Lord Shand—I am of the same opinion.

It is obvious that this is not a case in which it can be said that an error has occurred in the name of the person who is said to be the institute under this deed, the person therein named being Thomas Alexander Fraser of Strichen the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and therefore that there is no doubt about who is the person meant, and that he and his heirs-male are certainly called to succeed to this estate.

The contention of the petitioner John Fraser I understand is this—that although there be a name given as that of the institute, the name is not enough; that the destination, on the contrary, is not to him of the name, but to the person, whoever he may be, and whatever may be his name, who holds the peculiar character of being the nearest legitimate male issue of the entailer's ancestor Hugh Lord Fraser of Lovat. Now, that is a question of construction of the deed. I think the petitioner John Fraser must have succeeded in his contention that he has right to this estate, on the assumption that he can prove his pedigree, if on the one hand the destination had simply been to the "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat," without going on to designate the particular person whom the entailer had in view, or if, assuming that instead of the name being used as it is used, it had been used subject to the explanation that the succession was made conditional, if the same had been followed up by some such words as these, "provided the said Thomas Alexander Fraser of Strichen be the nearest legitimate male issue of my ancestor," or "if the said Thomas Alexander Fraser be the nearest legitimate male issue," and so on. But I confess I can see nothing unusual or uncommon in the way in which this deed has been expressed.

The decision of the case appears to me to be practically settled by the application of the rule *neque ex falsa demonstratione neque ex falsa causa legatum infirmatur*—neither by false demonstration nor by false cause can a legacy or benefit lose its effect.

It may be a question, whether taking the words of this deed it ought properly to fall under the category of being a case of false description or false cause of granting. It rather seems to me to be only a question as to the line of the ancestor. The destination is to "the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen." The word "namely" may be read, and must be read I think, as equivalent to "that is to say, Thomas Alexander Fraser." The entailer pointed to him as the person he meant to benefit. It may be that there is *falsa demonstratio* there in respect that he was in error in believing that Thomas Alexander Fraser held that character, but even if that was so the benefit will still result, because *falsa demonstratio non nocet*,—the name was there.

If, on the other hand, we are to regard these words "nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat" as the reason for which the benefit was conferred, as if the deed had been thus expressed, "I do hereby give, grant, and dispone, from me, my heirs and successors, to and in favour of Thomas Alexander Fraser of Strichen, because he is the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat," the result would still be the same. We often have a false reason assigned for giving a benefit, but still the benefit must result to the person, because he is named.

Now, as between these two constructions it rather appears to me that the case is one of *falsa demonstratio* rather than of *falsa causa*. But whichever of these be taken, the result must still be the same. It is not incumbent on Lord Lovat to show that Thomas Alexander Fraser of Strichen held the character of nearest legitimate male issue of the entailer's ancestor Hugh Lord Lovat, and therefore I agree in the conclusion at which your Lordship has arrived, and have nothing further to add on the subject.

I agree also with the observations of your Lordship on the executory clauses in this deed. I think a great deal of light is got from these operative or executory clauses—the clause giving power to infeft and to resign, and other clauses—all of which plainly show that what the entailer had in his mind was the individual whom he rightly or wrongly believed to be the nearest legitimate male issue of his ancestor Hugh Lord Fraser of Lovat.

Lord Deas was absent.

The Court recalled the interlocutor of the Sheriff of Chancery, and remitted to him to refuse the petition of John Fraser and to grant the petition of Lord Lovat.

Counsel for Lord Lovat—Mackintosh—Pearson. Agent—John C. Brodie & Sons, W.S.

Counsel for John Fraser—Campbell Smith—J. P. B. Robertson. Agent — P. H. Cameron, S.S.C.

Friday, July 18.

FIRST DIVISION.

STEPHEN, PETITIONER.

Public Company — Winding-up — Companies Act 1862, *sec.* 79, *sub-secs.* 4 *and* 5—*Inability to Pay Debts.*

Circumstances in which the Court made a winding-up order in the case of a banking company which had failed to pay a sum lodged with them on deposit when sued for the same, and was unable to state a good defence to the action.

The Scottish Banking Company, Limited, was incorporated as a limited company under the Companies Acts 1862 to 1880, the certificate of incorporation of the company being dated 12th January 1881. The registered office of the company was in Dundee. The objects for which the company was established were, *inter alia*, "(*a*) the transaction, both as principal and as agent, of every description of banking and mercantile business and financial operations; (*b*) the establishment and conducting of agencies or branches in any part of the United Kingdom of Great Britain and Ireland and elsewhere for the above-mentioned purposes." By the memorandum of association it was provided that "the capital of the company is ten million pounds stg., divided

into five hundred thousand shares of £20 stg. each." On 30th July 1883 the amount called up and paid on each of 1174 shares held by 15 shareholders was £1, thus making the total paid-up capital of the company £1174.

George Stephen, a creditor of the company for £100, contained in a deposit-receipt granted in his favour on 13th September 1883, with interest thereon, payment of which had been refused, raised an action on 13th November 1883 to enforce payment, to which the only defence was that the sum in question had been deposited on the footing that it was to remain on deposit for one year.

On the case being called in the Procedure Roll a minute was tendered for the company, by which, in respect of their obligation to pay the debt on 1st June 1884, they craved alternatively to have the action dismissed or sisted until that date. By interlocutor dated 6th February 1884, the action was sisted till 1st June, and the company having then failed to pay the deposit-receipt, the Lord Ordinary (Fraser) on 3d June gave decree against the company with expenses.

The defenders reclaimed against that interlocutor to the First Division, but on 28th June the reclaiming-note was refused in respect of no appearance for the company. After that date informal notice was received by Mr Stephen from Mr Alexander Gilruth Fleming "as general manager, a director and member of the Scottish Banking Company, Limited," of his intention to present an appeal in that action to the House of Lords. The debt was not *bona fide* disputed.

On 5th June 1884 Stephen served on the company a demand for payment, but payment was not made.

On 2d February 1884 a warrant of sale had been granted by the Sheriff-Substitute of Forfarshire for the rents of the office occupied by the bank at Dundee, and on 26th June 1884 a decree was pronounced by Lord Fraser (Ordinary) against the company for £163 in an action at the instance of Donald Macgregor of the Royal Hotel, Edinburgh.

It was stated that the estates of Alexander Gilruth Fleming, who with his brother had promoted the company, and had had its business almost exclusively under his control, had been sequestrated on 13th October 1883, and a trustee appointed thereon.

In these circumstances Stephen presented this petition for the winding-up of the company and the appointment of an official liquidator, founding on sec. 79, sub-secs. 4 and 5, sec. 80, sub-secs. 1 and 4, secs. 81, 82, and 92 of the Companies Act 1862.

Sec. 79, sub-secs. 4 and 5, provides—"A company under this Act may be wound up by the Court, as hereinafter defined, under the following circumstances; that is to say . . (4) Whenever the company is unable to pay its debts; (5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

The banking company lodged answers in which they stated that the company was still carrying on business; that general meetings of the shareholders had been held; that Lord Fraser's judgment in Stephen's action was erroneous, "because the petitioner had undertaken to withdraw the action, and because no opportunity was given the respondents (though they asked it) to prove their case by writ or oath;" that Stephen's requisition of payment was incompetent, as the debt was disputed and the question was being litigated; and that a reclaiming-note was being presented against Lord Fraser's judgment of 26th June 1884. They therefore submitted that the petition should be dismissed.

At advising—

Lord President—I am of opinion that we should make a winding-up order, and the ground upon which the Court is quite entitled to proceed is the demand which was made for payment on 5th June 1884, which was not complied with. It is in vain to say that there is any *bona fide* answer to the demand. The only defence to the action was that the deposit-receipt was not to be paid till September 1884, but that defence was completely put an end to by the minute which was lodged on 6th February 1884 in which, founding on an arrangement to postpone the period of payment until 1st June following, the Court was moved either to dismiss the action or to sist it until that date. The Lord Ordinary on the same day, the 6th of February, both parties being represented by counsel, as the interlocutor sheet bears, pronounced this interlocutor:—"The Lord Ordinary having called the cause in the Procedure Roll, on the motion of the defenders, allows the minute for them now tendered to be received, and in respect of the letters produced . . . sists procedure in the cause till the first day of June next, reserving meantime all questions of expenses." I hold that to be an arrangement between the parties in presence of the Lord Ordinary on the understanding and agreement that the money was not to be paid until 1st June. When the debt was not paid, decree was given on 3d June. And on a demand being subsequently made for payment of the money, it was not complied with. I therefore say that the bank and its manager had no answer to the action. The defence to the action was a mere sham from the beginning, and was entirely given up by the arrangement which was made upon 6th February. That appears to me to afford a requisite foundation in view of the statutory provisions for making a winding-up order, and I therefore think that we should grant the prayer of the petition.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court made a winding-up order, and appointed Mr David Inglis, accountant, Dundee, official liquidator of the company.

Counsel for Petitioner — Gloag — Fleming. Agent—William B. Rainnie, S.S.C.

Counsel for Respondents — Rhind. Agent — J. A. Trevelyan Sturrock, S.S.C.