the case of *Pitt* v. *Pitt* than in the present for holding that a change of domicile had taken place, and yet it was decided otherwise in the House of Lords. And the same observation applies to the decision in the case of *Jopp* v. *Wood* (34 Law Journal, Chancery Reports, p. 212), where it was held that a Scotchman who had gone to reside in India in 1805, and died there in 1830, had not lost his domicile of origin. And in the recent case of *Douglas* v. *Douglas* (Law Reports, Equity Series, vol. 12, p. 617), where the leading previous cases on domicile were reviewed, principles were enunciated and given effect to inconsistent with a judgment in favour of the defender in the present case.

"2. The defender's plea of *lis alibi pendens* is founded on the proceedings for a divorce which have been taken in the Court for Divorce and Matrimonial Causes in England at the instance of the defender against the pursuer. But it is obvious, and is made clear by the testimony of the English Solicitors, Mr Crosse and Mr Cowburn, who have explained the nature and effect of these proceedings, and the practice of the English Court in regard to them, that the present plea is ill founded. Even were the defender to prevail in his suit in the English Court, the pursuer would not in that suit, as the proceedings now stand, obtain a divorce against him: and if it were to turn out that both parties were guilty, there could not, according to the English law and practice—differing in this respect from the law and practice of Scotland—be any divorce at all by either of the parties, the one against the other. In *Geills* v. *Geills*, Dec. 14, 1850, 13 D. 321, it was held that a wife who had sued and obtained decree of divorce *a mensa et thoro* against her husband in the Consistorial Court in England was not thereby precluded from suing for the fuller remedy of a divorce in this Court.

"3. The observations now made in regard to the defender's second plea are substantially applicable also to his third plea of *non forum competens*, by which, as was explained at the debate, it is meant that the English Court, where the defender has instituted his proceedings, would be more convenient than this Court for trying and determining the disputed questions between the parties. But, for the reasons already adverted to, these questions cannot be tried and determined at all in the English Court—at least to the same effect as in this Court. Besides, it may be remarked, in reference to this as well as to the defender's second plea, that, for anything yet known, the defender's suit in the English Court may possibly be ultimately dismissed for want of jurisdiction, without anything whatever touching the merits of the disputed matters between the parties being determined."

Against this interlocutor the defender reclaimed, with the leave of the Lord Ordinary.

LANCASTER for him.

SOLICITOR-GENERAL and BALFOUR for the respondent.

At advising—

LORD PRESIDENT—We think it quite unnecessary to call for any reply from the respondent's counsel. There is only one question of any real importance raised, and that is, whether the defender has lost his domicile of origin in Scotland and acquired a domicile in England? It is certain that he was born a Scotchman, and retained his domicile of birth until he was twenty-nine or thirty years of age. All that can be said is, that he has now gone to reside with his mother in England. And that being so, he asserts that England is the proper place for the pursuer to institute this suit. It is true that he himself has raised in the Court of that country a suit against the pursuer, and that she has neglected to plead in time the want of jurisdiction of the English Courts. Whatever inconvenience the pursuer may have subjected herself to by reason of this omission, does not alter the real fundamental question of jurisdiction. It is a mere matter of procedure: not having pleaded want of jurisdiction, the case goes on. But if it turns out that there is no jurisdiction, divorce cannot be given. In cases of divorce, jurisdiction depends upon domicile, and the domicile in this case is here. And if the domicile, and consequently the jurisdiction, is here, it can be nowhere else. I have always been of opinion, as I expressed myself in the case of *Pitt*, that for the purposes of divorce there may be a matrimonial domicile differing from the absolute domicile which will rule succession. I refer to that only for the purpose of saying that no such question arises in this case, for the defender's domicile is in no respect in England, where he has no residence of his own. This being the case, the Court have no choice but to entertain the action.

The plea of *forum non competens* is also quite inadmissible. It can only be entertained where the Courts of two different countries have both of them jurisdiction, which, as I have said, is not the case here. I think, therefore, we must adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

Agents for Pursuer—Macnaughton & Finlay, W.S.

Agents for Defender—Hamilton, Kinnear, & Beatson, W.S.

Saturday, March 9.

BANNATINE'S TRS. *v.* CUNNINGHAME.

(*Ante*, p. 209.)

Expenses—Count and Reckoning.

In an action of count and reckoning the defender, who at the outset of the cause had tendered a sum exceeding what was ultimately fund due by him, found entitled to his whole expenses, without any special inquiry into the amount of success of the parties on the several points of dispute.

In accordance with the remit by the Court, of date 12th January 1872, the accountant, Mr A. W. Robertson, C.A., issued a Supplementary Report, in which the balance due by the defender as at 8th January 1869 was brought out as £187, 13s. 3d., with interest on £74, 8s. 11d., the capital sums forming part thereof, from that date until paid.

The case again came up on the accountant's report, and for discussion of the question of expenses.

At advising—

LORD PRESIDENT—There has been a great deal of litigation in this case with a very small result, and one cannot help inquiring whose fault it has been that this should be the case. This is the only pertinent inquiry remaining. Now, looking to the whole history of the cause, I cannot help thinking that the proceedings of the pursuers have been nimious in the extreme. This is an accounting which should have been, and which might have been, conducted on an amicable footing, and

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 decerned 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 *Vict. 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 plenishing, 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