on the poor's roll, the proceedings were consistorial, he was a defender, being defender in the action of adherence and aliment, and pursuer in the action of divorce only because of it; if not admitted he would have to pay aliment, his own costs and his wife's costs—Act of Sederunt, 21st December 1842, section 16.

Argued for the objector—The question was whether the applicant was in necessitous circumstances. He was not, looking to the wages he earned, and the fact that he had no dependents—*Robertson, cit. sup.*, governed the case, where Lord President Inglis laid it down that a man earning twenty-three shillings a-week was not except in exceptional circumstances entitled to get on the roll. See also *Muir*, February 1, 1850, 12 D. 632; *Mackenzie* v. *Campbell*, March 18, 1892, 29 S.L.R. 594. The Lord Ordinary had power to dispense with the payment of Court dues — The Clerks of Session (Scotland) Regulation Act 1889, section 9.

LORD JUSTICE-CLERK—Cases of this kind must be dealt with, first, upon general rules, and second, on considerations which the Court may think justify departure from such general rules. Lord President Inglis in the case of *Robertson* (7 R. 1092), laid down the general rule that a man with 23s. a-week is not entitled to the benefit of the poor roll, but that special circumstances may justify the admission of such a person; and in that case the applicant in the special circumstances was admitted. In this case the peculiarity of the position is that the applicant is not really a pursuer. He has been brought into Court by his wife. She demands adherence and aliment, having been away from her husband for eighteen months. He says that in order to meet this claim he wishes to bring an action of divorce. The reporters on *probabilis causa* report that he has a *probabilis causa*. His wife practically compels him to bring such an action, for I must assume at this stage that what she is trying to do is to extract aliment for the purpose of enabling her to live in adultery. If he is not admitted the applicant must pay his wife's costs, his own costs, and aliment to his wife. I think these are special circumstances enough to justify admission to the roll in this case.

In coming to this conclusion I desire to say that I do not assent to the opinions delivered by Lord Young in the cases cited. I do not think the views expressed by his Lordship are to be accepted as correctly stating the grounds on which the Court ought to decide such questions.

LORD KYLLACHY—I am of the same opinion. The special circumstances here are sufficient to justify the admission of the applicant.

LORD STORMONTH DARLING—I agree.

LORD LOW—I also agree.

The Court admitted the applicant.

Counsel for the Applicant — Melville. Agent—W. H. Hamilton, S.S.C.

Counsel for the Objector—Laing. Agent —J. B. Lorimer, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff-Substitute at Perth.

YEAMAN *v.* LITTLE.

Bankruptcy—Election of Trustee—Appeal—Competency—Error of Sheriff in Deducting Amount of a Vote which in Fact had not been Given—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 71.

At a meeting of creditors for the election of a trustee in a sequestration objection was taken to a number of votes for one of the two candidates on a ground which the Sheriff subsequently upheld. The Sheriff, misled by the parties themselves, in giving effect to his judgment disallowed the vote of a creditor who, according to the minute of the meeting, had in fact not voted, and deducted the amount of it from the candidate's total. By doing so the Sheriff was led to declare the wrong candidate in a majority and trustee. The unsuccessful candidate brought an appeal.

Held that the appeal was incompetent inasmuch as the Sheriff had exercised his jurisdiction and his decision was, under section 71 of the Bankruptcy (Scotland) Act 1856, final.

Farquharson v. *Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573, *distinguished.*

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), section 71, enacts—"*Judgment by Sheriff as to Trustee Final.*—The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any court or in any manner whatever."

At a meeting of creditors, held at Perth on 27th January 1906 for the purpose of electing a trustee or trustees on the sequestrated estates of Thomas Warrand Farquharson, of Cammock and Whitehills, Glenisla, votes to the value of £971, 1s. 1d. were given for John Yeaman, solicitor, Alyth, and to the value of £581, 10s. 5d. for John Little, solicitor, Perth. Objections were taken to a number of the votes and, *inter alia*, to a number given for Yeaman on the ground that the Justice of the Peace before whom the oaths bore to have been taken was a "solicitor" and a "procurator in an inferior court," contrary to 6 Geo. IV, c. 48, section 27. The Sheriff-Substitute (SYM) sustained this objection, and after a scrutiny of the votes, by interlocutor of 13th February 1906 found Little to be in a

majority, and declared him elected trustee. Against this interlocutor Yeaman now brought an appeal in the First Division.

It appeared that among the votes for Yeaman objected to by Little was one by a Mr George Gordon, ironmonger, Alyth, on the sum of £55, 1s. 3d. Gordon's name did not appear in the minutes of the meeting of creditors as having voted for Yeaman, but the Sheriff-Substitute having been misled by the parties themselves into thinking that Gordon had voted, deducted the value of his vote (£55, 1s. 3d.) from Yeaman's total, with the result that Little was in a majority of £33, 17s. 4d. Had this not been done Yeaman would have been in a majority of £21 or thereby.

Little objected to the competency of the appeal on the ground, *inter alia*, that review was excluded by section 71 of the Bankruptcy (Scotland) Act 1856.

Argued for the appellant—The appeal was competent. Even assuming that the Sheriff-Substitute was right in regard to the meaning of the Act 6 Geo. IV, c. 48, he had exceeded his jurisdiction in deducting £55, 1s. 3d., the vote of George Gordon, Mr Gordon not having voted, or at all events his vote not having been recorded in the minutes of meeting of creditors. Where the Sheriff had exceeded his jurisdiction appeal was not excluded. His duty was to declare elected the person chosen by the majority of the vote of creditors. Here he had not done so. The following cases were referred to—*Farquharson* v. *Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573; *Rankine* v. *Douglas*, July 19, 1871, 9 Macph. 1053, 8 S.L.R. 669; *Wylie* v. *Kyd*, May 21, 1884, 11 R. 820, 21 S.L.R. 693; *Moncur* v. *Macdonald*, January 8, 1887, 14 R. 305, 24 S.L.R. 225; (*Sampson* v. *Campbell*, June 29, 1849, 11 D. 1208, was also referred to on another point).

The respondent was not called upon.

LORD PRESIDENT—The scheme of the Bankruptcy Act undoubtedly was to put an end to appeals on such matters as the election of a trustee. This was forcibly put by Lord Adam in a case not referred to at the bar—*Wylie* v. *Kyd*, (June 21, 1884, 11 R. 968, 21 S.L.R. 693). This scheme was carried out by the finality clauses of the Act. The appellant admits that as a result we cannot go into the merits. He founds his appeal on what was decided in *Farquharson* v. *Sutherland*, 15 R. 759. That case is a binding authority on us for what it decided. It is not, however, desirable that we should extend the doctrine of *Farquharson* v. *Sutherland* one inch, because to do so would be against the undoubted policy of the statute. The ground of decision was that the Sheriff had declined to exercise his jurisdiction, and what the Court did was simply to send the case back to him. In the present case the Sheriff did exercise his jurisdiction. He counted the votes wrongly, being, as it appears, led into the mistake by the parties themselves. In my opinion the fact that the Sheriff counted the votes wrongly does not differ from the position if he had made a wrong determination in law and counted a vote which should not have been counted, or not counted a vote which should have been counted. In my view, then, this case falls within the finality clause.

LORD KINNEAR—The purpose of the Legislature was clearly to prevent sequestrations being hung up by litigation between persons contending for the office of trustee. The statute, accordingly, declares in the most imperative manner that the judgment of the Sheriff declaring the person elected to be trustee shall be final and in no case subject to review in any court or in any manner whatever. I cannot doubt that this prohibition of appeals applies whether the Sheriff has made a mistake in fact or in law. The ground of judgment in the case of *Farquharson* v. *Sutherland* is made quite clear by the Lord President, viz., that the Sheriff had declined to exercise his jurisdiction and the Court held he must perform the functions imposed on him by the statute. Here the Sheriff did perform the duty imposed on him by the statute, and the only complaint is that in the exercise of his jurisdiction he made a mistake for which the parties before him appear to have been responsible. It does not matter whether his decision was right or wrong. It is his decision as to the election of trustee, and is therefore final.

LORD PEARSON—My experience in sequestrations has made me very unwilling to relax the stringent provisions of the statute as to appeals. In this particular case there is further the speciality that the parties both misled the Sheriff into the miscount of the votes. This speciality distinguishes the case from *Farquharson* v. *Sutherland*.

LORD M'LAREN was not present.

The Court refused the appeal.

Counsel for Appellant—Younger, K.C.—Grainger Stewart. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondent—Clyde, K.C.—Constable. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, March 17.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

AVERY *v.* HILSON.

Justiciary Cases—Record—Note of Documentary Evidence — Failure to Note — Letter Produced and Read in Court—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 16.

The Summary Procedure (Scotland) Act 1864, section 16, enacts—"It shall not be necessary in any proceeding