I do not think the words will bear that meaning. Accordingly I think the questions ought to be answered as follows:—The first in the affirmative; the second in the affirmative of the first branch and the negative of the second; the third in the negative; the fourth to the effect that the widow is entitled to a liferent of the estate, not to be forfeited by re-marriage; the fifth in the affirmative; the sixth in the negative; and the seventh in the negative.

LORD KINNEAR—I agree upon all the points.

LORD GUTHRIE — I also concur. This case seems to show, as previous cases of the same kind have shown, that when such forms are used they should either be attested or should be written over so as to be entirely holograph, or they should be adopted as holograph.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court answered the first question in the affirmative; the second question in its first branch in the affirmative and in the second branch in the negative; the third question in the negative; the fourth question to the effect that the widow took a liferent not to be forfeited on re-marriage; the fifth question in the affirmative; and the sixth and seventh questions in the negative.

Counsel for the First and Fourth Parties —Macphail. Agents—H. & H. Tod, W.S.

Counsel for the Second Parties—Hon. Wm. Watson. Agents—J. & J. Turnbull, W.S.

Counsel for the Third Party—Carnegie. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 11.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

RAMSAY *v.* SPENCE.

Prescription—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 34—"*Ex facie Valid Irredeemable Title*"—"*Appropriate Register*"—*Disposition of Burgage Subjects in Form Applicable to Feudal Subjects Recorded in Particular Register of Sasines for County.*

A disposition of heritage, in form applicable to feudal subjects, was recorded in 1866 in the Particular Register of Sasines for the County, and possession followed thereon.

Held in 1909 that the disposition was an *ex facie* valid irredeemable title habile to found prescription, and that any inquiry whether prior to the disposition the subjects were held burgage, and whether the disposition ought not therefore to have been recorded in the burgh register, was excluded by section 34 of the Conveyancing (Scotland) Act 1874.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), enacts—Section 34—"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines shall be sufficient foundation for prescription. . . ."

In December 1907 George Ramsay, heritable proprietor of Blackness Inn, Linlithgowshire, raised an action in the Sheriff Court at Linlithgow against Edward Spence, concluding for declarator that a piece of ground occupied by the pursuer as a stable and yard, and adjoining Blackness Inn, belonged to him as part and pertinent of Blackness Inn.

The pursuer averred that he was infeft in the subjects known as Blackness Inn, conform to disposition in his favour by Andrew Gilmour, dated 23rd May, and recorded in the General Register of Sasines applicable to the county of Linlithgow on 3rd June 1907; that the subjects were acquired by Andrew Gilmour from Alexander Kirkwood, conform to disposition dated 11th, and recorded in the New Particular Register of Sasines, &c., for the sheriffdoms of Edinburgh, &c., on the 19th, both days of December 1866; that the foresaid piece of ground was included as part and pertinent of Blackness Inn, and that it had been possesssd by him and his authors as such part and pertinent for more than twenty years.

The defender averred that prior to 1866 the subjects known as Blackness Inn formed part of the common property of the royal burgh of Linlithgow; that the tenure was free burgage; that the property was acquired by the said Alexander Kirkwood from William Wood, trustee on the sequestrated estates of the royal burgh of Linlithgow, conform to disposition (following on sale by public roup) dated 12th, and recorded in the Particular Register of Sasines for Edinburgh, &c., 21st November 1866; that the disposition was a conveyance of lands held burgage and falling to be recorded in the Burgh Register of Sasines for Linlithgow in terms of the Act 1681, cap. 13 (11), and subsequent statutes, and that not having been so recorded the said disposition and writs following thereon were not valid titles on which to found prescriptive possession. The defender also denied the pursuer's prescriptive possession.

The disposition in favour of Alexander Kirkwood was in these terms—[*After narrating the sale by public roup*]—"Therefore I, the said William Wood, as trustee foresaid . . . do hereby dispone to and in favour of the said Alexander Kirkwood and his heirs and assignees whomsoever, heritably and irredeemably, all and whole the tenement of houses called and known by the name of the Blackness Hotel, with the garden ground on the south side thereof, and the vacant ground on the north side thereof so far as I as trustee foresaid have right thereto, with the pertinents of the said subjects and others, and my whole right, title, and interest, present and future, therein: And which lands are situated in the village of Blackness in the parish of Carriden and county of Linlithgow: But

declaring that the foresaid subjects are hereby disponed with and under all burdens and restrictions upon my right presently in existence: With entry at the term of Martinmas Eighteen hundred and sixty-six: To be holden the said lands and others *a me vel de me:* And I, as trustee foresaid and with consent foresaid, resign the said lands and others for new infeftment or investiture: And I, as trustee foresaid and with consent foresaid, assign the writs according to inventory: . . . And I . . . assign the rents: And I . . . bind myself to free and relieve the said Alexander Kirkwood and his foresaids of all feu-duties, casualties, and public burdens due prior to the said term of entry: And I . . . grant warrandice from my own fact and deed only, and under exception of all current tacks and leases of the said lands and others: And I . . . consent to the registration hereof for preservation. . . ."

The pursuer pleaded, *inter alia*—"*Separatim*—The pursuer's titles being habile to convey a right to the said piece of ground, and the pursuer and his predecessors and authors for more than the space of twenty years having possessed the same continually and together, and that peaceably, without any lawful interruption made during the said space of twenty years, and the said possession having followed upon an *ex facie* valid irredeemable title to the subjects libelled belonging to the pursuer, and recorded in the appropriate Register of Sasines, the pursuer is entitled to declarator of property in the said piece of ground, as craved."

The defender pleaded, *inter alia*—"(5) Pursuer having no habile title on which to found the plea of prescription, the action should be dismissed, with expenses."

In February 1908, on the application of the defender, the cause was transmitted to the Court of Session, under section 9 of the Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50).

On 15th January 1909 the Lord Ordinary (SKERRINGTON), after a proof, pronounced decree as craved.

Opinion.—"... The title of Dr Gilmour, the pursuer's author, consists of a disposition in his favour by 'Alexander Kirkwood, wood merchant, Borrowstounness, heritable proprietor of the lands and others hereinafter disponed,' dated 11th and recorded in the New Particular Register of Sasines, &c., kept for the sheriffdom of Edinburgh and constabularies of Haddington, &c., 19th, both days of December 1866. It bears to be granted in consideration of a price of £350 paid to Kirkwood by Dr Gilmour, and it describes the subjects as 'situated in the village of Blackness, in the parish of Carriden and county of Linlithgow.' Though the disposition does not expressly mention the ground lying to the west of Inn, it conveys the Inn with its pertinents. The holding is stated to be *a me vel de me*, and Kirkwood binds himself to free and relieve Dr Gilmour of all feu-duties, casualties, and public burdens. In short, the disposition is in the appropriate form prescribed by the Acts 10 and 11 Vict. cap. 48, and 21 and 22 Vict. cap. 76, in the case of subjects held otherwise than by burgage tenure. The subjects are disponed 'with and under the burdens and restrictions specified and contained in the disposition of the said lands and others granted by William Wood, Chartered Accountant in Edinburgh, trustee upon the sequestrated estate of the royal burgh of Linlithgow as a body corporate and politic, with consent of the commissioners on said estate in my favour, bearing date the twelfth day of November Eighteen hundred and sixty-six, and recorded in the New Particular Register of Sasines, Reversions, &c., kept for the sheriffdoms of Edinburgh, Haddington, Linlithgow, and Bathgate, the twenty-first day of November Eighteen hundred and sixty-six.'

"While it appears *in gremio* of Dr Gilmour's title that his author Kirkwood acquired the subjects from the trustee on the sequestrated estate of the burgh of Linlithgow, there is nothing upon the face of the disposition to show that the subjects were held burgage. I am therefore of opinion that the county register was the appropriate one in which to record this disposition. I am further of opinion that it is incompetent to refer to Kirkwood's title for any other purpose except to ascertain the burdens and restrictions affecting the subjects. See *Fraser* v. *Lord Lovat*, 1898, 25 R. 603. Any criticism of the validity of Kirkwood's title is I think excluded by the operation of the positive prescription, and the defender's objection really resolves itself into such a criticism. His objection, as I understand it, is that the disposition by the trustee in bankruptcy in favour of Kirkwood was ineffectual as constituting a *de me* holding, in respect that such a trustee has no power to grant a feu; and that it was ineffectual as constituting an out-and-out conveyance *a me* in respect that it does not bear that the subjects are to be held in free burgage, and that it is not recorded in the burgh register. Whatever may be the merits of these objections, I am of opinion that it is not open to me to consider them. For the same reason I think it unnecessary to refer in detail to the evidence upon which the defender founded as showing that the Inn was in fact held burgage. While I think that there is a strong probability that it was held by this tenure, the defender has not, in my opinion, proved this as a fact.

"In support of the proposition that a change of tenure may be gained by prescription, the pursuer's counsel referred to the case of *Hamilton* v. *Scotland*, 1807, Hume's Dec. p. 461. . . ."

The defender reclaimed, and argued—The pursuer had no title on which prescription could be founded. The subjects were proved to be burgage property; and the disposition to Kirkwood in 1866 was a conveyance and not a feu-charter. The appropriate register was therefore the burgh register. As the disposition and subsequent deeds had not been recorded in that register, the appropriate register,

the title was bad, and was in 1866 incapable of founding prescriptive possession — Act 1681, cap. 13 (11); *Donald's Trustees* v. *Yeats*, July 11, 1839, 1 D. 1249; *Earl of Fife's Trustees* v. *Magistrates of Aberdeen*, May 25, 1842, 4 D. 1245. The appropriate register depended on the character of the holding and not on the terms of the deed. The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 34, required that a title be not only *ex facie* valid but also recorded in the appropriate register of sasines, before it could be a sufficient foundation for prescription. Though it was doubtless true that the character of the holding might be changed by prescription—*Hamilton* v. *Scotland*, 1807, Hume 461—that would not avail here, because the change was effected and the pursuer's title complied with section 34 of the Conveyancing (Scotland) Act 1874, only on the lapse of forty years from the disposition to Kirkwood in 1866. If the title was not *ex facie* valid and recorded in the appropriate register of sasines, the possession following on it would not avail —*per* Lord Craighill in *Glen* v. *Sceales' Trustees*, December 15, 1881, 9 R. 317, 19 S.L.R. 201; *Hinton* v. *Connell's Trustees*, July 6, 1883, 10 R. 1110, 20 S.L.R. 731.

Counsel for the pursuer (respondent) were not called on.

LORD LOW — The main question is whether, assuming that the possession was sufficient, the title of the pursuer is habile to found prescription. The title is a disposition granted by the trustee on the sequestrated estate of the burgh of Linlithgow in favour of Alexander Kirkwood, and recorded in the New Particular Register of Sasines for the sheriffdoms of Edinburgh, &c., in 1866—Kirkwood having disponed in the same year to Dr Gilmour the immediate author of the pursuer. Now that is an *ex facie* valid irredeemable disposition, and *ex facie* it is recorded in the appropriate register. If the disposition had been recorded in the burgh register it would have been *ex facie* recorded in an inappropriate register, because it has all the characteristics of a disposition of property held in feu. It seems to me that to go back and inquire into the position of the property at the time when the disposition was granted would be to defeat altogether the object of section 34 of the Conveyancing Act 1874—that object being to render unchallengeable an *ex facie* valid title on which possession has been had for twenty years. The argument for the pursuer really is, not only that the disposition was recorded in an inappropriate register, but also that the wrong disposition was granted, because it comes to this, that if you inquire into the circumstances existing at the date of the disposition you will find that the disposition should have been in the form appropriate to burgage subjects, and should have been recorded in the burgh register. I think that inquiry is excluded by the Act of Parliament, and as twenty years' possession has been had it follows that the pursuer's right is now unchallengeable.

The LORD JUSTICE-CLERK, LORD ARDWALL, and LORD DUNDAS concurred.

The Court adhered.

Counsel for the Pursuer (Respondent)—Chree—Munro. Agents—Cornillon, Craig, & Thomas, S.S.C.

Counsel for the Defender (Reclaimer)—Craigie, K.C.—Mercer. Agents—Cunningham & Lawson, Solicitors.

Saturday, June 12.

SECOND DIVISION.

[Sheriff Court at Hamilton.

MERRY & CUNINGHAME, LIMITED *v.* BLACK.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1 (2) — *Compensation — Average Amount Workman Able to Earn after Accident—Diminution in Earnings owing to General Fall in Wages.*

The Workmen's Compensation Act 1897 gives the "scale and conditions of compensation" in its First Schedule, and that, in section (2), enacts—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. . . ." A workman, who in the course of his employment met with an accident necessitating the amputation of his right hand, subsequently accepted employment in a different capacity receiving the same wages as he had earned before the accident. Some time after his wages were reduced owing to a general fall in wages, and he proceeded to claim compensation.

Held that as the change in his wages was not attributable to any change in the workman's capacity to earn wages he was not entitled to compensation.

In an arbitration under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), between Merry & Cuninghame, Limited and Robert Black, the Sheriff-Substitute at Hamilton (THOMSON) awarded compensation, and at the request of Merry & Cuninghame, Limited, stated a case for appeal.

The following *facts* were found proved:—"(1) That so far back as 15th July 1898 the respondent in the course of his employment as a waggon shifter met with an accident which necessitated the amputation of his right hand at the wrist; (2) that he was paid compensation for eighteen months, and thereafter resumed work with defenders in the capacity of haulage engineman; (3) that his average weekly earnings before the accident were 18s. 6d., but that for some time prior to the proof they had been