Saturday, November 2.

SECOND DIVISION.

THOMSON'S TRUSTEES (PETITIONERS) *v.* EASSON.

Writ — Authentication — Where Informal through want of Testing-Clause and Recorded —Act 37 *and* 38 *Vict. cap.* 94, (*Conveyancing Act* 1874). *secs.* 38 *and* 39.

A testamentary writing which was not holograph and was without testing clause and date, but bore to be signed by the granter and two witnesses, was recorded and founded on in various actions. An application was thereafter presented under the 39th section of the Conveyancing Act 1874, asking that the Court should declare after proof that the document had been regularly subscribed. *Held* that the remedy provided by that section was competent in the circumstances, and was alternative to that provided by the 38th section of the same Act, which was inapplicable to the case of a recorded document.

David Thomson died on 14th July 1878, leaving a holograph last will and testament dated 8th February 1878. He also left a writing dated 20th June 1878, which was duly tested, with a codicil or writing to it which was not holograph of himself and was without a testing clause and date, but bore to be signed by himself and two witnesses who were not designed. The whole writings had been recorded in the Commissary Court Books for Midlothian on 14th August 1878, and they had further been founded on in various actions against the truster's debtors.

The petitioners, the trustees under the will, presented this application under the 39th section of the Conveyancing Act, which was as follows—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same. and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

They asked to be allowed to prove the date of the codicil, the name of the writer, and the genuineness of the subscriptions, and that the Court should thereafter declare that the codicil had been subscribed by the granter and witnesses by whom it bore to be attested.

Answers were lodged by Mrs Easson, one of the truster's daughters, in which it was urged that sec. 38 of the Conveyancing Act, and not sec. 39, was the section applicable to the facts of the case. Section 38 was as follows—"It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves." It was further stated that the petitioners had not timeously adopted the remedy provided by that section of appending the designations of the witnesses before the deed was recorded or founded on in Court. And farther, that sec. 39 was not intended to provide an alternative remedy to that provided by section 38.

Authorities—*Addison and Others, Petitioners,* Feb, 23, 1875, 2 R. 457 ; *M'Laren, &c.* v. *Menzies,* July 20, 1876, 3 R. 1157.

At advising—

LORD JUSTICE-CLERK—I have no doubt whatever about this matter. Section 39 is in terms applicable, and it is no answer that there might have been a remedy under section 38 which is now cut off. Section 38 provides that certain formalities if omitted may be afterwards appended, but with this proviso, that the instrument shall not have been recorded or founded on in any court. But section 39 is a general clause providing that no deed subscribed by the granter and bearing to be attested by two witnesses subscribing shall be deemed invalid because of any informality of execution, but that the burden of proof shall be upon the party using the deed.

How the informality in this deed can be taken out of this clause I cannot see, and the fact that the other clause in other circumstances might be applicable makes no difference.

LORD ORMIDALE and LORD GIFFORD concurred.

The Court pronounced an interlocutor allowing the petitioners a proof of their averments.

Counsel for Petitioners—Millie. Agent—Wm. Paterson, Solicitor.

Counsel for Respondent—M'Laren. Agent—H. B. Dewar, S.S.C

Wednesday, November 6.

SECOND DIVISION.

[Lord Adam, Ordinary.

PYPER AND ANOTHER *v.* CHRISTIE.

Title to Sue—Process—Joint-Adventure.

Held, in an action at the instance of two out of five members of a wound-up joint-adventur eagainst another member who had acted as treasurer, for a count and reckoning of its affairs, that the pursuers had a good title to sue, though by the articles of association it had been provided that three named

members should sue for all debts due to the adventure.

This was an action of count and reckoning at the instance of David Palmer, John Pyper, and J. C. Hay, members or partners of the Commercial Building Co., against John Christie, who was also a member, and acted as treasurer of the company.

The company consisted of these four partners and one other (Mr Gray), and was formed for the purpose of erecting dwelling-houses and shops, and selling them for behoof of the company. The company was formed in virtue of articles of association recorded in the Books of Council and Session. The purpose for which the company was formed was completed, and the balance of profit on its transactions was divided amongst the partners, in the summer of 1877.

The pursuers had subsequently been called upon by the Royal Bank, where the company had kept their account, to pay £343, the amount of a debt due by the company to the bank, and had so paid that amount. The pursuers had demanded that this balance should be paid by the defender, upon the footing that he had sufficient funds of the company in his hands to do so. The defender denied that he had; and this action was then raised concluding against him for count and reckoning of all the affairs of the company, and of all his actings as treasurer, and for payment of such sum as should be found due. Mr Palmer did not insist in the action, and the other pursuers then restricted their claim to two-thirds of £500 or whatever other balance should be found due.

By the articles of association Messrs Palmer, Gray, and Pyper had been appointed trustees to sue for all debts due or that should be due to the company.

The defender's first plea was—No title to sue.

The Lord Ordinary (Adam) sustained this plea and assoilzied the defender. He added this note—"This action is now insisted in at the instance of John Pyper and John Charles Hay, two out of the five partners of the Commercial Building Company. Mr Palmer, who was also a pursuer, has withdrawn from the action.

"The defender is treasurer of the company, and the action is an action of count and reckoning calling upon him to produce an account of the affairs of the company and of his intromissions as treasurer, whereby the balance due by him to the pursuers may appear, and for decree against him for that balance.

"The Lord Ordinary is of opinion that the defender is the servant of the company, and is bound to account to the company, but that he is not bound to account to the individual members of the company. Assuming it to be the fact that the defender is indebted in a sum of money to the company, he is neither bound nor entitled to pay that sum to the individual partners in proportion to the amount of their shares or interest in the company. The Lord Ordinary therefore thinks that the pursuers have no title to insist in this action."

The pursuers reclaimed, and argued—This was clearly a joint-adventure, and the present action was one to settle up the partnership accounts *inter se*, and therefore the pursuers had a good title.

At advising—

Lord Justice-Clerk—I have no difficulty in holding that the Lord Ordinary has gone wrong in this case. A joint-adventure is simply a coming together of people for the prosecution of a certain purpose. They may agree among themselves as to who is or are to sue on behalf of the company to recover debts due to it, but they cannot prevent the individual partners from suing to ascertain their rights or shares, and that is what we have here. As regards the reclaimers' interest and title, therefore, there is no doubt they have an interest, and I think they have a title also.

Lord Gifford—I am of the same opinion. The Lord Ordinary seems to have been led away by the formal shape in which this action has been laid, viz.—a count and reckoning at the instance of three of the members of the company against the defender, who was treasurer of the company, to exhibit a full and particular account of his whole actings as treasurer of the company, and to pay £500, or whatever balance should be found due.

Lord Young—[*who had been called in in the absence of Lord Ormidale*]—I concur. It is a general, and just short of a universal, rule that title to sue rests upon interest. Now here the pursuers obviously have an interest to sue, and I see no reason why they should not have a title also. [*His Lordship then stated the facts ut supra*]—We have therefore two of the joint-adventurers stepping forward and saying to a fellow-adventurer who kept the books and handled the money, "Be good enough to tell us how our account stands, and to pay us whatever money may be due to us." They have all an interest and a title, but if two or only one come forward and make this reasonable request, even though the others refuse to join them, there is undoubtedly, in my opinion, a title to sue. I could have understood it if the treasurer had said—"Call the company itself, as I may have to implicate them." That would have been the objection of "all parties not called," and could easily and cheaply have been remedied by the Lord Ordinary; but to turn the pursuers out of Court on the ground of their not having a title seems to me to be out of the question.

Their Lordships therefore repelled the defender's first plea-in-law, and remitted the case back to the Lord Ordinary.

Counsel for Pursuers (Reclaimers)—Balfour—M'Kechnie. Agents—Irons & Roberts, S.S.C.

Counsel for Defender (Respondent)—Keir—Shaw. Agent—George Andrew, S.S.C.