his widow found in an unlocked drawer, where no important