petitioner's apprehensions are well founded their remedy cannot be an appeal under the second schedule on a case stated by the Sheriff.

I am quite clearly of opinion that this is an incompetent appeal, and I am therefore for dismissing the application.

LORD PEARSON—I agree that the Sheriff was right in refusing to state a case. But his reference to the case of *Binning* v. *Easton* as his authority for so refusing perhaps requires some explanation, for, as Lord Kinnear has pointed out, the thing that was negatived in *Binning's* case was the alleged right of appeal from the Sheriff Court to this Court under the common law jurisdiction. The authority which, I think, really excludes the present application is the previous case of *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27, 38 S.L.R. 18, in this Division, where the Court (as here) was asked to entertain an appeal by stated case in an application to the Sheriff for a special warrant to record a memorandum of agreement the genuineness of which was disputed. The Court dismissed the case stated on appeal as incompetent on the ground that the procedure by way of stated case has no application except where the Sheriff is acting as arbritrator, and that he is not acting as arbitrator in a proceeding to register an agreement. So far as I know, that decision has never been challenged, and it furnishes the true ground for throwing out the present application. What has been challenged is the suggestion then made by the Court that an application to the Sheriff to register a memorandum was an application to him in the exercise of his ordinary common law jurisdiction. That is what was negatived in the case of *Binning* v. *Easton*, which laid down that in such a case the Sheriff was acting neither as arbitrator nor as judge but ministerially.

The appellants point out the hardship in which they are involved if the memorandum of agreement is now recorded. Both parties are now at one as to there having been originally an agreement for compensation under the Act. But after the appellants had paid the full statutory compensation for upwards of three months, the respondent attempted to throw over the agreement, and raised an action at common law for £350 damages. This was thrown out in July 1905 on the ground that the respondent had elected the statutory remedy, and the appellants were found entitled to expenses. They say they are now in this position, that if the agreement is recorded they will be liable in full compensation until the amount is modified or payment is stopped in terms of the statute, and, moreover, that they will not be entitled to set off the sum due to them for expenses in the action. I do not know whether these apprehensions are well founded or not. But I am afraid these considerations cannot affect the judgment; and besides I think the appellants might have been in a stronger position, at least on the first point, if they had themselves stood by the agreement and tendered a memorandum of it for registration as soon as the common law action was threatened. As soon as that action was over the Sheriff could have dealt with the compensation as the appellants desired, and the dispute might have ended more than a year ago.

LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court refused the application.

Counsel for the Pursuer and Respondent—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, W.S.

Counsel for the Defenders and Appellants—Hunter, K.C.—Horne. Agents—W. & J. Burness, W.S.

Friday, October 26.

SECOND DIVISION.

[Lord Pearson, Ordinary.

THE LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* SHEARER AND OTHERS.

Arbitration — Contractual Arbitration — Interdict against Proceeding with — Arbitration ex facie Regular—Refusal.

A note of suspension and interdict to stop proceedings in a contractual arbitration which was *ex facie* regular and in which the arbiter was *ex facie* well-appointed *refused*, it not having been made plain to the Court that the arbiter was not possessed of the power which he was called upon to exercise.

Dumbarton Water Commissioners v. *Lord Blantyre*, November 12, 1884, 12 R. 115, 22 S.L.R. 80; *Glasgow, Yoker, and Clydebank Railway Company* v. *Lidgerwood*, November 27, 1895, 23 R. 195, 33 S.L.R. 146, *followed*.

In November 1901 The Licenses Insurance Corporation and Guarantee Fund, Limited, issued a policy of insurance in favour of James Wilson, a license-holder at 69 Vennel, Greenock, for a maximum sum of £3000, insuring him against any loss he might sustain in the event of the license held by him not being renewed by the licensing authority owing to any reason beyond his own control. The policy contained, *inter alia*, the following conditions:—"(4) No person other than the insured, and in case of death his executors, representatives, or disponees, and an assignee of the premises to whom the licensing authority shall have granted a transfer of the certificate of license, shall benefit under this policy . . . (13) If any difference of any kind whatsoever shall arise between the insured or any claimant under this policy and the Corporation in respect of this policy or any claim hereunder, every such difference when and as the same arises shall be referred to the

arbitration of some person to be chosen by both parties, or of two neutral persons, one to be chosen by the insured or claimant, and the other by the Corporation, and in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice, the other party shall appoint both arbitrators, and in case of disagreement between the arbitrators, then of an oversman, who shall have been chosen by the arbitrators before entering on the reference, and in the case of death of the arbitrators or one of them or of the said oversman, another or others shall be appointed in his or their stead, each party to pay his or their own costs of the reference and a moiety of the costs of the award; and the award of the arbitrators or oversman as the case may be shall be finally binding upon all parties and shall be conclusive evidence of the amount payable in respect of the said loss. And it is hereby expressly declared to be a condition of the making of this policy and part of the contract between the Corporation and the insured that the insured or any claimant under this policy shall if he makes any claim hereunder which is not admitted by the Corporation appoint an arbitrator and give notice thereof to the Corporation within six months of the alleged refusal to renew the said certificate of license, and he shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured or claimant shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-precedent to any liability of the Corporation, or to the commencement of any action or suit upon the policy. (14) If the insured shall fail to do any of the matters and things herein required to be done by the insured, and in these conditions time shall be deemed to be of the essence of the contract, this policy shall become void. . . ."

In April 1904 the licensing magistrates refused to renew the certificate. Shortly thereafter Wilson went to South Africa, and in July, after Wilson's departure, Messrs W. & R. B. Shearer lodged a claim, bearing to be signed by them as Wilson's agents, with the insurance company for £3000. The insurance company refused to pay or recognise the claim; apart from the grounds of objection hereinafter stated, they contended that the license had been lost by Wilson's own misconduct, and accordingly in October Messrs W. & R. B. Shearer, professing to act on the instructions of Wilson, appointed William Shaw as an arbiter under the policy. Ultimately in November the insurance company also named an arbiter under protest and thereafter in the same month brought a note of suspension and interdict against Messrs Shearer, Shaw, and Wilson, seeking to have them interdicted from in any way proceeding with the pretended arbitration.

The attitude of the complainers is sufficiently indicated by the following excerpt from their statement of facts:—"(Stat. 11) The claim made by the respondents Messrs W. & R. B. Shearer, and the appointment by them of the respondent William Shaw to act as arbiter, are invalid. James Wilson neither claimed to benefit under the policy nor did he authorise these respondents to make a claim on his behalf at the time the said claim was made. In point of fact the said respondents are acting not on Wilson's behalf nor in his interest but on behalf of certain trade creditors of Wilson. Wilson himself had no knowledge that the claim was being made when it was made. Further, James Wilson did not authorise the nomination of an arbiter on his behalf, nor the submission of any claim under the policy aforesaid to the said arbiter. Further, the respondents Messrs W. & R. B. Shearer did not at the time when this note was presented hold any general mandate or power of attorney for James Wilson authorising them to act in the above matter on his behalf."

The respondents admitted that Wilson prior to his departure for South Africa had given them no written instructions or mandate, but they averred—"(Ans. 4) Before leaving the country he verbally instructed his agents, Messrs G. H. Robb & Crosbie, writers, Glasgow, to attend to his interests in regard to his claim under his policy of insurance. Messrs Robb & Crosbie undertook to have his interests attended to, but they explained to him that as they were local agents for the complainers and did not therefore desire to act themselves in the matter, they would arrange that the respondents, Messrs W. & R. B. Shearer, who had appeared for Mr Wilson in the Licensing Court, should also attend to his interests under the policy. To this the respondent Mr Wilson agreed, and the respondents Messrs Shearer received instructions accordingly." They also produced a letter addressed to them by Wilson written from South Africa, and dated January 2nd 1905, in the following terms:—"Dear Sirs—I hereby acknowledge that previous to my leaving Scotland for South Africa I verbally instructed Messrs G. H. Robb & Crosbie, writers, Glasgow, to authorise you to take all necessary proceedings on my behalf to recover the sum due to me under policy of insurance for the sum of £3000 issued by the Licenses Insurance Corporation and Guarantee Fund, Limited, 24 Moorgate Street, London, E.C., in my favor, numbered 27,109 and dated 8th November 1901, and I hereby homologate, ratify, approve, and confirm everything which has been done by you in pursuance of these instructions. Further, I hereby repeat in writing the instructions given to you by Messrs G. H. Robb & Crosbie on my authority, and authorise you to do everything which may be necessary for the recovery of the sum due to me as aforesaid. Yours truly, 'Adopted as Holograph, JAMES WILSON.'" They further produced a deed of factory and commission by James Wilson in favour of James Paterson dated also January 2nd 1905, authorising him to act for Wilson in all matters connected with the policy, arbitration, and present proceedings, and

containing a ratification of Messrs Shearer's actions and a narrative of what had occurred prior to his departure for South Africa to all intents and purposes the same as that contained in the letter set forth above.

With regard to the letter and deed of factory and commission the complainers stated—"The circumstances in which the said documents were executed are unknown to the complainers, but in so far as these allege antecedent instructions given by Wilson to make this claim the said documents are not in accordance with fact."

The complainers stated, *inter alia*, the following pleas-in-law—"(1) As the respondent Wilson has not signed or authorised the claim to benefit under the policy condescended upon, nor authorised the appointment of an arbiter, the same are invalid, and interdict should be granted as craved. (2) The claim made being in point of fact made by the respondents Messrs Shearer in the interest of and on behalf of trade creditors of Wilson, the same is invalid, and interdict should be granted as craved."

The respondents stated, *inter alia*, the following pleas-in-law—"(1) The respondent Mr Wilson having a claim against the complainers under the foresaid policy was entitled to employ a law-agent to recover it and to protect his interests under the policy, and he having employed the respondents Messrs W. & R. B. Shearer they are entitled to act on such employment, and to do whatever is necessary in their client's interests. (2) The steps taken by the respondents being those prescribed by the contract of insurance, and being proper and necessary to prevent the forfeiture of the claim under the policy, the present note should be refused. (3) The present proceedings are barred by the 13th clause of the conditions of the policy, *et separatim* the questions raised in the note fall to be decided by the arbiters named."

The Lord Ordinary on 15th July 1905 issued the following interlocutor:—" . . . Refuses the prayer of the note of suspension and interdict, and decerns. . . ."

Opinion.—"In 1901 the complainers, the Licenses Insurance Corporation, insured the respondent Wilson, who was a licenseholder in Greenock, for a maximum sum of £3000 in the event of his license not being renewed for any reasons beyond his control. The renewal of the license was refused by the Licensing Authority in April 1904, and I must assume, for the present purpose (though this is disputed), that it was not lost through the respondent's own fault. Thereupon it fell to the respondent to make a claim under the policy, and to appoint an arbitrator, and to give notice thereof to the company within six months of the alleged refusal. Within that period a claim was made under the policy, as on behalf of the assured, by Messrs W. & R. B. Shearer, writers in Greenock, who also intimated to the company the appointment of Mr William Shaw, writer in Glasgow, as arbitrator. The Insurance Company now seek to have the arbitration proceedings interdicted on the ground that the insured had not himself authorised the claim under the policy nor the appointment of the arbitrator; and that the matter was taken up by Messrs Shearer in the interest and on the instruction of creditors. It would appear that shortly after the license was refused Wilson went to South Africa in consequence (it is alleged) of an urgent telegram, leaving no written authority or mandate in this country, and, notwithstanding the time at their disposal, Messrs Shearer did not procure any such written authority until long after the six months had expired. In the meantime, upon the expiry of the six months, the present proceedings had been instituted, and it was not until 20th February and 9th March 1905 that a mandate and power of attorney were obtained and lodged in process. But these cover the whole ground; for Mr Wilson narrates that verbal instructions had been given by him before leaving Scotland to recover the sum due under the policy, and to do everything necessary therefor; he ratifies, approves, and confirms all that had been done in pursuance of these instructions, including the lodging of answers in the present proceedings; he renews the instructions to do all that is necessary for the recovery of the sum due to him under the policy; and he appoints a man of business in Greenock as his attorney, factor, and commissioner to act for him, and in his name, in all matters pertaining to this litigation, and in any subsequent arbitration proceedings. Now, it is said that while these documents may serve their purpose as a mandate for appearing to oppose the present note of suspension, they have no retroactive effect so as to regularise what was done by Messrs Shearer as on behalf of the assured in the way of setting up the arbitration within the six months. It is true this may have been done in pursuance of verbal instructions from Mr Wilson as alleged, and as narrated in the documents now produced under Mr Wilson's own hand. But these documents do not prove their own narrative; and the complainers aver that the narrative is untrue in so far as it bears that the assured claims to benefit under the policy, or that he authorised Messrs Shearer to make a claim, or to nominate an arbiter as on his own behalf. Accordingly the complainers' position now is that there must be a proof in this case. It appears to me, however, that on the documents now produced the nomination of the arbiter must be held *prima facie* to have been effectually made under the contract, whatever view may be taken of the facts as to antecedent authority to nominate. Even if there was no such authority given beforehand the intervention of the Messrs Shearer, as on Mr Wilson's behalf, as it expressly bore to be, was in my opinion capable of being approved and ratified by him in the circumstances of this case, so far as these are admitted, and it is now in fact 'ratified, approved, and confirmed.' It is thus established on the face of the documents that the person claiming is the assured, and that the arbitrator Mr Shaw is his

nominee, and this seems to me sufficient to dispose of this note, without prejudice to any of the questions now in dispute being stated and decided in the arbitration."

The complainers reclaimed, and argued—The arbitration was incompetent, Wilson not having given the notice to the company required under article 13. It was said, however, that Wilson's agents had given notice and that Wilson had "ratified" that notice. He had not, because (1) an act of ratification to be good must take place at a time when the ratifier could himself have done the act he ratifies. Wilson's so-called ratification took place after the six months—Evans on Principal and Agent, p. 64; *Bird* v. *Brown*, (1850) 4 Exch. 786; *Doe* v. *Walters*, (1830) 10 B. & C. 626; *Right* v. *Cuthell*, (1804) 5 East 491. (2) No ratification was effectual unless the act which was ratified by the principal was originally done by the agent on the principal's behalf—Evans, p. 66; *Watson* v. *Swann*, (1862) 11 C.B., N.S. 756; *Jones* v. *Hope and Others*, 3 T.L.R. 247. Here they would prove that the Shearers had acted on behalf of creditors and not of Wilson. It was perfectly true that the Court were slow to interfere with a constituted arbitration and preferred to allow an arbiter if possible to decide whether a certain matter fell or did not fall within his jurisdiction, but here the question really was, was there a properly constituted arbitration? How could that be a question for the arbiter? Compare *Symington's Executor* v. *Galashiels Co-operative Store Company, Limited*, January 13, 1894, 21 R. 371, 31 S.L.R. 253; *Ransohoff & Wissler* v. *Burrell*, December 10, 1897, 25 R. 284, 35 S.L.R. 229.

Argued for the respondents—The Lord Ordinary was right. The mandate was good; it operated *retro*—*Wylie* v. *Adam*, February 5, 1836, 14 S. 430; *Ross* v. *Shaw*, March 8, 1849, 11 D. 984. The complainers had cited no Scotch authorities for their two main propositions, which were at variance with the principles of Scotch law as exemplified in the whole doctrine of *negotiorum gestor*. The English cases cited were also very special, and contradicted the well-known case of *Bolton Partners* v. *Lambert*, 41 Ch. D. 295, where it was held to be the general rule that ratification operated *retro*. But in any event under article 13 the jurisdiction of this Court was excluded. The question was one for the arbiter. The Court was always very reluctant to interfere in arbitrations—*Dumbarton Water Commissioners* v. *Lord Blantyre*, November 12, 1884, 12 R. 115, 22 S.L.R. 80; *Glasgow, Yoker, and Clydebank Railway Company* v. *Lidgerwood*, November 27, 1895, 23 R. 195, 33 S.L.R. 146. The complainer's objections were too technical to deserve the serious consideration of the Court.

LORD KYLLACHY—I do not think that we should be justified in interfering with the Lord Ordinary's interlocutor. The Lord Ordinary has refused to interfere with the arbitration proceedings, and in so refusing I think he has exercised a just discretion. I do not profess to say that I have formed an opinion on all the questions with which the Lord Ordinary deals. For example, I do not think it necessary to enter upon the question as to how far ratification is possible of an act done by an agent without prior authority, and which is only ratified after expiry of the period within which the act fell to be done. That seems to be a question of some difficulty. Nor do I think it necessary to determine the other question, whether the subsistence of this policy as a valid policy is ultimately a question for this Court or for the arbiters. There is much to be said for the view that it is for the arbiters. But at anyrate that is a matter on which, as it seems to me, the arbiters must be allowed to judge. In the first instance it is not to be assumed that they will exceed their jurisdiction or act otherwise than as they ought; and dealing as we are here with objections, which are at least far from clear, to an arbitration which is *prima facie* regular, I do not think an interdict would be justified. It may be for the Court to interfere when the arbiter has either failed to exercise or has exceeded his jurisdiction. But in the meantime I am of opinion that we ought simply to adhere to the Lord Ordinary's interlocutor.

LORD STORMONTH DARLING—I am of the same opinion. We have here to deal with an arbitration under an insurance policy which has been *ex facie* validly set up to determine an *ex facie* relevant claim. The ground on which we are asked to interfere with the arbitration is that the assured, in whose name it was set up, gave no authority to do so. The Lord Ordinary has refused the note of suspension on the ground that whether the assured gave antecedent authority or not, he subsequently ratified what had been done in his name, as he was entitled to do in the circumstances. I say nothing against this ground of judgment, but I think the case can be disposed of on a simpler ground which will not even have the appearance of pronouncing on a question which may arise before the arbiter. That ground is—as exemplified by the cases *Dumbarton Water Commissioners*, 12 R. 115, and *Glasgow, Yoker, and Clydebank Railway Company*, 23 R. 195—that this Court will not interfere with the action of an arbiter *ex facie* well appointed unless it can be made "perfectly plain" (to use Lord President Inglis's expression) that the arbiter has no such power as that which he is called on to exercise. I agree in thinking that here that has not been made out and that the arbitration must proceed. I would only add that it does not seem to me to make any difference that this is a contractual arbitration instead of being a statutory one.

LORD LOW—I am of the same opinion. I think the kind of considerations which were present in *Dumbarton Water Commissioners* v. *Blantyre* (1884, 12 R. 115) and *Glasgow, Yoker, and Clydebank Railway Company* v. *Lidgerwood* (1895, 23 R.

195) are present here, and are sufficient to justify the Court in coming to the conclusion that it is not expedient to interfere with the arbitration proceedings at the present stage.

LORD JUSTICE-CLERK—I am of the same opinion. I think that to interfere with an arbiter is most inexpedient unless he is exercising or is proposing to exercise a jurisdiction which he does not have.

The Court adhered.

Counsel for the Reclaimers—The Solicitor-General (Ure, K.C.)—Monro. Agents—Douglas & Miller, W.S.

Counsel for the Respondents—Orr, K.C.—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

Wednesday, May 23.

OUTER HOUSE.

[Lord Johnston.

WHIGHAM (OFFICIAL LIQUIDATOR OF THE EDINBURGH PAVILION LIMITED) *v.* WALKER.

Company — Liquidation — Preferential Claims—Assets Insufficient to Pay Costs of Liquidation—Competition of Liquidator, Liquidator's Solicitor, and Petitioning Creditor—The Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 110.

The assets recovered under a liquidation were insufficient to meet the costs of the liquidation. In a competition between the liquidator, the liquidator's solicitor, and the petitioning creditor, *held* (*per* Lord Johnston, Ordinary) that the petitioning creditor was not entitled to a preferential charge on the assets remaining after deduction of the actual costs of realisation. *Opinion* that in the absence of any agreement or special circumstance he would rank the liquidator's solicitor first, the liquidator second, and the petitioning creditor third.

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 110, enacts—"The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the Court thinks just."

On 21st December 1905 the Court ordered the winding up of the Edinburgh Pavilion, Limited, on a petition by C. Cox Walker, one of the company's creditors. C. F. Whigham, C.A., was appointed official liquidator. The liquidator proceeded to realise the assets of the company, which consisted only of the Pavilion Theatre, Edinburgh, and its fittings. There were bonds over the theatre to the amount of £900, and its sale by the bondholders realised less than that sum. The only asset which became available for distribution in the liquidation was a sum of £55 obtained by the sale of the fittings. The expenses of the liquidation amounted to £76, 0s. 4d., and were made up as follows:—(1) Untaxed costs of the liquidator's solicitor, £30, 17s. 10d. (including a sum of £10, 10s., the estimated cost of winding up the liquidation); (2) taxed costs of the petitioning creditor, £29, 7s. 6d.; (3) liquidator's remuneration restricted to £15, 15s. The liquidator thereon presented a note to the Court narrating, *inter alia*, the situation above described, stating that the liquidator had suggested to the agent for the petitioning creditor that the sum in hand (£55) should be divided in proportion to the foregoing amounts, that this suggestion had not been acceded to, and craving the direction of the Court as to the disposal of the sum in his hands in terms of section 110 of the Companies Act 1862.

The agent for the petitioning creditor claimed that his costs, incurred in putting the company into liquidation, should form a preferential charge on the assets of the company after deduction of the actual expenses of realisation.

The following authorities were referred to—Companies Winding-up Rules 1903, rule 170; *Northern Distilleries, Limited, in Liquidation*, October, 18, 1901, 9 S.L.T. 213; *London Metallurgical Company* [1895], 1 Ch. 758; *Audley Hall Cotton Spinning Company*, 1868, L.R. 6 Eq. 245.

LORD JOHNSTON—A note has been presented in this liquidation informing me that the assets realised only amount to £55, and that the claims upon this sum preferable to the creditors amount to £76, 0s. 4d., and therefore that as they exceed the funds in the liquidator's hands these claims cannot all be paid in full. These claims are—

(1) The untaxed costs of the liquidator's solicitor . .	£30	17	10
(2) The taxed costs of the petitioning creditor . . .	29	7	6
(3) The liquidator's remuneration, restricted to . . .	15	15	0
	£76	0	4

and I am asked to order payment in such order of priority as I may think just. At the same time the liquidator and his solicitor state that they are quite willing to consent to a *pari passu* ranking. To this the petitioning creditor objects and claims a preference. He at the same time excepts to the account of the liquidator's solicitor, which he maintains contains many charges which ought not to have been incurred, and have no connection with the realisation of the moveable assets, with which alone the liquidator was concerned.

I may say, in the *first* place, that the objections to the liquidator's solicitor's account, though *prima facie* plausible, are made in ignorance of the situation in which the liquidator found himself, and disappear on a little explanation. The fact is that there were no moveables which were not inextricably mixed up with the heritage, being at least *quasi* fixtures. The heritage was a small theatre, and the moveables theatrical adjuncts of the particular theatre.