The defender reclaimed. On the case being called, the defender's counsel stated that the reclaiming note had been presented merely with the view of securing a judgment in the Inner House, which the parties considered to be more authoritative than the decree of the Lord Ordinary in the Outer House, and that in the face of the decisions on the subject, which he considered to be conclusive against the validity of the deeds of entail in question, he did not propose to take up the time of the Court by any argument. He referred to the cases of *Dewar* v. *Dewar*, July 20, 1852, 14 D. 1062; *Cunyngham* v. *Cunyngham*, March 9, 1852, 14 D. 636; *Ferguson* v. *Ferguson*, November 18, 1852, 15 D. 19; *Hamilton* v. *Hamilton*, April 29, 1870, 8 Macph. (H. of L.) 48.

At advising—

Lord Young—I am averse to doing anything unusual, but in this case I am quite prepared simply to refuse the reclaiming note, and for this reason—the law is quite well established that where in a deed of entail there is no irritancy directed against the clause prohibiting the alteration of the order of succession, then the whole entail is invalid. The contrary, indeed, is not maintained by the counsel for the reclaimer, and that being so there is sufficient for a judgment simply of refusing the reclaiming note. I rather appreciate what was said by the reclaimer's counsel, for I know that there is a feeling among men of business in Scotland that the title to an estate is more safe, and in fact that the estate will command a better price in the market, where a question as regards it such as this has been settled by a judgment of the Inner House. This for my own part I regard as a mere superstition, and in my opinion a decree in absence in the Outer House is quite sufficient. It is no doubt this feeling which has prompted the defender to lodge defences in the present action and obtain a judgment from the Lord Ordinary, and further, to bring the case before your Lordships. That being so, I should not require any argument from counsel, and should have no hesitation in simply refusing the reclaiming note.

Lord Craighill—I certainly have some difficulty here, but I agree with Lord Young in the main, and I am of opinion that all which it is necessary for us to say is, that having heard counsel for the reclaimer, we refuse the reclaiming note. The reclaimer's counsel has stated that the view he is instructed to maintain is met everywhere by contrary decisions; and if that were not so, it would be necessary to hear the argument out. But as it is, I repeat I think we may simply refuse the reclaiming note.

Lord Justice-Clerk—I cannot say that I am judicially satisfied with this case. Indeed, nothing of a contentious nature has been argued before us. My view is, that if counsel feel that the case is such a clear one as not to admit of argument, then the proper form of judgment is—"In respect that counsel for the appellant has submitted no argument, adhere." I do not, however, wish to run counter to your Lordships, therefore our judgment will be—"Having heard counsel for the reclaimer, refuse the reclaiming note."

The Court pronounced this interlocutor:—

"Having heard counsel on the reclaiming note, refuse the reclaiming note."

Counsel for Pursuer (Respondent)—D.-F. Kinnear, Q.C.—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Reclaimer)—J. P. B. Robertson—Low. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, July 13.

FIRST DIVISION.

MARSHALL *v.* NORTH BRITISH RAILWAY COMPANY.

Poor Roll—Where Reporters equally Divided in Opinion—Competency of Remit to other Reporters—Act of Sederunt 21*st November* 1842, *sec.* 1.

Where the reporters on the *probabilis causa litigandi* are equally divided in opinion as to the propriety of admitting an applicant to the benefit of the poor roll—*held* (*diss.* Lord Shand) (1) that it is incompetent to remit to any other reporters than those chosen in terms of the Act of Sederunt 21st November 1842; and (2) that the effect of an equal division of opinion among the reporters is to admit the applicant.

Margaret Ferguson or Marshall applied for the benefit of the poor roll, to enable her to carry on an action of damages against the North British Railway Company. The application was on 14th May 1881 remitted to the reporters on the *probabilis causa litigandi*. The reporters, after hearing parties, reported to the Court that they were equally divided in opinion as to the *probabilis causa litigandi*, one counsel and one agent being of opinion that the applicant had not, and one counsel and one agent being of opinion that she had, a *probabilis causa*. In these circumstances they craved the Court "to dispose of the remit," and referred to an unreported case of A B, May 1866 (Mackay's Practice, i. 337), where the reporters were equally divided and the Court admitted the applicant. Mrs Marshall then enrolled the case to have the remit disposed of.

The North British Railway Company objected to the applicant being admitted to the roll, on the ground that she had not produced a favourable report from the reporters on *probabilis causa litigandi*, and suggested that the case should be remitted of new to other reporters.

Authorities—*Clark* v. *Campbell*, July 6, 1833, 11 S. 908; *M'Callum*, June 26, 1841, 3 D. 1102; *Rutherford*, July 20, 1855, 17 D. 1140.

At advising—

Lord President—The Act of Sederunt of 21st November 1842 in its 1st section provides—"That the Faculty of Advocates, the Writers to the Signet, and Solicitors before the Supreme Courts, besides electing counsel and agents for conducting the causes of the poor as at present, shall also respectively name two advocates, one Writer to the Signet, and one solicitor each year, to act exclusively as reporters on the *probabilis causa* of the

pauper applicants for the benefit of the poor roll; the lists to be furnished to the senior principal Clerk of Session of each Division of the Court, and also to the Keeper of the Minute-book, in order to be printed and published on the meeting of the Court in January yearly, and headed 'List of Lawyers and Agents for the poor, 1843,' and so on yearly." Now, that arrangement was made with these bodies of practitioners after a careful consideration of the subject, in order to remedy an existing evil arising from the great laxity in the mode of admission to the poor roll. I had a good deal to do personally with the framing of that Act of Sederunt, and I know that it was the intention of the Court that nobody should be allowed to act as a reporter on the *probabilis causa* except the persons named by the Faculty of Advocates, the Writers to the Signet, and the Society of Solicitors. I should consequently be very slow indeed to resort to the remedy of remitting to persons not named by these bodies. The question therefore is, whether where there is an equal division of opinion among the gentlemen to whom alone this business is entrusted, the result ought to be to exclude or to admit the applicant to the benefit of the roll? On this point I have not much difficulty. If there is so much doubt in the particular case as to lead to two of the reporters to be in favour of admitting the applicant, I have little hesitation in following the case mentioned in Mr Mackay's book. I am for granting the application.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I cannot agree with your Lordships that this Court has not power to remit to other persons than those appointed under the Act of Sederunt of 1842. It is true that the Act of Sederunt says that these gentlemen are "to act exclusively as reporters on the *probabilis causa,*" but I cannot doubt notwithstanding this provision that the Court has the power to remit to any other person whenever it seems necessary to do so. I think therefore that we should have acceded to the motion of the respondents to remit to an independent third party.

As to whether a *probabilis causa* has in the present case been made out, if it is a decided point that an equality of division among the reporters is sufficient evidence of a *probabilis causa*, there is an end of the matter; but if the point is still an open one, then I must say that I differ from your Lordships. The *onus* upon the applicant is to show that he has probable cause of success, and I do not think that he has done so when the reporters are equally divided. It is not enough to show that he has a fair chance of success; I think he must have a preponderating chance. I therefore must be against admitting the applicant.

The Court admitted the applicant.

Counsel for Applicant — Sym. Agent — D. Cuthbert, S.S.C.

Counsel for Objectors — Dickson. Agent — Adam Johnstone, Solicitor.

Wednesday, July 13.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WHYTE *v.* HAMILTON.

Succession — Testament — Holograph Writing — "Intended Settlement."

In the repositories of a person deceased was found a document holograph of the deceased, dated seven years previous to his death, and evidently written with much care. It was headed "Notes of intended settlement by" the deceased, and was signed by him. He had executed no other testament. *Held* that it was a valid testamentary document.

Walter Whyte of Bankhead, in the county of Renfrew, died at Bankhead on 16th September 1880. He was proprietor of the lands of Cuthill, in Linlithgowshire, as well as of Bankhead, and was also *pro indiviso* proprietor of half the lands of Kenmure, in Lanarkshire, half the lands of Shettleston, in the same county, and of certain house property in Glasgow. He left personal estate considerably exceeding £20,000 in value.

Mr Whyte was married in 1859. By antenuptial contract he undertook to provide his wife, should she survive him, in an annuity of £400 and the liferent of Bankhead mansion-house, besides a sum for mournings, and the absolute property of his household furniture and plenishing. Mrs Whyte on her part accepted these provisions as in full of her legal claims.

Mrs Whyte survived her husband. There was no child of the marriage. Mr Whyte's heirs-at-law were his sister Mrs Jane M'Nish Whyte or Hamilton and his nephew Mr J. F. Watson, son of another sister deceased. The former was decerned executrix-dative to him. After Mr Whyte's funeral a search was made in his repositories by Mr Walter Whyte Pollok, writer, his brother-in-law, Mr John A. Hamilton, writer, and Mr J. M. Hill, writer. The first-named of these gentlemen had prepared the marriage-contract of Mr and Mrs Whyte, and Mrs Whyte and he had been on intimate terms, but Mr Whyte had never spoken to him about making a will. On a search being made there were found in a bureau in the deceased's bedroom a cash-box containing money and some papers of small importance. This bureau was a chest of drawers with a desk on the top and a folding lid. It contained a secret drawer, in which were afterwards found some deposit-receipts for about £6000 and some certificates belonging to the deceased. In a room adjoining the bedroom was found a tin box, which contained the title-deeds of Bankhead, a water-commission bond for £2500, and a number of interest coupons, estate accounts, and business letters. In the parlour in which the deceased was accustomed to write his letters there was found a portable writing desk which he had had in daily use. In this desk were found a bank book, a cash book, and a number of vouchers and business letters. In this desk there was also found the following holograph document signed by the deceased:—"*Bankhead*, 19*th June* 1873.—Notes of intended settlement by Walter Whyte of Bankhead.—first, I liferent my wife Mrs Margaret Pollok or Whyte in my whole estate,