credited except under deduction of the sums of £178 and £101 which were drawn out. I have reluctantly come to the conclusion that the liquidator is entitled to prevail. The winding-up commenced on 30th July and was equivalent to an arrestment in execution and decree of furthcoming. The bank therefore could not lawfully (although of course I do not doubt their *bona fides*) receive payment of the money for any other purpose than to hold it for the company. The bank plead that they did not know of the petition for a winding-up, but that cannot nullify the statutory effect of the winding-up, and a notice of the petition was advertised in the *Edinburgh Gazette* and *Scotsman* newspaper, which the bank might have seen, and of which I do not think they can profess ignorance—*Emmerson's* case, 2 Eq. 231. The bank contended that it was a case for the exercise of the discretion given to the Court by the 153rd section of the Act of 1862. I doubt if the provisions of that section apply to the present case, and in any view it seems to me that to sustain the claim of the bank would be to sin against the cardinal principle of the Act, viz., the *pari passu* ranking of creditors. In regard to the sums drawn out of the account, there is no reason to suppose that the draft was allowed because of the payment of the £718 into the account. And further, if the bank, after it ought to have known of the presentation of a winding-up petition, chose to allow drafts, it must, I think, take the consequences.

"(2) The liquidator contends that a sum of £527, 0s. 1d. which was drawn out of account No. 2, should be deducted from the balance due to the bank under that account in respect that one of the directors, Mr Robertson, who signed the cheque, was not one of the directors who came under personal liability for the advances. This contention is founded upon a provision in the minute of meeting of the directors of the company of 14th July to the effect that "cheques to be issued on said advance of £9000 shall be valid if signed by any two of the directors who will become guarantors therefor." This provision seems to me to be intended to guard against the account being improperly operated upon, and it is not said that the sum in question was not drawn and applied for the purposes for which the credit was given. I therefore do not think that the liquidator is entitled to found upon a mere technicality to the effect of depriving the bank of a ranking for the sum in question. This point, although it was argued, is not referred to in the prayer of the note, and as I am in favour of the liquidator in regard to the matters mentioned in the prayer, I shall give decree in terms thereof."

Counsel for the Liquidator—H. Johnston—Ure. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the National Bank of Scotland, Limited — Asher, Q.C. — Dundas. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Sir Thomas Clark, Bart., and Others—Asher, Q.C.—Dickson. Agents—T. J. Gordon & Falconer, W.S.

Saturday, July 11.

FIRST DIVISION.

RATTRAY AND ANOTHER, PETITIONERS.

Deed—Informality of Execution—Declaration that Deed was Subscribed by the Granter and Witnesses—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

One of the instrumentary witnesses of a disposition and conveyance subscribed "William Roberton, witness." The writer of the testing clause wrote "William Robertson, apprentice to me, the said Hugh James Rollo," and there thus occurred a descrepancy between the signature of William Roberton, to whose signature no designation was appended, and the statement in the testing clause that the instrumentary witness was William Robertson.

In a petition under section 39 of the Conveyancing Act of 1874, the Court, after a proof, declared that the disposition and conveyance was subscribed by the granter and witnesses by whom it bore to be subscribed.

This was an application for a declaration under section 39 of the Conveyancing Act of 1874, which provides—"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."

The late Very Rev. Edward Bannerman Ramsay, Dean of Edinburgh, died on 27th December 1872. He left a trust-disposition and settlement, the trustees nominated by which were the late Sir James Burnett of Leys and the late Hugh James Rollo, W.S.

In carrying out the purposes of the trust the trustees in November 1874 executed a disposition and conveyance in favour of the parties mentioned in the deed, of certain heritable subjects situated on the east side of Ainslie Place, Edinburgh.

The testing clause of the said disposition and conveyance was in the following terms, viz.—"In witness whereof, these presents, written on this and the two preceding pages of stamped paper by John

Ramsay Smith, clerk to Messieurs James Currie Baxter, Solicitor Supreme Courts, and Alexander Edward Burnett, Writer to the Signet, both of Edinburgh, are subscribed as follows, videlicet—By me, the said Sir James Horn Burnett, at Crathes Castle, Kincardineshire, the 27th day of November, in the year 1874, before these witnesses George John Pitt Taylor, late Captain of the 78th Highlanders, residing at Bandrum, near Dunfermline; and James Thom, butler to me at Crathes Castle aforesaid; by us, the said Mrs Harriet Georgina Alice Cochrane or Richardson, and Captain James Thomas Stewart Richardson, at Altamont, Blairgowrie, the 7th Day of December and year last mentioned, before these witnesses—Elizabeth Jarvis, nurse at Altamont aforesaid, and Mary Stewart, maid to the said Miss Caroline Ella Cochrane residing there; and by me, the said Hugh James Rollo, at Edinburgh, the 10th day of March 1875 years, before these witnesses, William Robertson, apprentice, and John Alexander James, clerk, both to me, the said Hugh James Rollo."

Doubts arose as to the probative character of the said disposition and conveyance, in the following circumstances. One of the witnesses to the signature of the said Hugh James Rollo, in whose presence as well as in that of John Alexander James, the other instrumentary witness, the said Hugh James Rollo subscribed the said disposition and conveyance, was William Roberton, apprentice to him, and the subscription of this witness, as written upon the said disposition and conveyance is, "Wm. Roberton, witness." The writer of the testing clause, however, wrote "William Robertson, apprentice to me, the said Hugh James Rollo," and there was thus a discrepancy between the signature of William Roberton, to whose signature no designation is appended, and the statement in the testing clause that the instrumentary witness was "William Robertson."

Both of the trustees of the said Dean Ramsay, who granted the said disposition and conveyance, were dead. The last survivor was Hugh James Rollo.

The subjects were recently acquired by a singular successor, who took exception to the title, and the present application was accordingly made.

The petitioners asked for a proof.

William Roberton deponed—"I remember generally the disposition being sent to Sir James H. Burnett and coming back to Mr Rollo. I knew Mr Rollo's signature well. I signed as one of the instrumentary witnesses to Mr Rollo's signature. The subscription, "Wm. Roberton, witness," is mine. It was appended by me at the time Mr Rollo executed the disposition, which he did in my presence. I produce the draft of the deed having the instructions of the testing clause. My name is properly spelt in the directions for filling up the deed. The schedule of directions, so far as applicable to Mr Rollo's signature, was filled up by me. There was no William Robertson in Mr Rollo's office at that time."

John James deponed — "That is Mr Rollo's signature, and that is my signature as one of the instrumentary witnesses. It was signed in my presence, and in that of Mr Roberton the last witness. There was no apprentice or clerk in the office of the name of Robertson at that time. I know Mr Roberton's signature well; he was in Mr Rollo's employment all the time I was, and that is his signature appended as one of the witnesses to the disposition No. 1. The testing clause is written by Mr J. Ramsay Smith, now a solicitor at Peebles."

Argued for the petitioner — A wrong name in the testing clause did not vitiate the deed—what was essential was the designation of the witnesses—*M'Dougall* v. *M'Dougall*, June 15, 1875, 2 R. 814; *Thomson's Trustees* v. *Esson*, November 2, 1878, 6 R. 141. Here there was no informality but only a discrepancy, and the Court ought to grant the declaration sought.

The purchaser was represented by counsel who did not submit any argument.

At advising—

LORD PRESIDENT—As no argument was offered to us by counsel for the purchaser, we may take it that he is quite satisfied with the title offered if we are able to pronounce the declaration prayed for. I am satisfied that the statute applies to a case like the present, and that looking to the proof which has been led we are in a position to grant the declaration asked.

LORD ADAM—I am of the same opinion. The petitioner has proved that the deed was subscribed by the granter thereof, and that it bears to be attested by two witnesses subscribing. I am therefore disposed to think that this case falls within the Act. The objection which has been stated is a very technical one, because what we have to deal with here is not an informality but only a discrepancy. If there had been no testing clause at all, the petitioner might still have had the declaration he seeks; he should not therefore, in the circumstances which have occurred, be in worse position.

LORD M'LAREN—This is a remedial statute, and in interpreting it we should endeavour to put upon its terms as wide a construction as possible. If the statute is applicable when there is no testing clause, I think it should also apply where a mistake has occurred in copying out the testing clause.

LORD KINNEAR—I entirely concur, and have no doubt that the statute is applicable in the circumstances.

The Court granted a declaration in the following terms:—

"Declare that the said disposition and conveyance was subscribed by the said Sir James Horn Burnett, at Crathes Castle, Kincardineshire, the 27th day of November, in the year 1874, before these

witnesses—George John Pitt Taylor, late Captain of the 78th Highlanders, residing at Bandrum, near Dunfermline; and James Thom, butler to the said Sir James Horn Burnett, at Crathes Castle aforesaid; by the said Harriet Georgina Alice Cochrane or Richardson, and James Thomas Stewart Richardson, at Altamont, Blairgowrie, the 7th day of December and year last mentioned, before these witnesses—Elizabeth Jarvis, nurse at Altamont aforesaid, and Mary Stewart, maid to the said Miss Caroline Ella Cochrane, residing there; and by the said Hugh James Rollo, at Edinburgh, the 10th day of March 1875 years, before these witnesses—William Roberton, apprentice, and John Alexander James, clerk, both to the said Hugh James Rollo, being the witnesses by whom the said disposition and conveyance bears to be attested: Further, grant warrant to the Keeper of the General Register of Sasines to record in said register the declaration now granted."

Counsel for Petitioner—Sym. Agents—Coventry & Roberton, W.S.

Wednesday, July 15.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

BANK OF SCOTLAND *v.* LANG AND OTHERS (WHITE'S TRUSTEES).

Succession—Heritable and Moveable—Constructive Conversion—Arrestments.

A testator died survived by eight children, and leaving moveable property of considerable value, and seven different heritable properties. By his trust-disposition and settlement he directed his trustees to divide the residue of his estate into equal portions, one for each of his lawful children and their respective lawful issue *per stirpes*, and declared that the whole of the provisions to sons should vest at majority, that two-thirds of the provisions of daughters should vest at majority or marriage, and that the remaining one-third should be held for them in liferent and their issue in fee. It was further declared that all property or funds, heritable or moveable, falling to females should belong to them exclusive of the *jus mariti* and right of administration and right of courtesy, and any other right of their husbands. Power was conferred on the trustees to sell all or any part of the trust-estate, but the deed contained no express direction to the trustees to sell the heritable estate. Upon the death of the testator his trustees realised the moveable estate, and after they had paid the testator's son David his share thereof, certain creditors of David used arrestments in their hands, and thereafter brought an action of furthcoming against the trustees and David. It appeared that unless it were held that there had been conversion of the heritable estate, the pursuers' arrestments had attached nothing.

Held—aff. Lord Wellwood—(following *Sheppard's Trustees*, 12 R. 1193) that as a sale of the heritage was not indispensable to a proper execution of the trust, there was no conversion, and that the arrestments had attached nothing.

Succession—Heritable and Moveable—Conversion.

A beneficiary under a will disposing of both heritable and moveable estate, consented to part of the moveable estate in which he had an interest being applied to buildings on the heritable estate.

Held that his consent operated conversion of his interest *pro tanto*.

Opinion (by Lord Wellwood) that where a testator left a mixed estate of moveable and heritable property, and, *inter alia*, certain buildings in course of erection, the funds required for their completion were heritable *destinatione*.

Mr David White died in 1888, survived by eight children, some of whom were in minority, and leaving moveable property, including thirteen wine and spirit businesses to the value of about £20,000, and seven separate heritable properties in Glasgow and elsewhere, the value of which was about £40,000.

By trust-disposition and settlement dated 29th August 1887 he directed his trustees therein named to pay certain legacies and an annuity to his widow, and to make provision for the education for any of his children who might be under seventeen years of age at his death. By the sixth purpose of the settlement he directed the trustees to give two of his sons the option of purchasing all or any of the wine and spirit businesses belonging to him, and in the event of any of those sons not exercising the option, to sell the same, "in terms of the general powers of sale hereinafter mentioned," unless some of his other sons should wish to purchase them. In the last place, with respect to the residue of his estate, the testator directed his trustees to hold and apply the said residue for the persons and in manner following—"That is to say, I direct and appoint them to divide the said residue into equal portions, one for each of my whole lawful children now alive, or hereafter to be born, or their respective issue, *per stirpes*, as after mentioned; and (first) as regards the whole portion of each of my sons and two-third parts of the portion of each of my daughters, it is hereby declared that the portions of such of my sons as have attained majority previous to my death shall vest at my death, and the portions of my sons then in minority shall vest on their attaining majority, and that two-third parts of the