The Court pronounced this interlocutor—

"The Lords, along with three Judges of the Second Division, having considered the reclaiming note for the defenders against the interlocutor of Lord Skerrington, dated 25th May 1911, and heard counsel for the parties, recal said interlocutor: Find that there is a casualty of composition due to the pursuers by the defenders, the trustees of the late James Paton mentioned in the summons, in respect of his death, and that as regards the subjects included in the feu-disposition by John Cockburn Ross in favour of Andrew Ferris, dated 14th and 16th August 1816 and 1st October 1817, the composition is to be measured by the sum of £20 tendered by the defenders to the pursuers; and with this finding remits the cause to the Lord Ordinary to proceed: Find the defenders entitled to expenses," &c.

Counsel for Pursuers (Respondents)—Constable, K.C. — Chree. Agent — Peter Macnaughton, S.S.C.

Counsel for Defenders (Reclaimers) — Murray, K.C.—Hon. W. Watson. Agents —Macpherson & Mackay, S.S.C.

Wednesday, July 3.

SECOND DIVISION.

(SINGLE BILLS.)

ANDERSON, PETITIONER.

Proof—Evidence—Divorce—Commission to Examine Pursuer Returning Abroad.

The pursuer in a divorce action, who was employed abroad, and who had returned to Scotland to raise her action, presented a petition for a commission to take her evidence to lie *in retentis* on the ground that she was obliged to return to her employment before the case could be called, which owing to the fact that her husband was resident in Australia could not be done within three months. The Court *granted* the prayer of the petition.

Mrs Isabella Joiner or Anderson, domestic servant, New Haven, Connecticut, U.S.A., then residing at Arbroath, wife of Alexander Matthew Anderson, tanner, formerly residing at Arbroath and then at Botany, Sydney, New South Wales, *petitioner*, presented a petition in which she craved the Court to appoint a commissioner to administer to her the oath *de calumnia*, and to take her evidence to lie *in retentis*, in an action of divorce at her instance against her husband.

The petitioner stated—"That of this date (15th June 1912) the petitioner was found entitled to the benefit of the poor's roll to raise an action of divorce on the ground of adultery against the said Alexander Matthew Anderson, her husband. The petitioner is employed as a domestic servant at New Haven, Connecticut, and recently returned to this country in order to raise the said action.

"That after their marriage in 1904 the parties resided together for some time in Arbroath, but the defender is now resident in Australia. The petitioner has discovered an address which may possibly find him, and edictal citation is accordingly inappropriate.

"That of this date (1st July 1912) the summons in said action was signeted, and a service copy of the summons was posted to Australia with a view to service upon the defender. Before the summons can be called it is probable that at least three months must elapse.

"That the petitioner has left her only child in New Haven, Connecticut, and has to pay for her board. Her money is nearly done, and she cannot afford to stay in this country for more than a few weeks. Moreover, her employer in New Haven has informed her that unless she can sail for America by the middle of July her situation must be forfeited."

On counsel moving in Single Bills that the prayer of the petition be granted, the Court pronounced this interlocutor:—

"Remit the cause to Lord Dewar to take the evidence of the petitioner, said evidence to lie *in retentis* subject to the orders of the Lord Ordinary, or to appoint a commissioner to administer to the petitioner the oath *de calumnia*, and to take her evidence; to dispense with interrogatories and with the reading in the minute book; and to order the deposition of the petitioner, and productions, if any, to be sealed up by the commissioner and transmitted to the Clerk of Court to lie *in retentis* subject to the orders of the Lord Ordinary."

Counsel for the Petitioner — Dunbar. Agent—Robert Gibb, W.S.

Saturday, July 6.

SECOND DIVISION.

(SINGLE BILLS.)

WALKER *v.* SMITH.

Poor's Roll—Reporters Equally Divided in Opinion—Sheriff Court Appeal.

A pursuer in a Sheriff Court action appealed from a judgment of the Sheriff, affirming a judgment of the Sheriff-Substitute, to the Court of Session, and applied for the benefit of the poor's roll. The reporters were equally divided in opinion. The Court *refused* the application.

Robert Walker, labourer, High Street, Perth, *pursuer*, brought an action in the Sheriff Court of Perth against John James Smith, baker, Pitlochry, *defender*, in which he claimed payment of the sum of £100 as damages for personal injuries sustained by

him through the fault and negligence of the defender. The Sheriff-Substitute (SYM) assoilzied the defender, and on appeal the Sheriff (JOHNSTON, K.C.) affirmed the judgment of the Sheriff-Substitute.

The pursuer appealed to the Court of Session and applied for admission to the poor's roll. The reporters on *probabilis causa* reported that they were equally divided in opinion as to the *probabilis causa litigandi* of the applicant, the two reporters who were advocates being in favour, and the two who were law agents being against the applicant's admission to the roll.

The pursuer then presented a note to the LORD JUSTICE-CLERK praying his Lordship to move the Court to pronounce an order dispensing with printing.

Argued for the pursuer—There was no absolute rule that where the reporters were equally divided in opinion the application should be refused — *Marshall* v. *North British Railway Company*, July 13, 1881, 8 R. 939, 18 S.L.R. 675.

Argued for the defender—Where there were two judgments adverse to the applicant, the rule was that if the reporters were equally divided in opinion, the application should be refused—*Carr* v. *North British Railway Company*, November 1, 1885, 13 R. 113, 23 S.L.R. 68; *Watson* v. *Callendar Coal Company*, November 17, 1888, 16 R. 111, 26 S.L.R. 61. The same rule was applied where the applicant appealed direct from the Sheriff-Substitute—*Ormond* v. *Henderson & Sons*, January 23, 1897, 24 R. 399, 34 S.L.R. 323; *Edgar* v. *Johnston*, June 17, 1904, 6 F. 825, 41 S.L.R. 622. The case of *Marshall* v. *North British Railway Company* (*cit. sup.*) founded on by pursuer was exceptional and prior in date to the other cases.

LORD JUSTICE-CLERK—The difficulty in this case arises from the decision in *Marshall* v. *North British Railway Company*, 8 R. 939, where the Court admitted a person to the poor's roll although there was not a majority of the reporters in favour of her admission. But when the facts of that case are examined I think the difficulty disappears, for the report of the case shows that the applicant there was suing in the Supreme Court, and was not in the position of the applicant here of having two judgments standing against her by the Sheriff and his Substitute.

Now where, as here, the action is brought in the Sheriff Court, and both the Sheriff-Substitute and the Sheriff decide against the party applying for the benefit of the poor's roll, it is decided by *Carr*, 13 R. 113, and *Watson*, 16 R. 111, that the party is not entitled to be admitted to the roll. In the former case, which was exactly the same as the present, the Lord President observed—"I think there are very clear grounds for distinguishing between this case and the case of *Marshall*. The applicant there asked the Court for admission to the poor's roll for the purpose of carrying on an action in this Court. The reporters were equally divided in opinion, and in the circumstances we admitted the applicant;" and then his Lordship pointed out that in the case before the Court there were two judgments against the applicant, and concluded that the application should be refused. In *Watson's* case, again, the decision was the same, the Court holding itself bound by the decision in *Carr*. Since those cases there have been two other cases, both in this Division, namely, *Ormond* (24 R. 399), and *Edgar* (6 F. 825), in which the earlier decisions were held to settle the rule in this matter. Now here the applicant, as I have stated, has two judgments against him, and this being so, I can only say, in the words of Lord Rutherfurd Clark in *Watson's* case, that we are bound to follow the decisions unless we send the case to the Whole Court. I am not prepared to do so here, and therefore the only course open to us is to refuse the motion, and I so move your Lordships.

LORD DUNDAS—I agree. I think the rule, as your Lordship has put it, is sound and salutary; and if the current of previous decisions has not been absolutely uniform—and I am not satisfied that it has been so—the decision in the present case will go to strengthen and establish the rule.

LORD SALVESEN—I am of the same opinion. There are four decisions—three in this Division and one in the First Division—to the effect that where there is an equal division of opinion among the reporters, the applicant is not to be admitted to the poor roll if there are adverse decisions by the Sheriff-Substitute and Sheriff. I do not think that there is any specialty in the fact that the two advocates among the reporters were in the applicant's favour, while the two who are against him are the members of the other branch of the profession. The special facts of this case we are not entitled to consider. They have already been considered by the reporters whose duty it was to do so. The decisions lay down the rule that when, under the circumstances that we have here, there is an equal division among the reporters, the *onus* placed on the applicant of showing a *probabilis causa* has not been satisfied.

LORD GUTHRIE was absent.

The Court refused the benefit of the poor's roll to the applicant, and appointed the applicant to print his appeal within fourteen days.

Counsel for the Pursuer—Fenton. Agent—Robert Gibb, W.S.

Counsel for the Defender—D. Anderson. Agents—J. Miller Thomson & Company, W.S.