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

only 16s. 7d. a-week owing to a general fall in wages."

On these facts the Sheriff-Substitute awarded compensation at the rate of 1s. 11d. per week.

The *question* for the opinion of the Court was—"Whether it was competent . . . under the statute to award compensation?"

Argued for the appellants—The Sheriff-Substitute had found that the diminution in the respondent's wages was due to a general fall in wages. From that it followed that he was earning the same wages now as if he had never met with the accident. The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule 1 (1) (*b*), and (2) clearly contemplated an award of compensation only when the diminution in the earnings of the workman was brought about by the accident. *Jamieson* v. *Fife Coal Company*, June 20, 1903, 5 F. 958, 40 S.L.R. 704, so far as in point, was in the appellant's favour. In that case it was decided that the rate of compensation for total incapacity could not be reduced on account of a fall in wages during the incapacity. Similarly, compensation for partial incapacity could not be increased, or, as proposed here, awarded on account of a fall in wages.

Argued for the respondent—The statement of facts, though perhaps not so full as it might have been, contained sufficient material on which to found an affirmative answer to the question stated. Impaired capacity resulting in a change of occupation and diminution of earnings were proved, and that was sufficient to justify an award of compensation. Diminution of earning capacity by reason of the injury was the sole test of right to compensation—*Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599. In any event, the Court could not find for the appellants on the facts stated. It could not be inferred that a general fall in wages was the sole cause of the diminution in the respondent's earnings. It might be that the employment of the respondent before the accident was not subject to the same fluctuation as the employment he had to accept afterwards. The workman had claimed arrears from 10th January 1900, and that suggested that the decrease in his earnings was not due to the general fall in wages, which was much more recent.

LORD LOW—The statement of facts in this case is not so full or precise as it might have been, but I think there is enough to enable us to dispose of the question of law which is raised. The third finding in fact is that the respondent's "average weekly earnings before the accident were eighteen shillings and sixpence, but that for some time prior to the proof they had been only sixteen shillings and sevenpence a week owing to a general fall in wages."

Now I can only read that as meaning that when the respondent was employed after the accident as a haulage engineman his wages were eighteen shillings and sixpence a week, being the same amount as that which he had earned prior to the accident when he was employed as a waggon shifter, but that for some time—I suppose for some weeks or months—before the proof he had earned only sixteen shillings and sevenpence in wages, owing to a general fall in wages. That implies that the fall in wages had nothing to do with the man's incapacity. It is plain that when he had so far recovered from the accident as to be able to work and the appellants had again employed him in a different capacity at the same rate of wages, he could not, and in fact he did not claim compensation, and that position of matters continued for eight years. Now by the shifting of the rate of wages owing to economic causes, and not because of change in his capacity to earn wages, his earnings have diminished. I am of opinion that that is not a ground on which the Sheriff can award compensation. The respondent is in no worse a position than he would have been in if he had never been injured, but had continued throughout to be employed as a shifter. Further, if instead of falling the rate of wages had risen, as they might have done and may still do, it is plain that the respondent would have reaped the benefit, and, in like manner, the rate of wages having fallen, I think the loss must fall upon him. Of course if the fall in wages had been due to supervening incapacity that would have been a totally different matter.

I am accordingly of opinion that the question of law must be answered in the negative.

LORD ARDWALL and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was presiding at a jury trial.

The Court answered the question in the negative.

Counsel for the Appellants — Horne — Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—J. C. Watt, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Thursday, June 17.

SECOND DIVISION.

HUGHES *v.* ALLENS.

Expenses — Act of Sederunt, 20th March 1907, sec. 8—Recovery of Less than £50 —One Action against Two Defenders—One Defence—Recovery of £40 from One Defender and £20 from the Other.

The Act of Sederunt of 20th March 1907, enacts—section 8—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be