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