

soon as it was certain (by his death without having recovered his health) that the contingency cannot be performed, the sum set aside fell back into the general estate to be divided according to the directions of the testator among the other children.

LORD SALVESEN—I concur.

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

The Court pronounced this interlocutor—

“Recal the first two findings in said interlocutor” (*i.e.* of 15th November 1907), “and in lieu thereof find that the bequest to the truster's son Frederick Smith of a share of the residue of the truster's personal or moveable estate and of a share of the price of the truster's heritable estate was contingent on Frederick's recovery of reason, and that Frederick having died without having recovered reason, the said bequests never took effect; and further, that the share of the residue of the personal or moveable estate set aside in respect of such contingent bequest falls to be divided among the remaining children of the truster who survived him, and their heirs in moveables and assignees, and that the share of the price of the heritable estate set aside in respect of the said contingent bequest falls to be divided among the remaining children of the truster who survived the truster's widow and their heirs in moveables and assignees, but subject always, in the case of the portions of such shares of moveable and heritable estate respectfully destined to the truster's son Lewis, to the contingency of his permanently recovering his reason.”

Counsel for Claimants and Reclaimers
John Rae Smith's Trustees and Others—
—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Claimants and Respondents
William Fiddes Smith and Others—Kemp.
Agents—A. & A. Campbell W.S.

Saturday, October 24.

SECOND DIVISION.

THE SCOTTISH QUEENSLAND MORTGAGE COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Petition for Confirmation—Cessation of Business—Return of Capital to Shareholders—Issue of Debentures.

A company, with no outside creditors, considering it undesirable to continue business, with a view to its ultimate liquidation and the division of its assets among the members, presented a petition to the Court for confirmation of a special resolution for reduction of capital. The petition was unopposed.

The reporter to whom it was remitted suggested that the competent and proper method of procedure was a winding-up, and, in particular, objected to (1) the confirmation of a repayment already made by the directors at their own hand to various members of sums paid up by them in advance of calls, (2) a return to members of capital to the extent of 15s. per share, of which only 3s. was to be paid in cash and the remainder by an allotment of new debenture stock.

The Court, without expressing opinions, granted the petition.

In July 1908 the Scottish Queensland Mortgage Company, Limited, presented a petition to the Court under section 2 of the Joint Stock Companies Arrangement Act 1870, section 24 of the Companies Act 1900, and section 38 of the Companies Act 1907, for sanction of a proposed scheme for reduction of capital, the ultimate object of the company being to wind up its affairs and divide its assets among its members. There were no outside creditors.

The petition stated—“The capital of the company was £500,000, divided into 100,000 shares of £5 each. Of the said shares, 35,000 were subscribed and £2 each called up thereon, of which 4668 were afterwards forfeited on account of failure of the holders to pay the calls, or a portion thereof, leaving the amount of shares subscribed and outstanding 30,332, upon which there was paid up £60,664. On the shares forfeited as aforesaid the sum of £4037, 2s. 11d. was paid up.

“In terms of the powers conferred upon them by article 24 of the articles of association of the company, the directors received from various members moneys due upon the shares held by them beyond the sums actually called up. The total amount so received was £18,709.

“In terms of the memorandum and articles of association, the company borrowed money on debenture to an amount not exceeding the uncalled capital for the time being. For a considerable number of years the company was successful, but some years ago, owing to the financial conditions in Australia, it was considered undesirable to continue the business of the company, and accordingly a policy of realisation of the company's assets was adopted, and the whole sums borrowed by the company on debenture were in due course repaid. In further pursuance of that policy the directors thereafter repaid the said sum of £18,709 (with the exception of £12, which has been placed on deposit—receipt pending production of title) received from members in advance of calls, with all interest due thereon, and the directors are of opinion that it is desirable in the interests of the company that the remaining assets should be judiciously realised, the proceeds distributed among the shareholders, and the company ultimately liquidated. The directors are of opinion that a gradual realisation will produce sufficient to repay at least 16s. per share, and it is desirable that 24s. per share should

be written off by a reduction of the capital to that extent.

"The company have funds in hand at the present time equal to about 3s. per share, and, with the view of distributing this sum, and the further proceeds of realisations, among the shareholders as quickly and economically as practicable, the directors have proposed that an arrangement should be entered into between the shareholders and the company, in terms of a scheme, of which the salient provisions are shortly as follows:—That the capital of the company should be reduced to 30,332 shares of £1 each of 1s. paid up. That such reduction should be effected by—(a) Cancelling and extinguishing 69,668 shares of the capital of the company of £5 each, which by reason of non-issue, forfeiture, or otherwise, are no longer outstanding. (b) Confirming the repayment of £18,709 paid up by various shareholders in advance of calls. (c) Reducing each of the £30,332 shares of £5 each, £2 paid, issued and outstanding, to £1 shares, 1s. paid, such reduction to be effected (1) by returning to the holders of said shares capital to the extent of 15s. per share (whereof 3s. will be paid in cash, and 12s. by the allotment of debenture stock), (2) by cancelling paid-up capital on the said shares to the extent of £1, 4s. per share, and (3) by extinguishing the liability in respect of uncalled capital on the said shares to the extent of £2, 1s.

"Upon the scheme becoming effective, and the requisite authority obtained for the reduction of the capital in terms thereof, it is provided that the shareholders should in respect of the 15s. per share to be repaid to them in terms of the scheme, accept in satisfaction and full discharge thereof 3s. per share in cash and 12s. per share in non-interest-bearing debenture stock, the company having right to redeem such debenture stock at any time upon giving thirty days' notice of their intention so to do, such redemption to be either by purchase on the market or by tender, at a price not exceeding par, or by *pro rata* payments."

The Court sanctioned the scheme, and the company thereafter passed a special resolution reducing its capital in accordance therewith.

In September the company presented the present petition for confirmation of reduction of capital.

The petition was remitted to Mr Charles Young, W.S., to report.

In the course of his report he stated—"The reporter has some difficulty as to whether the proposed reduction of capital is one which your Lordships can competently be asked to grant, and he lays the matter before your Lordships for consideration."

"Under head (b) of the proposal your Lordships are asked to confirm the repayment to various members of a sum of £18,709 paid up by them in advance of calls. It would appear that such a repayment made by directors at their own hand is irregular, and while several cases are referred to in Sir Francis Palmer's Com-

pany Precedents, 9th ed., vol. i, p. 964, in which the English Courts have ratified such repayment, the reporter has been unable to find any case in which the Scotch Courts have done so. The only analogous case to this would appear to be where trustees had at their own hand done an act which would under the Trusts Acts require the sanction of the Court. The Court has never been in the habit of confirming such, as the Trusts Acts lay down the procedure to be followed, which is, that the sanction of the Court shall be got before the act is done. It seems doubtful even whether directors may repay money paid to them in advance of calls without first going through the process of reducing capital. In the present case they have already repaid the money, and now ask your Lordships to confirm their act. The question here is, however, somewhat complicated by the fact that, in approving of the scheme submitted to the Court in the petition which was before your Lordships in July, this repayment has already been confirmed before the petition to reduce capital came into existence. Under head (c) of the above proposal it is intended that the directors shall issue debentures for 12s. of the amount proposed to be repaid to the shareholders, and the question which arises here is whether this is a true reduction of capital in terms of the Companies Acts. There is no doubt that a company may reduce capital by repayment to the shareholders of capital in excess of the wants of the company, and borrow a similar amount (*Nixon's Navigation Company*, 1897, 1 Ch. 872). In that case the company had been prosperous, and were continuing business. In this case, however, the reduction is proposed on account of loss, and as a means of distributing assets. For this purpose the reporter does not see that the company is any better off as regards the 12s. of its capital which it is proposed to reduce if they incur liability for debentures for that amount.

"The simpler plan would be if the company were judiciously liquidated, and the petition sets forth that this is the only object the company now has in view. The reporter knows of no case where such a course as the one proposed here has been pursued in Scotland. In England, where a company had ceased to carry on business, and the only object was to divide the assets, the Court held that it was not a proper reduction of capital as contemplated by the Acts, and refused the petition (*Wallasey Brick Company*, 1894, 70 L.T. 870.) It is, therefore, for your Lordships to consider whether this is a reduction of capital as contemplated by the Companies Acts, or whether the same object would not be more properly attained by a winding-up or liquidation of the company. It must, however, be borne in mind that the proposed reduction of capital is a part of the Scheme of Arrangement which on 17th July 1908 your Lordships approved of in the previous petition.

"If your Lordships take the view that this is a proper reduction of capital in terms

of the Companies Acts, and that the repayment of the £18,709 already made by the directors is one which may be confirmed, the reporter has found the procedure for reducing capital regular and proper, and in conformity with the Companies Acts."

Counsel for the petitioners moved the Court to grant the prayer of the petition, submitting that there was no foundation for the reporter's objections. He cited the additional authority *Poole v. National Bank of China*, [1907] A.C. 229.

The Court granted the prayer of the petition.

Counsel for the Petitioners—The Hon. William Watson. Agents—Guild & Shepherd, W.S.

Wednesday, October 28.

SECOND DIVISION.

[Sheriff Court at Inverness.

CHISHOLM v. WALKER & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13—“Workman”—Contractor—Owner of Horse Engaged to Bring Horse and Drag Logs of Timber from One Place to Another—Payment Including Use of Horse—No Obligation to Do Work Personally.

A party was engaged by a firm of timber merchants to bring a horse belonging to him and drag logs of timber from the side of a ship which was being unloaded in harbour to a place where the logs were stored. He received a certain sum per day for himself and his horse, and he might have got that sum by sending a servant, if he had one, to lead his horse. He was under no obligation to come on any particular day, and he could be told not to come until he was wanted. Having been injured while so engaged, he claimed compensation under the Workmen's Compensation Act 1906. Held that he was not a "workman" in the sense of the Act, but an independent contractor, and therefore not entitled to compensation. *Paterson v. Lockhart*, July 13, 1905, 7 F. 954, 42 S.L.R. 755, distinguished.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, enacts—"In this Act, unless the context otherwise requires . . . 'Workman' . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing. . . ."

In an arbitration under the Workmen's Compensation Act 1906 between Thomas Chisholm, carter, Inverness, who had received injuries through an accident, and

claimed compensation, and James Walker & Company, Inverness, the Sheriff-Substitute at Inverness (GRANT) refused compensation, and at the request of the claimant stated a case, in which the following facts were found proved:—"The appellant is the owner of a horse and he along with others was engaged by the respondents to bring his horse and drag logs of timber from them from the side of a ship which the defenders were discharging at Inverness harbour to various piles near the pier where those logs were stored according to their sizes. The hours during which the unloading of the ship was carried on were from 7 to 12 and 1 to 6. The pursuer only dragged the logs from the ship's side while the unloading was proceeding. He received 8s. a-day for himself and his horse. He might have got the 8s. a-day by sending a servant, if he had one, to lead his horse. He was under no obligation to come on any particular day. He could be told not to come until he was wanted, but if he came and was wanted he got a day's work for himself and his horse. He also habitually carted for coal merchants and for anybody else who would give him a job. He provided his own horse and his duty was to lead that horse when it dragged the logs as he might be directed by the defenders' representatives. The pay was more for the work of the horse than that of the man. If he had been a servant working the respondents' horse his own wage would have been less than half the 8s. a-day that he received. After the accident the defenders put a servant of their own to drive the pursuer's horse until the work was finished. The pursuer afterwards engaged a man to work his horse, collected the accounts for work done by him and paid him a weekly wage of £1 per week. It was also proved that prior to the accident the pursuer was somewhat lame, and that in consequence he would not have been employed by the defenders as an ordinary workman to unload the ship, and that he was engaged merely as the owner of a horse. It was further proved that though the appellant had been working for some days for the respondents before receiving his injuries he was under no obligation to do so. In his own word he 'could have left at any time for a better job.' He could also be dismissed at any time. There was no evidence that the pursuer previous to the accident had ever employed a servant to work his horse."

On these facts the Sheriff-Substitute held that Chisholm was employed as an independent contractor and not as a "workman" in the sense of the Act.

The question of law for the opinion of the Court was—"Was the appellant a 'workman' in the sense of section 13 of the Workmen's Compensation Act 1906, and was he under a contract of service with the respondents or was he an independent contractor?"

Argued for the appellant—The appellant was a workman in the sense of the Act, because the contract under which he was working was a contract of service.