

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

papers lay, in the deceased's bedroom, a document in the following terms:—

“Draft of Codicil.—Should Annie Anderson Forsyth, my daughter, remain unmarried at the death of myself and her mother, and considering the attention and interest she has taken in us since Agus and Mina was married; and farther, considering they were both set off with a competent assortment of bed and body clothes, table linen, and other things necessary for their house-furnishing, I give and bequeith to my daughter Annie the whole of my household furniture, bed and table linen, silver plate, books, pictures—indeed all in use in the house: and considering at my death there will be in cash £10,000 (ten thousand pounds), less or more, including the life insurances in the Scottish Widow's Fund and Caledonian Life Ins. offices, I bequeith to each of my married daughters £3000, free of legacy-duty, which sum is to be put out to instt. in good heritable security, or in the Glasgow Water or River Trusts, and the instt. paid half-yearly to them so long as they live; and in the event of them leaving a family, the money to be equally divided among their children when the youngest is twenty-two years old; but should there be no family left by either of them, the money is to revert to the longest liver, and after her death to be distributed as follows, viz.:—The reversion or balance of the money, which I expect will amount to considerably more than £3000, is to go to Annie, my oldest daughter, and to be out put at instt. as before mentioned; and in the event of her dying unmarried and without leaving lawful issue, is to revert as before mentioned, along with the proceeds of the sale of the household furniture, and other effects, belonging to her at her death.

“21 Sept. 1870. WILLIAM FORSYTH.”

The drawer in which this paper was found was immediately under the private drawer mentioned before. A chest of drawers stood in the deceased's room, with a bookcase upon the top. The private drawer was in the bottom of the bookcase, and was secured by a lock and springs. The unlocked drawer is the top drawer of the chest, and contained articles of dress in daily use by the deceased. The document was found folded, and lying flat in the front of the drawer.

A Special Case was presented by—(1) The testamentary trustees of the late William Forsyth; (2) Mrs Currie and Mrs Lindsay, and their respective husbands; (3) Miss Annie Forsyth.

The parties were agreed that the document last-mentioned was entirely in the handwriting of the deceased.

The question submitted to the Court was as follows:—

“Whether the said last-mentioned document, and which is printed second in the appendix hereto, is a valid testamentary writing, and forms part of the last will and settlement of the said deceased William Forsyth?”

BALFOUR and BRAND for the First and Second Parties.

SHAND and M'LAREN for the Third Party.

The following authorities were cited—*Munro v. Coutts*, July 3, 1813, 1 Dow, 437; *Horsburgh*, Jan. 12, 1847, 9 D. 329; *Scott*, Feb. 5, 1864, 2 Macph. 613; *Lowson*, March 20, 1866, 4 Macph. 631; *Sibbald's Trs.*, Jan. 13, 1871, 9 Macph. 379; *Williams on Executors*, vol. i, pp. 68, 69.

At advising—

LORD PRESIDENT—Mr Forsyth died on 25th September 1870, leaving a widow and three

daughters. The eldest is unmarried, and has always resided with her father and mother. The other two were married in August 1867 and August 1869 respectively. Both of them received an outfit at the time of their marriage, though not any sum of money.

Mr Forsyth had made his settlement originally in 1847. It was duly prepared by a firm of conveyancers in Glasgow, and is a formal and tested deed. Its general principle is the provision of a life rent of his estate to his widow, and an equal division of the capital among his three daughters. By codicils in 1848 and 1867 he made certain alterations, but not affecting the principle of division. But it is said that he made an alteration on 21st September 1870 by a holograph will.

The great difficulty in holding this paper as part of the testament of Mr Forsyth is the title which he has given it. He calls it “draft of codicil.” These words are in his handwriting, equally with the rest of the paper. The object is to benefit the eldest daughter. The motive is declared to be that each of his two married daughters had received an outfit at their marriage—a statement which shows that the writing was made after the marriage of his youngest daughter in August 1869. The effect is to pay off each of the younger daughters with £3000, leaving the balance to the eldest daughter, which, both according to his own estimate, and as it turned out, was between £4000 and £5000.

This is called a “draft of codicil;” and it is very difficult to suppose that the writing is anything but a draft. The question is, Whether, and at what time did it change its character of a draft into that of a perfect testamentary paper? It is signed by the deceased. If it could be proved that it was not signed at first, but that the signature was appended *post intervallum*, that would give a perfectly intelligible point of time at which the draft was converted into a perfect testamentary paper. But no one can tell that. There is no reason to suppose that the signature was not written at the same time as the body of the paper.

There are also circumstances connected with the discovery of the paper, not conclusive, but more or less material. The original deed and the codicils of 1847 and 1868 were found in what was understood to be Mr Forsyth's repository for papers of value—a locked drawer in a bookcase. This holograph paper was not found there: it was in an unlocked drawer where no papers of value lay, in a chest of drawers under the bookcase in which was the locked drawer. The articles usually kept there were articles of clothing in daily use. In one of these drawers the paper was found folded and lying flat, without backing or indorsement.

We have to determine whether this paper is to be taken as part of the will of the deceased, or only as an intended alteration of his settlement. On the one hand is to be considered the fact that it is signed by the deceased, on the other that it is called, in his own handwriting, a “draft of codicil.” These circumstances are not very consistent with one another. It is not, however, an unknown thing for a draft to be signed for the purpose of authenticating it when it comes into the hands of the conveyancer. Another circumstance, in itself not very important, assumes a certain degree of importance in the present question. There is an important blank in the paper, much more likely to be left in a draft than in a completed testamentary paper. The £3000 left to each of

his younger daughters and their families is to be divided when the youngest of their children reaches the age of twenty-one, but should there be no family left by either of them, the ultimate destination is left blank. The circumstance that Mr Forsyth was in use, when he made testamentary papers, to employ a law agent, is not to be thrown out of view. His three former testamentary writs were executed by three different firms. All these accordingly appear as tested instruments. He had not left Glasgow, so far as we are informed. It is not said that he was not in Glasgow at the time when he wrote the holograph paper. He had thus immediate access to a man of business to put it into shape. It is not alleged that he was in a state of incapacity to employ a law agent. Although he was taken somewhat suddenly ill, that was at a later period. The imperfect state of the paper, and its important blank, are not therefore to be accounted for by sudden illness followed by death.

Taking the whole circumstances into account, I am of opinion that there is no sufficient reason for taking what the deceased himself has described as a "draft of codicil" to be a completed testamentary paper.

LORD DEAS—I have had great difficulties in regard to this case; but, on the whole, I am not prepared to differ from your Lordship.

LORD ARDMILLAN—I have also felt this to be a question of great difficulty, but there are two or three circumstances which have led me to the same conclusion. In the first place, there is no indication that the testator ever attempted to make a holograph settlement. He made several testamentary papers, and in every one he employed an agent. Next, he lived for three months after this document was written; and I think that, whereas a writing which bears to be only a draft has, in certain circumstances, been given effect to, this is not so where the party has had ample time to have converted it into a formal writing, especially taken in connection with his previous practice to make settlements by formal writings. Again, it is important that he leaves a blank, intended to be filled up either by himself, after further reflection, or by the agent on consultation. He may have intended to form his opinion more deliberately, or he may not have known how to express his intention. This is to be taken into account, although the blank in itself would not necessarily be fatal to the deed. *Lastly*, the paper is not found alongside of his other papers, but in a different drawer, where it is at least as likely that it got by carelessness or accident as that it was deposited by himself. It would not be safe to hold this as part of the settlement.

LORD KINLOCH—I am of opinion that the alleged codicil cannot be held part of the last will and settlement of the deceased William Forsyth.

The paper in question is entitled by the deceased "draft of codicil." This implies that when he wrote it he considered it a mere draft, and not a completed instrument. The same is to be inferred from the circumstance that, in regard to the ultimate destination of his fortune, failing his daughters and their issue, a blank is left in the document for the names to be afterwards filled up. It may be that in a final deed of settlement the want of an ultimate destination would not affect the validity of the writing. But, coupled with the title

"draft of codicil," this blank in the document confirms the inference that Mr Forsyth intended this as nothing but a scroll, and did not leave it as a completed instrument.

I do not think it of any conclusiveness that the document is signed by Mr Forsyth. Some people sign even drafts; and we have cases on the books in which the document was signed, and yet held to be a mere draft or instructions. If, indeed, it could have been shown that the document was originally unsigned, and that some time afterwards Mr Forsyth deliberately put his name to it, that would have been strong evidence to prove that he intended to leave it as a completed instrument. But there is no proof of this. From aught that appears, the name was adhibited at the same time that the document was written. And the mere addition of the signature does not, I think, in that case alter its character from what Mr Forsyth himself calls it—a "draft of codicil."

The other evidence in the case all runs in the same direction. Mr Forsyth's will, and two prior codicils, are all regularly tested: and the probability is that he intended to follow the same course with the additional codicil. It was not put up with the will and the other codicils, but found loose in an open drawer. It bears the date of 21st September 1870, and Mr Forsyth did not die till 25th December subsequent, so that he had abundance of time to turn this draft into a formal settlement, if he was so disposed. As he did not do so, I think the only legal and safe conclusion is to hold that he left it, as it bears to be, a "draft codicil," and nothing else.

The Court answered the question in the negative.

Agents for the First and Second Parties—Campbell & Smith, S.S.C.

Agent for the Third Party—Adam Shiell, S.S.C.

Tuesday, March 5.

SECOND DIVISION.

ADAMSON v. EDINBURGH STREET TRAMWAYS COMPANY.

General Tramways Act, 1870, sect. 33—Clause of Reference—Court of Session Act, 1868, sect. 9.

Held that the clause of reference, viz., sect. 33, in the General Tramways Act, 1870, did not exclude the application of a private individual to the Court, craving that the Tramways Company should be ordained to fulfill a statutory obligation.

This was a petition presented by certain omnibus proprietors in Edinburgh, craving the Court to order the respondents, the "Edinburgh Street Tramways Company," to construct a passing place or places connecting the one line of tramways with the other line of tramways at a certain place in Leith Street, Edinburgh, where there is a less width between the outside of the footpaths on either side of the road and the nearest rail of the tramway than nine feet six inches, so that by means of such passing place or places the traffic shall, when necessary, be diverted from one tramway to the other.

The 9th section of the "Tramways Act, 1870," which was alleged to have been contravened, was as follows:—"Every tramway in a town, which is