

upon which markets or sales are habitually held, shall, as soon as practicable after being used for the purposes of a market or sale, and before being again so used, be cleansed or disinfected as follows;" and then, after a precise description as to the manner of disinfecting and cleansing the premises, the third sub-head provides—"All pens, hurdles, and fittings used in connection with the market or sale shall, as soon as practicable after being used for such purpose, and before being again so used, be cleansed by scraping and washing, and after such cleansing shall be thoroughly sprinkled with a solution of carbolic acid and limewash, as prescribed above." Now this reference to all pens, &c., shows that it is not enough to state generally that the place where the sales were held was a mart or market, and that "it" was not disinfected between the dates of the two sales, but that it is necessary to specify the particular pens as having been used on both occasions; and the reason why such an averment is required is I think obvious. It does not follow as a matter of course that every pen is used at each sale, and if a pen is not used at the first sale there is no necessity for immediately disinfecting and sprinkling it before the second sale is held. Hence there was a good reason for the Order requiring a specification of the particular pens, and, in any case, it is sufficient that the Order does so require. A very few words would have made it clear whether the pens in question were used on both occasions, but, as there is no such averment it follows that the complaint is defective, and therefore I hold that the complaint is irrelevant for want of it, and that the conviction must be quashed. The Sheriff-Substitute may or may not have been satisfied on the proof that the pens in question were used on the occasion of both sales—his statement is not absolutely clear on this point—but in any case this would not cure the defect. The procurator-fiscal cannot say that this objection to the relevancy has been sprung upon him, for it along with other objections was duly taken at the first calling of the case on 15th November, when it would have been open to him to move for leave to amend the complaint, and it would then have been for the Sheriff to allow or refuse the amendment.

LORD ARDWALL—In regard to the first question stated for our opinion, I think there is no doubt as to the title of the procurator-fiscal to present this complaint, his title not having been expressly or impliedly excluded by the terms of the statute.

In regard to the first branch of the second question, I think it would have been desirable, to say the least, to have set forth explicitly in the complaint that the Southern Central Mart was a place in which sales were habitually held, for we know that there are marts where sales are not habitually held, and to which the provisions of the Order would not apply. But when we come to the objection raised by the second

branch of the question I have no doubt that it is well founded, and that the complaint is bad for want of specification. The gravamen of the charge against the respondents is that they used certain pens without having had them cleansed after their use on a previous occasion. Now it appears that the respondents' saleyard is of large dimensions, extending to about $5\frac{1}{2}$ acres, and that the pens in question are only used in connection with special sales held by them. One of these special sales was held on 17th September 1906, and another on 20th September. It might well be that some of the pens which were used on the 17th were not occupied on the 20th, especially in view of the fact that 2000 fewer sheep were sold on the second occasion than on the first. Accordingly, in order to libel an offence under the Act it was necessary for the complainer to state specifically in his complaint not only that the pens in question were used on the 17th but also that they were again used on the 20th, and that they had not been cleansed in the interval. This he has failed to do, and I think that the complaint is irrelevant in consequence of such failure.

With regard to the remaining questions stated, it is not necessary to express any opinion.

LORD LOW was absent.

The Court answered the second question of law by stating that it was necessary for the respondent to aver specifically that the pens in question were used on 17th and 20th September 1906 respectively, and found it unnecessary to answer the other questions.

Counsel for the Complainer and Respondent—**J. R. Christie**—**W. T. Watson**.
Agent—**A. Elliot Keay**, Solicitor.

Counsel for the Respondents and Appellants—**M'Lennan**, K.C.—**D. Anderson**.
Agents—**Dalglish, Dobbie, & Company**, S.S.C.

Saturday, March 2.

FIRST DIVISION.

[**Lord Johnston**, Ordinary.]

HUGHES v. THE THISTLE CHEMICAL COMPANY AND OTHERS.

Master and Servant—Process—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Sched. II (8)—Recorded Memorandum of Agreement for Compensation—Reduction in Court of Session—Declarator that there was no Agreement—Appeal from Deliverance on Petition to Rectify—Competency.

Employers sent for registration a memorandum of agreement for compensation under the Workmen's Compensation Act 1897. The agreement was based on certain receipts granted by the workman, his father, and his mother. The genuineness of the memo-

random being disputed by the workman, who maintained that no agreement had ever been made, the employers presented in ordinary Sheriff Court form a petition asking the Sheriff to ordain the clerk to register. After a proof and a series of appeals the Sheriff found that there was an agreement, and ordered the memorandum to be recorded. The workman brought in the Court of Session an action of reduction and of declarator that no agreement existed. The employers, relying on *Binning v. Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312, maintained the action was incompetent.

Held (1) that the action was competent, and (2) that as the declarator should be treated as the main conclusion and the reductive conclusion merely as ancillary, it was unnecessary to examine critically the averments in support of reduction; and case sent to *proof*.

Opinion, per Lord President, that if a petition to rectify the register had been presented to the Sheriff, and he had adjudicated thereon, his deliverance, being a judicial act, would have been open to the whole course of appeal.

Opinion, per Lord Salvesen, that the reductive conclusion was unnecessary, and the declaratory conclusion more appropriate to the Sheriff Court; and that a Sheriff should refuse to give special warrant for the registration of a memorandum of a verbal agreement which is bona-fide disputed.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) Sched. II, sec. 8, as made applicable to Scotland by sec. 14 (a), provides:—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt] by the said committee or arbitrator, or by any party interested, to the [sheriff clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt] on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a [Sheriff Court] judgment: Provided that the Sheriff may at any time rectify such register."

The Act of Sederunt of 3rd June 1898, section 7 (a), provides:—"The memorandum as to any matter decided by a committee, or by an arbitrator other than a sheriff, or by agreement, which is by paragraph 8 of the second schedule appended to the Act required to be sent to the sheriff clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all the parties interested, or where it purports to be a memorandum of a decision or award of a committee or of an arbitrator agreed on by the parties and to be signed, in the former

case by the secretary or by at least two members of the committee, and in the latter case by the arbitrator, the sheriff clerk shall proceed to record it in the special register to be kept by him for the purpose without further proof of its genuineness. In all other cases he shall, before he records it, send a copy [for which, unless it is supplied to him along with the memorandum, he shall be allowed to charge at the rate of 1s. a sheet] to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

On July 26, 1906, William Hughes junior, panman, 25 Inglis Street, Dennistoun, Glasgow, brought an action against the Thistle Chemical Company, Easterhouse, near Glasgow, and the individual partners thereof, with conclusions (1) for reduction of "(First) a pretended receipt granted by the pursuer in favour of the defenders the Thistle Chemical Company, dated 8th February 1905; (Second) a pretended receipt granted by William Hughes senior, the pursuer's father, in favour of the defenders the Thistle Chemical Company, and bearing no date; (Third) a pretended receipt granted by Mrs Hughes, the pursuer's mother, in favour of the defenders the Thistle Chemical Company, dated 21st February 1905; and (Fourth) a pretended memorandum of an agreement made under the Workmen's Compensation Act 1897, entered into between the defenders the Thistle Chemical Company, the partners of said company, and the pursuer, dated 3rd March 1905, and registered in the special register kept by the Sheriff Clerk of Lanarkshire at Glasgow on 6th July 1906"; and (2) for declarator "that no agreement as to compensation to be paid under the Workmen's Compensation Act 1897 by the defenders to the pursuer in respect of an accident which occurred to the pursuer while in the defenders' employment on 17th January 1905, has been concluded between the pursuer and the defenders."

The defenders, *inter alia*, pleaded—" (1) The action is incompetent, in respect that the provisions of the Workmen's Compensation Act include application to the Court in reference to the subject-matter of the action. (2) *Res judicata*, in respect that the subject-matter of the action has been judicially decided and a final judgment pronounced thereon. (3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who, on 5th December 1906, pro-

nounced an interlocutor repelling the defenders' first three pleas-in-law, finding the cause unsuitable for jury trial, and therefore dispensing with the adjustment of issues, and allowing parties a proof of their averments.

Opinion.—"The pursuer William Hughes was injured on 17th January 1905, when in the employment of the defenders the Thistle Chemical Company, Glasgow. On 3rd March the defenders lodged, in terms of the 8th section of the 2nd schedule to the Workmen's Compensation Act 1897, with the Sheriff Clerk of Lanarkshire a memorandum of agreement alleged to ascertain the amount of compensation due to the pursuer under that Act, and requested that the same should be recorded. The Sheriff Clerk, in terms of the above section and of the relative Act of Sederunt, notified the pursuer, who on 6th March intimated that the genuineness of the memorandum was disputed on the ground that he had come under no agreement whatever to accept Workmen's Compensation benefits in respect of the accident to him while in the defenders' employment. The Sheriff Clerk therefore intimated to the defenders that the memorandum would not be recorded without a special warrant from the Sheriff. So far, procedure was in accordance with the statute and Act of Sederunt. Thereafter the defenders presented to the Sheriff of Lanarkshire a petition in ordinary Sheriff Court form, in which they called the present pursuer as defender, praying the Court 'to ordain the Clerk of Court to register in the register kept in terms of the Workmen's Compensation Act 1897, in the Sheriff Court of the county of Lanark at Glasgow, the memorandum of an agreement made under said Workmen's Compensation Act 1897 between the pursuers and the defender, dated said memorandum the 3rd day of March 1905, and lodged with the Clerk of Court on said date, and to find the defender liable in expenses.'

"On this petition a record was made up, debate followed, a proof was led, and generally procedure was taken before the Sheriff-Substitute, with appeals to the Sheriff, which lasted till November 1905, to all intents and purposes as if the application had been the initiation of an ordinary action for declarator—incompetent, by the way, in the Sheriff Court—that a valid agreement had been entered into. On 7th November 1905 the case was appealed to the First Division, when, following the decision of the consulted Judges in the case of *Binning v. Easton & Sons*, 8 Fr. 407, the appeal was found incompetent, the judgment of the Sheriff was recalled, and the matter sent back to the Sheriff-Substitute, who, in accordance with his own previous judgment to the effect that an agreement in the terms stated in the memorandum had been entered into between the present defenders and pursuer on 6th July 1906, ordered the memorandum of agreement to be recorded and it has been recorded accordingly.

"The pursuer, who had, pending the above proceedings raised an action of damages

against the defenders at common law and under the Employers' Liability Act on 26th July 1906, in order to clear the way for prosecuting said action of damages, raised the present action for reduction of the foresaid memorandum of agreement, and of three documents preceding it in date, upon which the Sheriff-Substitute had founded his judgment, but he also concludes in the second place for declarator— . . . (*quotes declarator supra*) . . . In defence to this action of reduction and declarator the defenders plead— . . . (*quotes defenders' pleas 1 and 2*) . . .

"I do not think that these pleas are well founded. After some difference of opinion between the two Divisions of the Court, it has now been authoritatively decided by the case of *Binning v. Easton & Sons, supra*, that the Sheriff-Substitute in ordering the memorandum in question to be recorded was acting ministerially and not judicially, and the position taken by the defenders in these pleas appears to me to be inconsistent with that judgment. The defenders are in this dilemma:—If they maintain that the Sheriff-Substitute's judgment on the application for recording is *res judicata*, the Sheriff-Substitute must have been acting judicially, and this the Court, in the case of *Binning v. Easton & Sons, supra*, have decided that he was not. If they admit, as they are bound to do by reason of that judgment, that he was acting ministerially, then there can be no *res judicata*.

"There has been, I think, some difficulty introduced into this matter by the Act of Sederunt of 3rd June 1898, and I think it doubtful whether in some of its provisions that Act has not, *ex facie* at least if not in reality, gone beyond what was intended by the statute in virtue of which it was made, and which is now better understood than it was on its first enactment. Going back to the second schedule appended to the Act itself, and which must be read as part of it, it is provided by section 8 thereof, reading it short and as applied to Scotland, that where the amount of compensation under the Act has been ascertained by agreement, a memorandum thereof shall be sent in manner prescribed by Act of Sederunt by any party interested to the Sheriff Clerk of the county in which any person entitled to such compensation resides, who shall, subject to such Act of Sederunt, on being satisfied as to its genuineness, record such memorandum in a special register, 'and thereupon the said memorandum shall for all purposes be enforceable as a Sheriff Court judgment,' but it is added—'provided that the Sheriff may at any time rectify such register.' As indicated by the Lord President in the case of *Binning v. Easton & Sons, supra*, it is, I think, more than doubtful whether this section in its entirety, if at all, was intended to be applicable to Scotland, and whether the recording, so far as Scotland was concerned, was not intended to be provided for by section 14 (b). But as section 8 is not among the sections of the schedule specially declared not to apply to Scotland, I must treat it as so

applying. Taking it thus, I think that there is now no doubt that what it provides is that the Sheriff Clerk, on a memorandum of agreement being presented to him, if he is satisfied of its genuineness, shall record it, with a view to ready enforceability, as *fictione juris* the equivalent of a Sheriff Court decree. But the Sheriff Clerk's being satisfied of its genuineness, as he is not a judge, cannot give it more than *prima facie* effect, or prevent its being challenged by suitable action in a competent court. Whether that might be done by action in the Sheriff Court under the proviso at the end of the 8th section—that the Sheriff may at any time rectify the register—has yet to be determined. But if it could, then the Sheriff in such proceeding would be acting judicially, and be subject to review.

“Now, the Act of Sederunt, in section 7, makes much more elaborate provision with regard to the recording of memorandums of agreements. It provides, first, that where a memorandum purports to be signed by or on behalf of all the parties interested the Sheriff Clerk shall proceed to record it without further proof of its genuineness. In such case it is impossible to contend that the act of the Sheriff Clerk in recording it gives it unchallengeable validity. If, for instance, a signature is forged, there can be no doubt that the memorandum is challengeable, and that its being recorded would be no bar. The section then proceeds to deal with the case in which the memorandum does not purport to be signed on behalf of all the parties interested, and then if, after notice provided to be given, the genuineness of the memorandum is disputed the Sheriff Clerk is not to record it without a special warrant from the Sheriff. If this means that the special warrant of the Sheriff is to be granted only after an ordinary Sheriff Court litigation has run its course, and that the Sheriff's judgment directing the Sheriff Clerk to record or not to record is to be final, I think the provision is not justified by the power to make Acts of Sederunt conferred on the Court by the 8th section of the 2nd schedule to the Act. But I cannot think that any such proceeding was contemplated when the Act of Sederunt was framed. As has been pointed out in the case of *Binning v. Easton & Sons*, *supra*, the act of recording is still the act of the Sheriff Clerk; the Sheriff is his official superior and entitled to direct him, and he is bound to follow such direction. All that I think the Act of Sederunt meant, or could competently mean, was that the Sheriff Clerk should apply for such direction and should follow it. I do not think that the Act of Sederunt contemplated anything like the proceeding which the Sheriff-Substitute allowed to be initiated and carried on before him, in which an elaborate proof was led really to constitute the agreement, and the merits of the question involved were gone into as if in a declarator. I doubt even whether such a summary proceeding as might have been taken under the 52nd section of the Sheriff Courts Act 1876 was intended. I think that

the Sheriff was meant to act and could only act as the Sheriff Clerk would have done, but applying his presumably riper and more skilled experience. He should, I think, at most have called the parties before him and have ascertained what the real question between them was, and if he found that this question was one such as we have had disclosed here, where the alleged agreement has to be spelt out by establishing authority to a third party to make it, or by proving acquiescence in and homologation of an agreement which such party had not power to make, then I think that his clear course was to say that he was not so satisfied of the genuineness of the memorandum as to justify his giving special warrant or direction to the Sheriff Clerk to record it, and that he was not entitled to order proof to be led in order that he might satisfy himself of the existence and validity of the agreement alleged and so of the genuineness of the memorandum. The term genuineness is not an expression very happily chosen, but is applied only to the memorandum, and I am unable to read it as involving the validity of the agreement on which it proceeds unless it is merely the *prima facie* validity. In what the Sheriff-Substitute did do he was really determining judicially in order that he might act ministerially. That was, in my opinion, outwith the schedule to the statute and not contemplated by the Act of Sederunt. I am fully alive to the fact that this opinion is in opposition to what was said by Lord Adam in delivering the judgment of the First Division in the case of *Traill & Sons v. Cochrane*, 3 F. 1091, but having regard to the decision by the consulted Judges in *Binning v. Easton & Sons*, *supra*, I do not think that I am bound by the judgment in *Traill & Sons v. Cochrane*.

“I shall therefore repel the first two pleas for the defenders.

“It was further pleaded by the defenders that even if this could be regarded as an action of reduction, the pursuer's averments were not relevant, and that there was no issuable matter. I have come, however, to the conclusion that reduction is not necessary, and that the pursuer gets all that he requires if he succeeds in obtaining declarator that there was no agreement ever entered into by him as alleged in the memorandum which was recorded. If there was no agreement the memorandum ought not to have been executed and ought not to have been recorded, and the Sheriff-Substitute may now be directed to rectify the register, which under the final proviso of section 8 of the second schedule to the Act he has power to do. The reduction of the memorandum does not appear to me to be apposite or necessary, though, if it be thought otherwise, the direction to the Sheriff-Substitute may take that form, for which the conclusions of the summons provide.

“Nor do I think that it would do anything but confuse the necessary inquiry to attempt to reduce the matter to issues and send the case to a jury. The subjects of in-

quiry are whether, when the pursuer's father signed the undated receipt he had any authority from the pursuer? Whether if he had such authority he made an agreement? Whether in signing the receipt the pursuer was aware that such agreement had been made? And whether, in doing so he acquiesced in or homologated that agreement? And as bearing on this, his state of body and mind, the information given him, and the inducements presented to him at the time of signing will have to be inquired into. Whether pursuer's mother signed or had any authority to sign the receipt. Whether, if the pursuer's father had no authority to effect an agreement for him, all or any of these receipts can be interpreted as importing an agreement, or as acquiescing in or homologating an agreement made on his behalf without authority, or as adopting an agreement assumed by the defenders to have been made though never made with authority on his behalf. What is really to be inquired into is the constitution of the alleged agreement, and, because it is necessary to inquire into this reversely in the form of a negative declarator (for which I think there is an amply relevant record), whether that be or be not accompanied by a formal reduction, to do so by way of a jury trial or issues would be, I think, to obscure the real question and run the risk of the miscarriage of justice. It would in fact be to treat the reduction as the primary conclusion because it is stated first in the summons, and the declarator as a mere consequence, whereas I consider the declarator to be the real essence of the case, and the reduction, if necessary at all, to be merely ancillary.

"Even if I thought otherwise I should not be prepared to send the case to a jury, as I think it not improbable that it may be necessary to consider judicially the question left open by the judgment in *Binning v. Easton & Sons*, though decided in *Traill & Sons v. Cochrane*, whether an agreement under the Act must in Scotland be in writing or can be proved by parole.

"I shall therefore repel also the defenders' third plea-in-law, and send the case to proof."

The defenders reclaimed, and argued—The series of receipts produced here established an agreement for compensation under the Workmen's Compensation Act—*Little v. P. & W. McLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287. *Fowler v. Hughes*, January 27, 1903, 5 F. 394, 40 S.L.R. 321, was, *v. opinio*ns, to the same effect, though on the one receipt there produced the decision was against an agreement. There being an agreement, a memorandum thereof was rightly recorded, and in any case there was no appeal against the Sheriff's decision in that matter—*Binning v. Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312. The intention of the Workmen's Compensation Act was that the Sheriff's judgment on the genuineness of a memorandum should be final and should not be got behind. Such an intention was easily to be implied where, as here, a new jurisdiction was conferred

—Lord President Inglis' opinion in *Marr & Sons v. Lindsay*, June 4, 1881, 8 R. 784, at p. 785, 18 S.L.R. 535—and that no appeal was competent had been decided in the case of the Railway Clauses Consolidation Act 1845, section 61, a similar instance of the conferring of a new jurisdiction on the Sheriff—*Main v. Lanarkshire and Dumbartonshire Railway Company*, December 17, 1893, 21 R. 323, esp. Lord Adam at p. 324, 31 S.L.R. 239. This intention that the Sheriff's decision should be final was confirmed by the power conferred on him to rectify the register, *i.e.*, if necessary to delete a recorded memorandum. The Sheriff was entitled to take evidence and determine judicially in order that he might act ministerially—*Cochrane v. Traill & Sons*, July 19, 1901, 3 F. 1091, Lord Adam at p. 1093, 38 S.L.R. 848. The action was an attempt to review the judgment of the Sheriff acting in a ministerial capacity and in a matter where his jurisdiction was at once privative and final by statute. It should be dismissed as incompetent and irrelevant. [Counsel also argued that the averments were irrelevant. For the reduction of a written contract, averments of essential error induced by the opponent were necessary—*Stewart v. Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469—averments, even stronger, amounting to fraud, must be made for the reduction of a decree of a Court. A recorded memorandum was a decree of Court—*Workmen's Compensation Act, 1897, Schedule II, section 8.*]

Argued for the respondent—The Lord Ordinary's judgment was right. The Sheriff's granting warrant to record the alleged memorandum of agreement was a ministerial act only—*Binning, cit. sup.*—and consequently could not support the plea of *res judicata*. The memorandum might still be reduced, *e.g.*, on the ground of forgery, or the agreement itself on the ground of fraud, or essential error, or a declarator might be brought that an agreement never existed—opinions in *Binning, cit. sup.* The Sheriff was no doubt the final authority on the genuineness of a memorandum, but on that only, leaving the agreement to be attacked otherwise—*Macdonald v. Fairfield Shipbuilding and Engineering Company, Limited*, October 20, 1905, 8 F. 8, Lord Kyllachy at p. 12, 43 S.L.R. 1. It was a strained view of the statute that its intention was that the Sheriff's granting warrant to record was to finally settle all questions and to be subject to no species of review, and it was contrary to the opinions in *Binning, cit. sup.* In that case Lord Kyllachy (at 8 F. 414) had given his opinion that a reduction was competent. The power given to the Sheriff to rectify did not affect the question, as it merely referred to power to alter the compensation standing the agreement. [On the relevancy of the averments counsel argued that essential error only need be averred, the agreement being in fact a gratuitous alienation—*M'Laurin v. Stafford*, December 17, 1875, 3 R. 265, 13 S.L.R. 174; *M'Caig v. Glasgow University Court*, July 2, 1904, 6 F. 918, 41

S.L.R. 700. The essential error was induced by material matters being withheld—*Fowler v. Hughes, cit. sup.* The recorded memorandum was not a decree of a Court, but only enforceable as such.]

At advising—

LORD PRESIDENT—The matter in dispute in this case arises in this way. The pursuer William Hughes was injured while in the employment of the defenders the Thistle Chemical Company. The defenders the Chemical Company lodged, in terms of the Workmen's Compensation Act, a memorandum of agreement with the Sheriff Clerk of Lanarkshire, and requested that the same should be recorded. The genuineness of the agreement was disputed by the pursuer, but after procedure before the Sheriff Clerk and the Sheriff-Substitute it was registered. The pursuer thereafter raised an action in the Sheriff Court of Lanarkshire against the defenders for damages under the Employers' Liability Act. The defenders took the plea that the pursuer could not proceed against them under that Act because he had elected to claim under the Workmen's Compensation Act, and as your Lordships are aware, it is not possible to sue both proceedings at once.

In order to obviate that plea the pursuer asked the case to be sisted, and raised the present action of reduction and declarator, in which he alleges that the memorandum of agreement was improperly registered, inasmuch as he never came to any agreement at all. The Lord Ordinary has allowed the pursuer a proof of his averments. I think the Lord Ordinary is right, and that this is a necessary result of the case of *Binning v. Easton & Sons*, 8 F. 407. That case, which is an authoritative judgment of Seven Judges, decided that the office of the Sheriff Clerk (or of the Sheriff-Substitute, under the Act of Sederunt, when called on to assist the Sheriff Clerk) was a ministerial office as regards the registration of the agreement, and that no appeal lay from the decision. Once that is decided, it seems to me that it is absolutely necessary that there should be some way of getting rid of what otherwise might be an injustice. Generally the person who would ask to get rid of the agreement would be the employer, because he is the person who under the agreement has to pay, but it may sometimes be—as in the present case—the interest of the workman to get rid of the agreement. Now the moment you have it possible—as is possible under the Act of Parliament—that the so-called memorandum of agreement may be an *ex parte* statement of an alleged verbal agreement, you have also the possibility of the memorandum not representing any real agreement at all. No doubt a *prima facie* decision must be come to by the Sheriff Clerk, if necessary assisted by the Sheriff-Substitute, whether a memorandum of an alleged agreement truly represents a genuine agreement. The effect of *Binning's* case is that the determination of this question is a purely administrative act,

and not subject to review, although it involves a decision on the merits, *i.e.*, on the question whether there was a genuine agreement.

Now it is obviously a denial of justice if, on the assumption that the memorandum was fabricated and really represented nothing the parties had agreed on, there should be no way of getting rid of it. The only two ways possible would be an action at common law or a petition under the clauses of the statute which allow a petition to be presented to the Sheriff-Substitute to rectify.

I do not wish to pronounce an opinion that a petition under the Act would be incompetent, but I see no difficulty whatsoever in saying that if the Sheriff-Substitute did entertain a petition to rectify he undoubtedly would be acting judicially, and I apprehend the ordinary rule would apply that where an Act of Parliament invokes the assistance of a tribunal and allows that tribunal to act judicially, appeal is competent unless expressly excluded by the Act. Accordingly, I think that if a petition to rectify was presented and the Sheriff pronounced thereupon, his judgment would be a judicial judgment and would be subject to the whole gamut of appeal just as any other judgment of the Sheriff which is not declared by Act of Parliament to be final.

I therefore look upon this action of declarator and reduction as a proper means of getting rid of something by which the pursuer alleges he is injured through there not having been a proper judicial decision in the matter.

There was a subsidiary question raised as to whether the averments were such as could be properly remitted to probation, looking at the action as one of reduction. I do not think that difficulty really arises. I agree with the Lord Ordinary that it is quite proper here to treat the leading conclusions as those of declarator. I do not think there is any need to say that the reductive conclusions are not also good, for it seems to me the entry on the register must be got rid of somehow, and I think the reduction proposed is an appropriate way to do it.

But I only want to point out that it is a perfectly different thing from the question of reducing a contract to which both parties have put their hand. There the rule applies which you have laid down in the House of Lords case, *Stewart v. Kennedy* (17 R. (H.L.) 25), but here that is not so, and we have not got a signed contract between the parties. We have merely got an alleged agreement which no doubt has been asserted to exist in the proceedings leading up to registration. But this action is really in one sense a negative declarator, *i.e.*, for declarator that no such agreement existed—and I think that the reductive conclusions are really only ancillary to the declarator, and if a declarator were pronounced in the terms in which the pursuer says it ought to be, then these ancillary conclusions are simply for the purpose of removing entries from the register.

On the whole matter I am of opinion that the Lord Ordinary has come to a proper conclusion, and that his judgment should be affirmed.

LORD M'LAREN—The difficulty that has arisen in administering this branch of the Workmen's Compensation Act springs from the practice that has grown up of putting on the register so-called agreements which have never been reduced to writing by consent of parties. As the practice of recording such unilateral writings has not yet suffered positive prescription, I hope that when we come to administer the new Act that will soon come into operation we may be able to examine the grounds of the practice. If the language of the new Act—which I have not at present before me—is substantially the same as that of the old, we may be able to reconsider its operation, for I cannot help thinking that the view of the Legislature is that where parties have agreed in writing as to a scale of compensation, that writing may be recorded and become a ground of effectual legal proceedings. But in the case of *Binning v. Easton & Sons* the competency of putting a so-called verbal agreement on the register was assumed for the purposes of the inquiry. What was determined there was only this, that the entry on the register is the act of the Sheriff Clerk, who is not a judge, and whose acts are not therefore subject to review in the same way as the acts of a judge. The Sheriff was held as having merely come to the assistance of the Sheriff Clerk in the exercise of his supereminent power in the control of all legal matters connected with his jurisdiction. It was clearly expressed in the opinions of more than one of the judges who took part in the decision of *Binning v. Easton*, that there were other means of bringing before a higher Court the question whether there was to be an agreement by which the two parties were bound. The first attempt to re-open the question was in a case which we heard about the beginning of this session—*Lochgelly Iron and Coal Co. v. Sinclair*, 1907, S.C. 3—but in that case the pursuer was not successful in the mode of review he chose. He had got the Sheriff to state a special case. When we heard that case I was of opinion—and it was concurred in by Lord Kinnear and the other Judges—that arbitration and agreement were really alternative methods, and that it was only in a case of arbitration that it was possible to obtain an opinion by a special case, and the application was accordingly dismissed. Another method, which I suggested myself, was that it might be possible to raise the question of the existence of an agreement by suspension. That would of course be before the agreement had been put on the register. But here it has been registered, and the process we have to consider is one of reduction and declarator. I agree that there is not much difference between the process of reduction and what is called negative declarator. The reduction is really a kind of decree of nullity; there is nothing in the decree except that it declares the

document that is produced before the Court to be null and void, and the peculiarity of the summons is more accidental than substantial. But I think that in this case there may be a convenience in holding the declaratory conclusions as raising the question of the existence of the agreement, and then, if it is found that the agreement is non-existent, the reductive conclusions may be held as merely auxiliary in order to have the agreement removed from the register.

I therefore concur in the decision arrived at by your Lordship.

LORD SALVESEN—In my opinion it is a necessary corollary of the decision in *Binning's* case that the order by the Sheriff-Substitute to record the memorandum of agreement does not conclude the rights of parties. Where the Sheriff-Substitute is acting as arbitrator under the Act he is final upon all questions of facts; and it would have been a reasonable enough provision that he should be equally final in deciding whether an agreement to accept compensation under the Act had been come to. There is, however, no such provision; and it is pretty obvious from the language used that the Legislature had primarily in view written agreements, and did not contemplate any question arising except as to the genuineness of the signatures. Whatever the practice may have been formerly, I think that it ought now to be understood, that wherever there is a *bona fide* dispute as to whether a verbal agreement in terms of the memorandum presented was in fact entered into, the Sheriff-Substitute should decline to order the memorandum to be recorded. This can involve no possible hardship to either party. If the workman is the applicant, and has given notice of his claim under the Act, he can at once invoke the jurisdiction of the Sheriff as arbiter to assess the compensation due to him. In the rare cases of the workman not having given the requisite notice because of his understanding that the employer had agreed to pay him compensation in terms of the Act, there is no difficulty in his bringing an action to have the agreement established. On the other hand, where, as here, the employer presents a memorandum of agreement for registration with the object of excluding the workman's other remedies, the procedure is useless, for he can state his pleas in bar just as effectually in any action which the workman may raise to recover damages. Such a procedure is quite familiar, and is illustrated in the case of *Fowler v. Hughes* (5 F. 394), where a preliminary proof was taken on the question whether the pursuer had elected to take compensation under the Workmen's Compensation Act. Apart, therefore, from the competency of the Sheriff-Substitute investigating the facts as to a disputed agreement, on a petition to record it, it is obvious that his doing so would be a mere waste of time. His order to record the memorandum or his refusal to record it will not prevent the actual fact being ascertained at the instance of the person who has the interest to do so,

and will not obviate any of the expense incident thereto. I cannot refrain from stating, however, that this action, so far as it is an action of reduction, was in my opinion wholly unnecessary. A reduction could only be necessary if the memorandum of agreement constituted a bar to other proceedings, but our decision negatives this. As regards the receipts, neither singly nor together can they be held to constitute an agreement, although they may be evidence that an agreement was entered into. But I never heard of it being necessary to reduce a document because an erroneous inference had been drawn as to its effect.

So far as the action is a negative declarator, I think it is competent enough in the Court of Session, although the question involved might quite well have been determined in the Sheriff Court action at the instance of the pursuer, and in any subsequent case ought, I think, to be determined there. The present action may be justified because of the difficulty of gathering from prior decisions what the pursuer's true remedy was, but I think it should not be taken as a precedent in future cases of the same nature. This question was, however, not raised in argument; and as I agree with the reasoning of the Lord Ordinary I concur in the motion which your Lordship in the chair has proposed.

LORD PRESIDENT—With reference to what my brother Lord Salvesen said as to reductive conclusions, my observation as to reduction was entirely confined to the agreement recorded in the register. I quite agree with Lord Salvesen that it is, of course, quite impossible to reduce some of the documents that are here sought to be reduced.

LORD KINNEAR and LORD PEARSON were absent.

The Court adhered and refused the reclaiming note.

Counsel for the Pursuer and Respondent—Watt, K.C.—Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders and Reclaimers—M'Clure, K.C.—Murray. Agents—Simpson & Marwick, W.S.

Thursday, February 28.

SECOND DIVISION.

BLEAKLEY'S TRUSTEES v.
JOHNSTONS.

Succession—Vesting—Discretionary Power to Trustees on Death of Liferentrix to Sell and Divide Property among Beneficiaries—Postponement of Vesting till Exercise of Discretion.

Terms of a holograph trust-disposition and settlement giving discretionary power to trustees after the death of the

liferentrix to sell a certain property and divide proceeds amongst the fiars, which were held to postpone vesting till the exercise of the discretion.

John Bleakley, boot and shoemaker, Edinburgh, by his holograph trust-disposition and settlement, dated 3rd February 1902, conveyed his whole estate, heritable and moveable, to trustees. He directed his trustees, *inter alia*, "to dispoise, convey, and make over that house belonging to me, the south half-flat, being the top half-flat No. 2 (two) Lauriston Terrace, together with the cellar thereunto belonging in Lauriston Lane, Edinburgh, to my niece Margaret (Maggie) Armstrong or Johnston, wife of John Johnston, in liferent, and to her four youngest children in fee, namely, Alice, Harry, Herbert, and George, in fee, at the death of the said Maggie Johnston the house is to be either sold or let, I hope the trustees will do best for the children, rents could go to their benefit when young, if I think would be a pity to sell while they are young, money would soon be fritted away. But when it is realised to be divided thus into five shares—Alice one share, Harry one share, Herbert called after my dear wife's father two shares, the remaining share to George. Should any of the children die before division is made their share, except they have a family, be divided between the survivors, these presents are given subject to regularly paying feu-duty 35s. per anon and keeping the house in good repair together with mutual repairs on tenement allowcate on feu-duty not on rents; should my death and the above Margaret Johnston's death take place while the above children are under age it would be much better to let the house till they were older."

Bleakley, who died on 9th December 1905, was survived by the said Mrs Margaret Armstrong or Johnston and by her said four youngest children, who were born, Alice on 13th February 1888, Harry on 14th June 1890, Herbert on 24th June 1895, and George on 7th May 1897.

Questions having arisen as to the administration of the trust, a special case was presented, to which William M'Culloch Ramsay and others, the trustees under Bleakley's trust-disposition, were the *first* parties, and the said Alice Johnston, Harry Johnston, Herbert Johnston, and George Johnston were the *third* parties. The question of interest to the parties who were second parties to the case was settled.

The case stated—"With regard to the question between the first and third parties, the third parties maintain that, subject to Mrs Johnston's liferent, the fee of the top half-flat at 2 Lauriston Terrace, Edinburgh, vested in them *a morte testatoris* in the proportions of one share to Alice Johnston, one share to Harry Johnston, two shares to Herbert Johnston, and one share to George Johnston. The first parties on the other hand maintain (1) that no vesting takes place in the second parties until the half-flat at 2 Lauriston Terrace has been sold, and that with regard to the time when this sale should take place, the first parties, subject always to Mrs Johnston's liferent,