

otherwise, to nominate and appoint a judicial factor upon the trust-estate of the said John Salmon."

The truster's daughter, Mrs Aitken, and her husband, and the trustee on John and Peter Salmon's sequestrated estates, being the sole beneficiaries under the deed, concurred in the application.

LANCASTER, for petitioners, cited *Smith*, 20 March 1862, 24 D. 838; *Watt*, 13 June 1854, 16 D. 941; *M'Aslan*, 17 July 1841, 3 D. 1263; *Glasgow*, 7 Dec. 1844, 7 D. 178; *Miller*, 19 Jan. 1854, 16 D. 358; *Fraser*, 1 March 1837, 15 S. 692.

The Court pronounced the following interlocutor:—

"*Edinburgh*, 13th May 1868.—The Lords having heard counsel for the petitioners, and no appearance having been made for any other party, appoint this petition to be intimated to John Salmon and Peter Salmon, therein designed, and that by sending through the post-office a copy of the said petition and of this interlocutor to each of them, addressed to their place or places of abode last known to the petitioners; further appoint this petition to be intimated to William Mathieson, therein designed, the last known agent of the said John Salmon and Peter Salmon, and appoint the said John Salmon and Peter Salmon to state, and that within ten days from the signing of this interlocutor, whether they or either of them will or will not act under the trust mentioned, and with certification that if they fail to do so the Lords will proceed to remove them from the said office." (Signed 15th May.)

A minute was lodged by the agents, stating that intimation had been made as directed. No reply was made by the absent trustees.

Thereafter this interlocutor was pronounced:—

"*27th May*.—The Lords having resumed consideration of the petition, with the intimation and the minute No. 9 of process, remove John Salmon and Peter Salmon from the office of trustees under the trust-disposition and settlement of the deceased John Salmon, as prayed, and decern."

Agents for Petitioner—Jardine, Stodart, & Frasers, W.S.

Wednesday, May 27.

HENDRY v. GRANT AND ANOTHER.

Agent and Client—Funds received—Specific purpose—Advocation. Law agents received from a client a sum of money for the purpose of getting the opinion of counsel as to the competency of an advocation, and of advocating the cause if so advised, or raising some other action. Nothing else was done than to take the opinion, which was adverse to advocation. The auditor having reported that the sum received was more than was required for that purpose,—*Held* that, the money being given for a specific purpose, the agents must return the balance whatever counter claim they had against their client.

The pursuer in this case, a farm grieve, pursued the defenders, a legal firm, for damages, and for the recovery of certain specific sums, upon two grounds—(1) that they failed to obey his express instructions in regard to raising an action at his instance against his master (by whom he said he had been improperly dismissed) in respect that while he ordered an action to be brought for a sum of about £28, including his yearly wages and allowances,

the defenders only brought the action for half that amount, being the pursuer's claim for half yearly wages. The action for £14, 4s. having been raised, the Sheriff-substitute decerned for the pursuer. The Sheriff altered this judgment; and the ground of action in this case was that, through the failure of the defenders to obey his express instructions, the pursuer had lost his remedy of advocation, whereby he could have got his rights against his master redressed; (2) the second ground of action was, that, after the final judgment of the Sheriff, the defenders had encouraged the pursuer in the idea that the process in the Inferior Court was capable of being advocated, and had taken from him £10, the purpose of which was expressed in the following receipt which they gave to him:—

"*Elgin*, 3d July 1866.—Received from Mr Wm. Hendry the sum of ten pounds sterling, for the purpose of getting counsel's opinion, and for advocating *Hendry v. Grant*, and raising such other action as may be necessary."

(Signed) "GRANT & JAMESON."

The pursuer said that the defenders were guilty of a want of professional skill in supposing, and leading him to believe, that the process could be advocated.

The Court allowed a proof, and heard parties upon it.

W. A. BROWN for pursuer.

GIFFORD and LANCASTER for defenders.

The Court held (1) that the pursuer had failed to prove that he gave such instructions as he represented; (2) without affirming that the defenders had shown any want of professional skill in taking the opinion of counsel on the point, that advocation of the process was clearly incompetent; but (3) that the sum of £10, having been given for a specific purpose, must be so used, and being too large sum for taking the opinion of counsel, which was all the defenders did with it, they have to return the balance after deducting a lawful charge for agency and counsel's opinion.

The Court having remitted to the Auditor to tax the account, he reported that £4, 6s. was a lawful charge for that purpose, the Court accordingly decerned for the pursuer for the balance of £5, 14s; but assuozied the defenders from all the other conclusions of the action.

Agent for Pursuer—James Bell, S.S.C.

Agents for Defenders—H. & A. Inglis, W.S.

Thursday, May 28.

FIRST DIVISION.

HENRY & CO. v. FOWLER.

Agreement—Remuneration for Work done. Circumstances in which *held* that a party suing for remuneration for work done had failed to prove that the work was done on the employment of the defender.

This was an action for payment of certain sums of money alleged to be due by the defender to the pursuers for work done in the way of pulling down old houses and making excavations in ground belonging to the defender.

The Lord Ordinary (KINLOCH), after a proof, pronounced this interlocutor:—"Finds that, on or about the month of August 1856, the defender William Fowler entered into a contract with Robert Paterson, designing himself mason, 140 Renfield

Street, Glasgow, under which the said Robert Paterson agreed to execute the digging, mason, and brick work of three tenements proposed to be erected by the defender, for the contract price, in whole, of £2366, 4s. 0½d., from which the said Robert Paterson afterwards made a deduction of £100: Finds that his contract included, *inter alia*, the work of digging a foundation for the intended buildings, and also that of taking down a certain old building on the ground; Finds that the work of digging the foundation was in greater part performed by the pursuers William Henry & Company, as was also that of taking down the old house in question: Finds that the pursuers have not proved, by sufficient evidence, that this work was done by them on the employment and responsibility of the defender, and not as sub-contractors under Paterson, or otherwise under his employment: Assolizes the defender from the conclusions of the action and decerns: Finds the pursuers liable to the defender in the expenses of process," &c.

The pursuers reclaimed.

WM. N. M'LAREN for reclaimers.

FRASER and STRACHAN, for respondent, were not called on.

The Court adhered.

Agent for Pursuers—J. M. Macqueen, S.S.C.

Agent for Defender—John Galletly, S.S.C.

Friday, May 29.

THOMAS v. STIVEN.

(*Ante*, p. 504.)

Expenses—Bankrupt—Trustee in Cessio—Unsuccessful Litigation—Taxation of expenses as between agent and client, and party and party. A., as creditor and as trustee in B.'s *cessio*, litigated with C. for recovery of part of B.'s estate. He was partly successful, and obtained decree against C. for a certain sum of expenses. B. was thereafter sequestrated, and A. claimed in the sequestration the balance of his law expenses after deducting the sum received from C. *Held* that the sum paid to A. by C. represented the difference in A.'s favour between his expenses for that part of the litigation in which he had been successful, and C.'s expenses for that part of the litigation in which A. had failed, and that A. had thus already got payment of the expenses of his *successful* litigation, which was all he was entitled to; but that as the expenses paid by C. to A. were taxed as between party and party, and A. was entitled to expenses taxed as between agent and client, A. was entitled to claim from the estate the balance arising in his favour between the two modes of taxation.

Thomas lodged in Robertson's sequestration an affidavit and claim for the following sums:—"1st, The sum of £338, 0s. 7d. stg., being the amount of expenses incurred and payments made by him for behoof of the estate and creditors of the said David Robertson, as trustee foresaid, conform to State No. 1," annexed to the said affidavit; and "2d, The sum of £689, 10s. 5d., being the balance of expenses incurred and payments made by the deponent (appellant) as trustee, and as a creditor foresaid for behoof of the estate and creditors of the said David Robertson, conform to State No. 2,"

thereto annexed. The said sum of £338, 0s. 7d. consists (with the exception of £80, 13s. 11d.) of accounts incurred and paid by the appellant to his law-agents in connection with the said Sheriff-court process and relative advocacy, and to some extent in connection with the said action of reduction, and the said £80, 13s. 11d. is the account of the expenses found due and paid by the appellant to the said William Thomson in the said process of advocacy. The said sum of £698, 10s. 5d. consists of the balance of the accounts incurred and paid by the appellant to his law-agents in connection with the said action of reduction, after deducting the proportion thereof found due and paid to the appellant by the said William Thomson. By the said claim the appellant claimed to be ranked for the said sums 'preferably to the whole ordinary creditors of the said David Robertson, and that the said sums should be paid to him out of the said estate immediately after payment of the expenses of taking out sequestration.'"

The trustee rejected the claim, and the Lord Ordinary (BARCAPLE), on appeal, sustained the deliverance of the trustee.

Thomas reclaimed.

CLARK and BALFOUR for claimer.

SHAND and WATSON for respondent.

At advising—

LORD PRESIDENT—The claim which has been disposed of by the trustee, and by the Lord Ordinary on appeal, is a claim by Thomas (*reads claim, ut supra*). The trustee rejected the claim, and the Lord Ordinary has substantially confirmed that deliverance, although not on the same grounds. The Lord Ordinary goes on the ground that the expenses incurred in litigation for the purpose of making available a part of a bankrupt's estate, can only be claimed in so far as the litigation has been successful, and the expenses to be deducted from the estate must be reasonable expenses incurred for the benefit of the estate. As to the general application of that rule there can be no doubt. The only doubt is as to its application here. The facts of the case are these. Robertson, the bankrupt, was contractor for building an infirmary in Dundee. It turned out to be an unfortunate contract, and in the course of its execution Robertson became insolvent. His brother-in-law, Thomson, was cautioner, and had advanced money to enable him to carry on the contract, and the consequence was that Thomson became a large creditor of the bankrupt, so as, in fact, to swallow up his whole estate if he could secure a preference, and leave nothing for the other creditors. In these circumstances Robertson obtained a *cessio*. In the decree of *cessio*, the moveable estate, but the moveable estate only, was adjudged to belong to Thomas, as trustee. In that character he raised an action against Thomson to obtain payment of money alleged to belong to the bankrupt estate, and which had been paid to Thomson under circumstances which were thought not to justify such payment. The first claim is for expenses incurred in that litigation. But in that litigation Thomas, as trustee in the *cessio*, was entirely unsuccessful. The proceedings were entirely unproductive to the creditors of the bankrupt, who have got no benefit from them, and never can get any. The action was found irrelevant, and the defender was assolized. Therefore, as to that part of the claim, the application of the general rule stated above is clear.

But then there is a second sum of £698, 10s. 5d., which stands in a different position. It seems that,