

Saturday, January 23.

SECOND DIVISION.

[Sheriff-Substitute of
Forfarshire.

ORMOND v. ALEXANDER HENDER-
SON & SONS.

Poor's Roll—Appeal from Sheriff-Substitute, and Reporters Equally Divided in Opinion.

A pursuer in a Sheriff Court action for damages for personal injury appealed direct to the Court of Session against a judgment of the Sheriff-Substitute dismissing the action as irrelevant. The pursuer applied for the benefit of the poor's roll, and the reporters on *probabilis causa* were equally divided in opinion as to the relevancy of the pursuer's averments. The Court refused the application.

This was an action brought in the Sheriff Court at Dundee by Samuel Ormond, jute worker, against Alexander Henderson & Sons, spinners in Dundee. The pursuer craved decree for £100 as damages for personal injuries sustained by him.

The Sheriff Substitute (CAMPBELL SMITH), by interlocutor dated 29th July 1896, dismissed the action as irrelevant.

The pursuer appealed to the Court of Session, and applied for admission to the poor's roll. The case was remitted to the reporters on the *probabilis causa litigandi* of applicants for the benefit of the poor's roll, who on 18th December reported that they were equally divided in opinion on the question whether the pursuer's averments disclosed a relevant ground of action. The pursuer moved the Court to admit. The defenders opposed the motion on the ground that when the applicant had appealed direct to the Court of Session from the judgment of the Sheriff-Substitute without taking the judgment of the Sheriff, the case must be taken to be practically in the same position as if both Sheriffs had decided against the applicant, and therefore to be governed by the rule laid down in the case of *Carr v. North British Railway Company*, November 1, 1885, 13 R. 113; and *Watson v. Callander Coal Company*, November 17, 1888, 16 R. 111, which was to the effect that when both Sheriffs were against the applicant and the reporters were equally divided, the application ought to be refused.

At advising—

The opinion of the Court was delivered by

LORD TRAYNER—This is an application for the benefit of the poor's roll, and as the reporters on *probabilis causa* are divided in opinion, the question is whether the applicant is entitled to the privilege which he seeks.

On the authorities cited to us at the discussion, it appears that the Court has laid down what I think I may venture to call a

rule, that where the judgments of the Sheriff and the Sheriff-Substitute are against the applicant, and the reporters are divided in opinion, the application for admission to the benefits of the poor's roll is refused.

That rule appears to me to be a sound rule, with which I would not interfere. This case, however, is not exactly in the position of the cases to which the rule has hitherto been applied, because the applicant has appealed directly from the Sheriff-Substitute, who has found his case to be irrelevant, and has not taken advantage of the appeal to the Sheriff, which was open to him. I think that an applicant who does not avail himself of the right to appeal to the Sheriff must be held to occupy the same position as if he had exhausted the resources of the Inferior Courts—as if he had appealed to the Sheriff, who had affirmed the judgment of his Substitute. If the Sheriff on appeal had differed from the Sheriff-Substitute, there would have been no need of further appeal. The pursuer would then have had a judgment to the effect that his case was relevant. If the Sheriff had agreed with the Sheriff-Substitute and held the action irrelevant, then the pursuer would have been within the rule which I have mentioned. But as the applicant has not taken advantage of the appeal afforded by the Sheriff Court procedure, I think he must be taken as if he acknowledged that the Sheriff would on appeal have been of the same opinion as his Substitute. I am accordingly of opinion that the application should be refused.

The Court refused the application.

Counsel for the Applicant (Pursuer)—
Blair. Agent—R. Macdougald, S.S.C.

Counsel for the Defenders—E. F. Macpherson. Agent—Charles T. Cox, W.S.

Thursday, January 28.

FIRST DIVISION.

FREER'S TRUSTEES v. FREER.

Succession—Trust—Capital or Income—Liferent Use of Residue—Profits of Law Business.

A truster directed his trustees that his widow should have during her widowhood the free liferent use and enjoyment of the residue and remainder of his whole means and estate. By a codicil the truster—who was a solicitor, at that time practising alone—authorised his trustees to make arrangements for carrying on his business till one of his sons should be ready to take it up. Before his death the truster entered into a partnership, which was to last fourteen years, with power to either party to terminate it at the end of seven. One of the conditions was, that in the case of the death of the truster