for payment of the rent; and the third conclusion is for warrant of sale with a view to realise enough to pay the rent and expenses. I cannot in any view consider the value of the action greater than the amount of the rent sued for, namely, £22, 10s. The application for a warrant to sequestrate is, properly speaking, no part of the conclusions of the summons, but merely an initial step taken with a view to secure that if decree for the rent is given, there will be goods out of which payment may be operated. The real conclusion is for a warrant for payment, and for sale so as to operate payment. There is no answer, I think, to Mr Dickson's observation that if this appeal is held to be competent every cause in which a warrant for sequestration is applied for will be appealable, and there are no cases to warrant such a conclusion.

The case of *Thomson* v. *Barclay* is, I think, clearly distinct from the present. I am not quite sure that I agree with the grounds on which that case was decided, but these grounds were, first, that the warrant might bring back goods of far greater value than £25, and also that there were conclusions for caution and removing. There are no such specialties in this case.

LORD SHAND—I am also of opinion that this appeal is incompetent, following the principle of the cases of *The Singer Manufacturing Company* v. *Jessiman* and *Dickson* v. *Bryan*. The principle the Court has acted on in questions of this kind is to apply as a test of the value of the action this question—By paying what sum would the defender be enabled to get rid of the action? When you reach that you have ascertained the value of the cause. If a person is summoned, and can get rid of the action by the payment of a sum under £25, then the value of the cause is fixed under that sum, though no doubt there may be cases distinct from that rule, as where a document is sought to be recovered for some collateral purpose. Accordingly, applying the above test to the present action, the conclusion is for £22, the conclusion for sequestration being merely ancillary to the conclusion for payment. And therefore, following the authorities, the present appeal is incompetent.

In the case of *Thomson* v. *Barclay* there are three grounds mentioned on which the decision is rested. The first is that although the sum concluded for was under £25, the amount of goods in the inventory exceeded that in value. In that ground I do not think I can concur. The officer taking the inventory is bound to make a fair valuation of the goods. The second ground of decision is that the conclusion for warrant to bring back articles removed might bring back goods to a value exceeding £25. That seems to me an ancillary conclusion, and the decision not to be satisfactorily rested on that ground. In the third ground of decision I am disposed to concur — there was a conclusion to remove from the subjects. In the present case, however, there is no such conclusion. There is simply a pecuniary conclusion, and ancillary conclusions to make the first good.

Further, I do not think it is competent to attempt to bring this case under the authority of certain other cases as raising a question of greater value than £25 by the defences which have been stated.

LORD ADAM—It appears to me the pecuniary value of the action is the amount set forth in the conclusions of the summons. It is clear that the pursuers cannot get decree for a larger sum, nor can the defender be forced to pay a larger sum. By paying that sum the defender can get rid of the action, the other conclusion being merely ancillary to the conclusion for payment.

With reference to the case of *Thomson* v. *Barclay*, it appears to me that there were ample grounds for that decision, but I do not agree with it in so far as it is rested on the ground that under the sequestration goods to a larger amount than the sum sued for might be seized. I think Mr Dickson's argument is sound that if that were so, then in every sequestration there would be an appeal competent to the Court of Session.

Appeal refused as incompetent.

Counsel for the Pursuers—C. S. Dickson. Agent—White Millar, S.S.C.

Counsel for the Defender — Salvesen. Agents—

Wednesday, November 6.

SECOND DIVISION.

BRAETER *v.* BOARD OF TRADE.

Ship—Loss of Ship—Master—Duties of Master—Shipping Casualties Investigations Act 1879 (42 *and* 43 *Vict. c.* 72)—*The Shipping Casualties* (*Appeal and Rehearing*) *Rules* 1880.

Circumstances in which the Court, acting upon the advice of Nautical Assessors, *found* that the steamship "Sevilla" was not lost owing to the wrongful act or default of the master, but owing to an error in judgment on his part, which error was shared in by his crew as to the distance of the ship from the land, the weather being hazy at the time; and *restored* to the master his certificate which had been suspended by the deliverance of a Court of Inquiry, at the same time reprimanding the master for said error of judgment.

The certificate of Henry Braeter, lately master of the steamship "Sevilla" of Glasgow, which was lost off the east coast of Harris on 20th May 1889, was suspended for twelve months by a decision of a Court of Inquiry, consisting of one of the Sheriff-Substitutes of Lanarkshire, and two Nautical Assessors, dated 28th June 1889. Against this decision Braeter appealed to the Court

of Session under the provisions of the Shipping Casualties Investigations Act 1879, and the Shipping Casualties (Appeal and Rehearing) Rules 1880, and craved that the same in so far as it found that he was in fault, and in so far as it suspended his certificate, should be recalled as contrary to the evidence adduced. He also moved the Court for leave to lead further evidence bearing upon the loss of the vessel in terms of rule 6, sub-section (*h*) of the above rules, which evidence he alleged he had had no opportunity of obtaining and adducing at the inquiry.

The grounds of the decision of the Court of Inquiry as set forth in their deliverance were—That the loss of the vessel was due to her position when off Skerryvore not having been properly ascertained, and also to the careless manner in which the bearings were taken when off Ushinish and the south end of Harris. The Court also found, in answer to the questions submitted by the Board of Trade, that proper allowance was not made for tide or currents, although the tide was on the starboard-bow setting in towards land, that the master was not justified in keeping so close to the land, and that the contention that the rock on which the vessel struck was not marked on the chart could not be accepted by the Court, which failed to see that the manner in which the master navigated his vessel was careful enough to justify the conclusion that it was any other than the "Poor Woman's Rock."

The note of appeal was lodged on 4th July 1889, but owing to the master having applied also to the Board of Trade for a rehearing under the above Act, which was refused, the note of appeal, with the judgment and reasons of the Court of Inquiry and the evidence led before that Court, was not boxed until 22nd October. Their Lordships then appointed the note of appeal to be heard before them and two of the Elder Brethern of the Trinity House on 5th November.

The master deponed before the Court of Inquiry that he ascertained his position off Skerryvore by a five point bearing at 5 a.m. of the 20th May, and found himself to be six miles off the Lighthouse, bearing S.E. by E. by the pole compass, which had a quarter of a point easterly deviation; that he then set a course N.E. by N. by pole compass; sighted Ushinish about 11 o'clock, and ascertained his distance when abeam by a three point bearing to be seven miles; sighted the south end of Harris about 2·40 p.m., and by a two point bearing ascertained his distance to be four to five miles; that he then altered his course to E.N.E. by compass, which was correct on that course, and at 3·38 sighted Glass Island Lighthouse a quarter of a point on his port-bow; that he then altered his course about half a point more to the eastward, and that about two minutes thereafter the ship struck upon a sunken rock not marked on the chart (or, as he now alleged from evidence since obtained, possibly upon a sunken wreck), and shortly afterwards sank. He denied that his vessel struck on the "Poor Woman's Rock," and stated that when she struck she must have been from a mile and a half to two miles to the south-west of it, and about one mile and a half from the land. Those of the crew who were examined agreed with the master as to the distance from the land. The "Poor Woman's Rock" is about 800 yards from the land.

At the hearing on the appeal it was argued for the master—The judgment was contrary to the evidence. The Court below had found the master in default, not on the evidence, but on inferences therefrom which were erroneous, and without giving the master an opportunity of explanation as to same. The master had since the inquiry obtained the evidence of persons who had seen the vessel sink, and had ascertained her present position by soundings, and this evidence would show that it was impossible the ship could have struck on the "Poor Woman's Rock." The notice that the inquiry was to be held was served on him only two days previously, and contained no particulars of the faults to be alleged against him, and he had had no opportunity of adducing this evidence at the inquiry.

Argued for the Board of Trade—The master must account for the loss of the ship, and he had failed to do so. The suggestion that there could be a sunken rock at the place in question not marked on the charts was absurd, and was not supported by any evidence. There was also no evidence of the existence of any sunken wreck. The additional evidence now proposed to be adduced was too vague.

At advising—

LORD JUSTICE-CLERK—I shall read the opinion of the Nautical Assessors, in which we all concur, and which is therefore the judgment of the Court:—

"Having carefully considered this case, with the evidence given in the Court below, and the arguments brought forward on the present occasion, and being guided by the questions put to us by the learned Judges, we have come to the following conclusions:—

"We believe that the 'Sevilla' struck on the rock described in the chart as the 'Poor Woman's Rock,' and that the evidence produced does not justify the conclusion that she struck either on an unknown rock or on a sunken wreck.

"That the reasons stated in the annex for the decisions arrived at, viz., that 'the loss of the vessel was due to her position when off Skerryvore not having been properly ascertained, and also to the careless manner in which the bearings were taken when off Ushinish and off the south end of Harris,' are not justified by the evidence and arguments put before us.

"That this particularly applies to the following answers of the Court below—There is no evidence that the proper corrections were not applied to the courses steered or the bearings taken. We consider that the bearings taken at 5 a.m. on the 20th were as carefully taken as the appliances at the master's disposal permitted,

and that even if this was not the case, it in no way contributed to the casualty which occurred more than ten hours afterwards, during which interval the master had two opportunities (of which he appears to have availed himself) of testing his position, and that the discrepancy alluded to in the answer does not appear to have been sufficient to excite any apprehensions in the master's mind. That there is nothing in the sailing directions or on the chart submitted to bear out the statement that the set of the tide would affect the vessel's course as described by the Court below.

"We are also of opinion that the course made is wrongly described in the annex as being magnetic N.E. by N. by the pole compass, and that the loss of the 'Sevilla' was occasioned by an error of judgment on the part of the master in over-estimating his distance from the shore of the island of Harris, an error which was shared by all the witnesses from the vessel, and was due to the misty and deceptive condition of the atmosphere. That with this exception the vessel appears to have been navigated with an average amount of proper and seamanlike care."

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, and considered the cause with the assistance of Captain James Bucknell Atkins and Captain George Rawlinson Vyvyan, Assessors appointed in terms of the statutes, Recal the finding and sentence set forth in the report of the Sheriff-Substitute of Lanarkshire appealed against: Find that the loss of the steamship 'Sevilla' of Glasgow was occasioned by an error in judgment on the part of the master, the appellant, in over-estimating his distance from the shore of the island of Harris, an error which was shared by all the witnesses from the vessel, and was due to the misty and deceptive condition of the atmosphere, the consequence of which error was that the vessel was run upon the sunken rock known as 'Poor Woman's Rock:' Find that with the exception of said error in judgment the vessel was navigated with an average amount of proper and seamanlike care, and that the fault of the appellant was such as would have been sufficiently dealt with by reprimand and caution: Find that the appellant's certificate ought to be returned to him, and direct that it be returned to him accordingly: Find him entitled to the expenses of the appeal: Remit to the Auditor to tax the same and report: Further, direct that this judgment be reported to the Board of Trade in terms of the rules to that effect, and decern."

Counsel for the Master (Braeter)—Dickson — Aitken. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Board of Trade—Lord Adv. Robertson, Q.C.—Sol.-Gen. Darling, Q.C.—H. Johnston. Agent—David Turnbull, W.S.

Thursday, November 7.

SECOND DIVISION.

DRUMMOND *v.* FLETCHER & COMPANY.

Poor's Roll — Admission where the Reporters on the Probabilis causa litigandi are equally Divided in Opinion — Case Competent only in the Court of Session.

A person applied for the benefit of the poor's roll to enable him to raise an action in the Court of Session which could only be brought there. The reporters on the *probabilis causa* were equally divided.

The Court (following the case of *Marshall* v. *The North British Railway Company*, July 13, 1881, 8 R. 939) *admitted* the applicant.

William Ayson Drummond, 166 Perth Road, Dundee, applied for the benefit of the poor's roll to enable him to carry on an action for damages for infringement of patent and for interdict depending in the Outer House before Lord Wellwood against Thomas Fletcher, gas engineer, and Thomas Fletcher & Company, gas engineers, both of Thynne Street, Warrington, in Lancaster, against whom jurisdiction had been founded by arrestment.

The Court remitted to the reporters on the *probabilis causa*, who reported that they were equally divided in opinion, one of the counsel and one of the agents being of opinion that the applicant had, and the other counsel and the other agent that he had not, a *probabilis causa litigandi*.

The applicant moved the Court to admit, and argued that the case was ruled by that of *Marshall* v. *The North British Railway Company*, July 13, 1881, 8 R. 939. The more recent cases of *Carr* and *Watson*, in which the Court had[1] refused to admit where the reporters were equally divided, were appeals from the Sheriff Court where both Sheriffs had decided against the applicant. The case of *Shanks* was very peculiar. Here the action could only be brought in the Court of Session, consequently he was in a more favourable position than the applicant in *Marshall's* case. This distinction had been pointed out by Lord Rutherfurd Clark in the cases of *Stevens* v. *Stevens*, January 23, 1885, 12 R. 548 and *Wright* v. *Brown's Trustees*, May 21, 1885, 12 R. 959.

The defenders objected to the admission of the pursuer, relying upon Lord Shand's opinion in *Marshall's* case, and upon the more recent cases of *Carr, &c.* v. *The North British Railway Company*, November 1, 1885, 13 R. 113; *Shanks* v. *The Moderator, &c., of Reformed Presbyterian Church*, March 11, 1886, 13 R. 749; and *Watson* v. *The Callander Coal Company*, November 17, 1888, 16 R. 111.

At advising—

LORD JUSTICE-CLERK—I think we must follow the case of *Marshall* and admit.