

is the case here. The £12,500 has been lost, and is not represented by any available assets. The fact, adverted to by the reporter, that it appears from the company's last balance-sheet that there are surplus assets of the company to the extent of £1811, does not appear to me to affect the petitioner's right to have the capital reduced. The reporter does not say how the surplus is arrived at, but he remarks that that £1811 could be immediately used for payment of a dividend. Now, if available for dividend, it cannot be capital. There is no question here of protecting the interests of creditors. The whole capital has been paid up.

LORD MONCREIFF — I have had some difficulty in agreeing to grant this application in so far as it asks for reduction of capital in apparent excess of the actual loss. I am not, however, prepared to differ from your lordships, as I understand that the interests of creditors are not affected.

The LORD JUSTICE-CLERK concurred with Lord Trayner.

LORD YOUNG although present at the hearing was absent at the advising.

The Court pronounced this interlocutor:—

“Confirm the reduction of capital as resolved by the special resolutions of 22nd March and 21st April 1900, approve of the minute set forth in the petition: Direct the registration of this order or interlocutor and of the said minute to be made by the registrar of Joint Stock Companies, and to be advertised once in the *Edinburgh Gazette* and *Dundee Advertiser*: Dispense with the addition of the words ‘and reduced’ to the company's name, and decern.

Counsel for Petitioner—Donald. Agent—William Douglas, S.S.C.

Saturday, June 16.

FIRST DIVISION.

[Sheriff-Substitute of
Renfrewshire.

DUNLOP & COMPANY v. M'CREADY.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7—“Workman”—Contract of Employment—Member of Squad Undertaking Piece Work.

A firm of shipbuilders entered into an arrangement with the leader of a squad of platers for the preparation by the squad of certain frames. Under this arrangement the squad were to be paid a certain sum per frame with extras. They worked with their own hands, but had to employ certain unskilled labourers, called helpers, who were paid by the squad. All the requisite plant and material was provided by the shipbuilders, and the whole work was carried on in their

premises. The members of the squad were bound to work continuously all the working hours recognised in the yard, and when the working hours were exceeded they were entitled to 6d. for each extra hour, and the helpers to half time extra. The leader of the squad received weekly the sum due to the whole squad, and this sum, after payment of the helpers, was divided among the members of the squad. The members of the squad were subject to the general rules and regulations of the yard. The shipbuilder's foreman supervised the work, but did not interfere with it unless it was badly done.

A member of the squad was accidentally killed while at work in the shipbuilding yard. *Held* that he was a “workman” within the meaning of the Workmen's Compensation Act 1897; and that the shipbuilders were liable in compensation to his representatives under that Act.

Opinion (per the Lord President) that the benefits of the Workmen's Compensation Act 1897 are not confined to persons under contracts of service or apprenticeship.

In a case stated for appeal under the Workmen's Compensation Act 1897, at the instance of D. J. Dunlop & Company, engineers and shipbuilders, Port-Glasgow, against Mary Laing M'Creedy, widow of the late John M'Creedy, the Sheriff-Substitute of Renfrew (BEGG) found the following facts to be admitted or proved—“This is an arbitration before the Sheriff-Substitute as arbitrator under the said Act. The respondent prays for decree against the appellants for compensation under the said Act in respect of the accidental death of the said John M'Creedy, on whose earnings the respondent and his and her two pupil children were wholly dependent at the time of his death.

“It was admitted that on 6th October 1899 the said John M'Creedy, while working as a plater in the defenders' premises, Port-Glasgow, was so severely crushed between a barrow and a punching machine that he died of his injuries next morning. It was also admitted that the defenders' said premises are a shipbuilding yard within the meaning of the Factory and Workshop Act 1878, and of section 7 of the said Workmen's Compensation Act 1897, and that the appellants were the undertakers within the meaning of the latter Act.

“M'Creedy was at the time of the accident one of a squad of four platers styled Qua & Company—James Qua being the leading man of the squad. The arrangement to do the work upon which M'Creedy was engaged when he met with the accident was made by the said James Qua with the appellants' foreman Mr James Walker. At the time the arrangement was made M'Creedy was not a member of the squad; and it was not until after the work had commenced that he was brought into the yard. James Qua had previously asked (as he was bound to do) the appellants' foreman, Mr Walker, if M'Creedy would be

allowed into the squad, as the work required four platers; and the foreman having given the necessary consent, M'Cready became one of the squad.

"The arrangement referred to was that the squad of platers should mark, punch, set, and screw together frames ready for rivetting, sufficient for the construction of two vessels in the defenders' yard, at 42s. per frame, with extra allowances for double bulkheads and double reverse bars. The squad worked with their own hands, apportioning the work as they thought fit; but they required to engage, and did engage, from twelve to sixteen ordinary labourers, called helpers, to work under them. Each helper was paid by the squad a wage of 7d. per hour with 10 per cent. additional. The four members of the squad were bound to work continuously all the working hours recognised in the defenders' yard, so as to finish the job without delay; and they could dismiss any helper. When the working hours were exceeded, the defenders paid the four members of the squad 6d. per each extra hour, and the helpers half time extra. The leader of the squad received from the defenders once a week the sum due to the whole squad for the work done in the previous week, and after paying the helpers' wages he divided the balance equally among the four members of the squad. All the requisite machinery, tools, appliances, and material were supplied by the appellants, and of course the whole work was carried on within the appellants' premises. Printed rules and regulations were hung up in the defenders' premises, and formed part of the bargain between the parties—it being expressly declared that every person engaged at piece-work would in all respects be subject to them, except in so far as they might be modified by special agreement. In the present case there was no special agreement. Lastly, the appellants' foreman plater, Mr Walker, supervised the work of both time-workers and piece-workers. He required to be satisfied before any skilled man was taken into a squad, but he never interfered with platers who were doing their work in the recognised way unless it were badly done, in which case he made them put it right."

On these facts the Sheriff held that the dependants of the late John M'Cready were entitled to compensation under the Act, and awarded the sum of £300.

He stated the following question of law—"Are the dependants of the deceased John M'Cready entitled to compensation under and in terms of the Workmen's Compensation Act 1897?"

The rules and regulations referred to, so far as material, are quoted in the opinions of the Lord President and Lord Adam, *infra*.

The Workmen's Compensation Act 1897 gives the following definition of "workmen" (section 7)—"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing."

Argued for the appellants—M'Cready was not a workman in the service of the appellants; he was a contractor, and therefore outside the Act. His position as a member of the squad or gang was independent of the shipbuilders, in respect that he did not receive wages from them, but a share of the contract price for the work done by his squad. In a series of cases under the Employers Liability Act 1880—*Robertson v. Russell*, February 6, 1885, 12 R. 634; *Nicolson v. M'Andrew*, July 7, 1888, 15 R. 854; *M'Gill v. Bowman and Company*, December 9, 1890, 18 R. 206; *Sweeney v. Duncan & Company*, June 17, 1892, 19 R. 870—it had been held that a man in the position of M'Cready was not employed within the meaning of that Act. The control exercised in the present case by the foreman was similar to that exercised by the foreman in the last of these cases. The fact that the squad were subject to the rules and regulations of the yard was immaterial, because any contractor working in a yard might be subject to such general rules. The Act did not impose liability on the owner of a yard whenever a man was injured there; he was only liable for his own workmen.

Counsel for the respondents were not called upon.

LORD PRESIDENT—There is no doubt a peculiarity in the way in which this case is presented, as after stating the facts it merely puts this general question—"Are the dependants of the deceased John M'Cready entitled to compensation under and in terms of the Workmen's Compensation Act 1897?" but I think it sufficiently appears that the question intended to be put is, whether John M'Cready stood in such a relation to Messrs D. J. Dunlop & Company as to entitle his widow and children to claim under the Act.

It is to be observed that the question in such a case is not whether the parties stood to each other in the relation of master and servant, but whether they stood in the statutory relation, either of employers and workmen, or (in some cases) of undertakers and workmen. The question therefore is, whether upon the facts stated M'Cready was a "workman" in the employment of Messrs D. J. Dunlop & Company within the meaning of the Act of 1897. "Workman" is defined in the interpretation clause of that Act, section 7, thus—"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." "Or otherwise" here means whether his agreement is otherwise than one of service, or otherwise than one of apprenticeship, showing that the benefits of the Act are not confined to persons under contracts of service or of apprenticeship. We know that in shipyards on the Clyde and elsewhere certain parts of the work are usually done under contracts, to use a neutral term for what is really piece-work; and

amongst the persons usually employed under such contracts are the platers. They work in gangs or squads—they are skilled workmen—they employ unskilled or less skilled men called helpers (labourers) to assist them, and they generally pay these men. It appears however that, at all events in the case of overtime, the employers pay the helpers half-time extra. It seems to me that it would be very difficult, on the interpretation clause of the Act of 1897, as applied to the facts stated in the case, to say that the Sheriff is wrong in holding that the Act applies. But it further appears that in Messrs D. J. Dunlop & Company's yard there are printed rules and regulations which form part of the contracts with their workmen (including platers), both the title and the substance of which are important in this question. They are entitled "Rules and Regulations to be observed by Workmen employed by David J. Dunlop & Company." They say nothing about master and servant, but are expressed in the language of the Act of 1897, not in the language of some prior Acts. On going through them it will be found that the persons to whom they relate are described as "workmen," not "servants." No. 6 of the rules may be taken as an example. It bears that "Any workman or class of workmen interfering with, annoying, or molesting other workmen, or dictating as to how such should or should not be employed or paid, will be subject to instant dismissal, and forfeiture of the whole wages then due." I should be surprised if it were said that if any of the platers infringed this or any other of the regulations they could not be turned out of the yard at once, and from the whole tenor of the regulations it is plain that the element of control over them existed in such a form and to such an extent as to make them "workmen" in the sense of the Act. I only refer to one other rule, 17, "Piece-work."—"Every person engaged at piece-work will, in all respects, be subject to these rules and regulations except in so far as they may be modified by special agreement." All the members of a platers' squad, and also the helpers, would seem to fall under this rule.

The fact of men working under such contracts as those made with the platers does not, in my judgment, prevent them from being "workmen" within the meaning and for the purposes of the Act of 1897, and if the argument which we have heard to-day were to prevail, scarcely any of the men employed in a shipyard would fall under that Act. Upon the whole case I am of opinion that we should answer the question in the affirmative.

LORD ADAM—I agree with your Lordship. It appears to me that, reading the question as it is put to us, which is meant as a question of law, it is impossible to come to a conclusion whether it involves a question of law or not. It depends upon the facts. We are not told by the Sheriff what the question of law was that he decided. He just, after stating certain facts as being

admitted or found, puts the question:—"Are the dependants of the deceased entitled to compensation under the Workmen's Compensation Act 1897?" Whether he came to the conclusion he has done upon any question of law that was argued to him I do not know. But I suppose he did not, because Mr Wilson with all his ingenuity has not been able to state what the question of law is that this case raises. But I agree with your Lordship that the question arises in this way—and we have, in previous cases, considered questions of the same kind, viz., whether or not the facts set forth by the Sheriff are sufficient to warrant the conclusion come to by the Sheriff? Because that may in most cases, as in this case, lead to the consideration of the Act, and if it leads to the consideration of the Act, that is a question of law. Now, in this case, after all I have heard, I think Mr Wilson is in this position—he says that the facts found by the Sheriff, or stated by the Sheriff, do not warrant a conclusion in law of liability. Now, it is as your Lordship says, if the Sheriff is wrong, that may be because he has put a wrong construction on the Act, and has instructed himself wrongly as to the decision he should come to. That is one view of it. Or else he may come to a wrong conclusion from the facts. I think the question before us in this case is very much this—whether the facts found and set forth by the Sheriff warrant a certain conclusion which he draws from them? I think that is much the same thing as if those facts were set forth in the case, and the question had been, were they relevant to support the conclusion? I think that is very much the way in which these cases have been treated by us—whether or not the facts are relevant to support the conclusion? I think that in a certain sense that does raise a question of law, although it may not be a distinct and precise question of law which is so raised. Taking that view of the case the question here is beyond all doubt, for it is not disputed that the man who was injured here was a workman engaged in work which fell within the Act. There is no question about that. The Sheriff finds so, and there is no dispute about it. That being so, he would be entitled to compensation. Mr Wilson says that he was not a workman in the sense of the Act, because he was a true and independent contractor. If the facts found by the Sheriff should lead to that, and he were to come to that conclusion, then possibly he would not be entitled to his relief. But then is it so? Is it clear, upon the facts found by the Sheriff, that this man was a true and independent contractor? Or was he anything more than a workman in the sense of the Act? It appears to me that this man was anything but a true and independent contractor. From the very beginning to the end of his employment and career here he was under the direct control of the employers. Look, for example, at his very appointment. He could not be appointed one of the four platers except with the consent of the appellants' foreman, and accordingly it was

only after getting his consent that this man was enrolled as one of the squad. And we see that that consent was necessary simply because they required an efficient man to do the work—because the reason for his being brought into the yard was that there were only three of them originally, and four platers were required to do the work as required. And then we are told that the squad worked with their own hands as they thought fit. Therefore the very beginning of this man there shows that he was there as a workman to work with his own hands, and he would not have been there unless he had been in the position of a workman. Then if we go on a little further into what the Sheriff has found, we come upon this, which your Lordship has already adverted to, that the four members were bound to work continuously during the working-hours recognised in the yard, so as to finish the job without delay. That would be rather an unusual arrangement to put upon an independent contractor. Then, again, we have got this somewhat startling proposition in the case of a contractor, that “When the working-hours were exceeded, the defenders paid the four members of the squad 6d. per each extra hour, and the helpers half-time extra.” That is to say, as I said in the course of the argument, that this man is a contractor up to six o'clock, and the moment six o'clock strikes he becomes nothing else than a paid servant; and so with all the helpers. I do not believe they are called contractors, but up to that time I suppose they are in the service of the squad, and at five minutes past six they immediately become the direct paid servants—I am using the word “servant” in the qualified sense your Lordship does—of the appellants. That is a very curious state for a true and independent contractor to be in—to be a paid servant in the actual work he has contracted for. That does not look like an independent contractor. Then we come down to the next thing which the Sheriff finds. He finds that there are printed rules and regulations which form part of the bargain between the parties—“It being expressly declared that every person employed at piece-work would in all respects be subject to them, except in so far as they might be modified by special agreement.” And then he goes on to tell us—“In the present case there was no special agreement.” Therefore it was found by the Sheriff that all these rules and regulations are part of the case, and were agreed to by this independent contractor. Now, as your Lordship has pointed out, these are not rules and regulations to be observed by independent contractors. That is not what it says; it is—“Rules and regulations to be observed by workmen employed by David J. Dunlop & Co.” And according to the statement in this case, every one of these rules and regulations applies to the present case. Your Lordship has pointed out several of the most prominent of them, and I do not propose to go over them again. Your Lordship pointed out section 6, where

—“Any workman,” including this gentleman, if he is found interfering with other workmen, is to be turned out. But there is another to the same effect, which says “Any workman absenting himself from his work for a whole day without permission will not be at liberty again to resume without leave.” That is to say, that if this independent contractor happens to have a day away without leave, this binding contract of this contractor comes instantly to an end. I think these are rather curious rules and regulations with which to bind an independent contractor. And so, through the whole case, we see, up to the very last, because the very last point taken by the Sheriff was, that the appellants' foreman “supervised the work of both time-workers and piece-workers. He required to be satisfied before any skilled man was taken into a squad, but he never interfered with platers who were doing their work in the recognised way, unless it were badly done.” That is to say, these workers are to work in a recognised way, but any ingenious contractor who might think he had invented a shorter or cheaper way of doing his work was not to be allowed to use it just because it would not be the recognised way. And so we see that from first to last, from the initiation of this contract or arrangement, these four men were workmen, and nothing but workmen; and to call them independent contractors is, as I agree with your Lordship, a mere playing with words. And therefore I have no hesitation in saying that the Sheriff in this case has directed himself rightly in the conclusion at which he has arrived.

LORD KINNEAR concurred

LORD M'LAREN was absent.

The Court answered the question in the affirmative.

Counsel for the Appellants—W. Campbell, Q.C. — Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Shaw, Q.C. — Findlay. Agents—J. & J. Galletly, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Sheriff-Substitute of
Lanarkshire.

DAILY v. JOHN WATSON LIMITED.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. (2) (c) — “Serious and Wilful Misconduct” — Stated Case — Competency — Fact or Law — Schedule II., sec. 14, (c).

A special rule for the safety of workmen in a mine provided as follows:—
“While charging shot-holes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a