Mr Cooper argued that the Sheriff-Substitute had gone so extravagantly wrong that his decision was really in excess of the powers conferred upon him, I feel bound to say that in my humble judgment, having read all the papers with care, it is clear that there is no foundation whatever for that objection.

LORD ARDWALL—I agree with both your Lordships. The first question that arises in considering this case is whether we are entitled to deal with the judgment of the Sheriff, which is the last judgment in this case. However, any difficulty there was has been obviated by the very reasonable admission given by Mr Cooper, and I need say no more than that there are authorities which were quoted to us from one side of the Bar which show that this Court has frequently entertained questions of excess of jurisdiction on the part of inferior judges, not only when brought before them by way of reduction and suspension but also by way of appeal. But as that matter was not argued out I do not pursue it further.

We come now to the question whether the Sheriff was acting within his competency in reviewing the judgment of the Sheriff-Substitute, and on that question I entirely agree with what has been said by both your Lordships. In the first place, this is not a proceeding initiated in the Sheriff Court. It was initiated before the Magistrates of the city, and accordingly it cannot be viewed as an ordinary process in the Sheriff Court. In the next place the appeal to the Sheriff is not properly an appeal to him in his judicial or legal capacity but truly in his administrative capacity. In the third place, the code of procedure which we have set forth in the 45th section of the Corporation's Act of 1899, as amended by sec. 77, sub-sec. 8, of the Edinburgh Corporation Act 1906, is in accordance with summary procedure and inconsistent with procedure in which a review is contemplated. There is a special power given to the Sheriff to take such means as he may consider proper for obtaining further information. Now I take it that the object of that was that he might get that further information in such way as he liked, but one thing is plain, that however got that information is for himself alone, for there is no provision for its being recorded in any way. Now, without a record of the evidence on which the inferior judge proceeded, it is clear that a Judge of Appeal cannot review his decision on its merits. This I think again indicates that this procedure was intended to be of a summary nature without an appeal to another Judge.

Last of all, there is a special power given of awarding expenses, and as pointed out by my brother Lord Low that would not have been given if this had been an ordinary Sheriff Court action, because then the Sheriff would have had power to award expenses without anything being said about it in the Act. A number of cases have been quoted to us which were to the effect that in a special statutory jurisdiction such as that under consideration, unless power is given to award expenses, the judge cannot deal with them, and I have no doubt that that was the reason for inserting the power to award expenses in the clause referred to. Therefore I have no doubt that there is no room in this case for an ordinary appeal to the Sheriff. On the contrary, a special power of review of the resolution of the Corporation is given to one person answering to the description of "Sheriff," be he the Sheriff or the Sheriff-Substitute, and once that power is exercised the proceeding is at an end.

Like your Lordships, I think we have nothing to do with the merits of this case, but I think it is only just to the Sheriff-Substitute to say that I do not think he has in the least exceeded his jurisdiction; and I may further say that my impression is that if I had been in his place I would have decided the cases in the same way as he has done.

LORD DUNDAS was absent.

The Court sustained the appeal, recalled the Sheriff's interlocutor as incompetent, and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Constable, K.C.—A. M. Stuart. Agent—J. Ferguson Reekie, Solicitor.

Counsel for the Respondents—Cooper, K.C.—Morton. Agent—Thomas Hunter, W.S.

Wednesday, November 4.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

[Sheriff Court at Kilmarnock.

BOYD *v.* DOHARTY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—*Workman—Sub-Contractor—Stone-breaker Engaged at Fixed Rate per Cubic Yard.*

A was engaged to break stones for road metal, at a fixed rate per cubic yard, by B, who had a contract for the supply of road metal with a county road authority, and who furnished A with material. A was injured while engaged on the work, and claimed compensation from B under the Workmen's Compensation Act 1906.

Held, on appeal, that A was a "workman" in the sense of the Act, and not a sub-contractor, and was entitled to compensation.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule* I (1) (*b*)—*Compensation—Incapacity for Work.*

A workman was awarded compensation under the Workmen's Compensation Act 1906 on the ground that he was "permanently incapacitated for work at his trade of stonebreaking." His employer objected to the award on the ground that it had not proceeded on a finding that the workman was incapacitated for any description of work.

Held, on appeal, that the Court would not interfere with the judgment of the Sheriff-Substitute, as any injustice arising therefrom could be obviated by subsequent application for review.

Opinion (*per* Lord M'Laren) that the finding that the workman was "incapacitated for work at his trade as a stonebreaker" sufficiently complied with the requirement of Schedule I (1) (*b*) of the Act that he was incapacitated "for work."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Sec. 13—"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."

Schedule I (1)—"The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity . . ."

Robert Doharty, stonebreaker, 30 Sharon Street, Dalry, claimed in the Sheriff Court at Kilmarnock compensation under the Workmen's Compensation Act 1906, from Thomas Boyd, merchant and contractor, Main Street, Dalry, in respect of injury received by him while engaged in Thomas Boyd's employment.

The matter was referred to the arbitration of the Sheriff-Substitute at Kilmarnock (MACKENZIE), who awarded compensation, and at the request of Thomas Boyd stated a case on appeal.

The case stated that the following *facts* were proved—"(1) That the pursuer and respondent was employed by the defender and appellant in breaking stones for road metal, the defender and appellant having entered into a contract for the supply of road metal to be applied to the roads in the Dalry district of the County of Ayr, and the pursuer and respondent being employed by him at a fixed rate per cubic yard of metal which should satisfy the requirements of the County Road Surveyor, the pursuer and respondent being under the defender and appellant's orders as to where he should work, and subject to dismissal by him. (2) That the pursuer and respondent was so employed on 27th December 1907 at Burnside, near Dalry. (3) That on said date, while so employed, the pursuer and respondent was struck on the right eye by a chip of metal which flew from the hammer of a fellow-workman and penetrated the pursuer and respondent's right eye. (4) That notice of said accident was given to defender and appellant, and a claim made for compensation. (5) That in consequence of said injury the pursuer and respondent is permanently incapacitated for work at his trade as a stonebreaker. (6) That the pursuer and respondent was not guilty of serious and wilful misconduct in not wearing spectacles at the time the accident occurred, but that, in any case, the injury he sustained was a "serious and permanent disablement" in the sense of section 1 (2) (*c*) of the Act of 1906. (7) That it was found necessary to extract his right eye, and that there was no proof of his being able to earn wages in his present condition. (8) That the pursuer and respondent's engagement with the defender and appellant was at the rate of 2s. 2d. per cubic yard of metal broken, and that he was paid in all by the defender and appellant £10, 9s. for the period of seventeen weeks during which he worked, although not continuously, in the defender and appellant's employment."

The Sheriff's finding was—"On these facts I found the pursuer and respondent entitled to compensation under the said Act at the rate of 6s. 1d. per week, from the said 27th day of December 1907, and until the further orders of Court, in respect—(*a*) That the pursuer and respondent was a 'workman' in the sense of the Workmen's Compensation Act 1906; and (*b*) That the said 'injury' arose out of and in the course of his employment by the defender and appellant."

The *questions of law* for the opinion of the Court were—"(1) Whether the pursuer and respondent, upon the facts as proved, was a workman in the sense of the Workmen's Compensation Act 1906? (2) Whether the pursuer and respondent was a contractor, and is, or is not, excluded from claiming compensation by the terms of the Workmen's Compensation Act 1906? (3) Whether, upon the facts as proved, the pursuer and respondent is entitled to compensation, as decerned for, under and in terms of the Workmen's Compensation Act 1906?"

Argued for the appellant—The respondent did not fall within the definition of a "workman" in the sense of section 13 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), and it was noticeable that that definition was less wide than the corresponding one in the Act of 1897, section 7 (2). It was a fair inference from the findings in fact here that the respondent was an independent sub-contractor. They disclosed no contract of service, and no obligation to do the work with his own hands, or at settled hours. He had failed to discharge the *onus* lying upon him of showing that he was within the Act. (2) The Sheriff-Substitute had found that the respondent was permanently disabled from work as a stonebreaker. But Schedule I (1) (*b*) of the Act provided that compensation should be paid during "incapacity for work," which was plainly general and meant any work. There was nothing here to suggest that the respondent, although not able for stonebreaking, was unfit for other kinds of work, or that his wage-earning capacity

was reduced in consequence of the accident. If it were so, it lay upon him to prove it, which he had not done.

Counsel for the respondent was not called upon to reply.

LORD M'LAREN—The points in this case have been brought clearly before us by Mr Lippe, and I am not satisfied that there is any good objection to the Sheriff-Substitute's decision. It was argued, first, that it does not appear from the findings in fact of the Sheriff-Substitute that the pursuer was in the position of a workman as defined by the Act of 1906, and second, that the Sheriff-Substitute has found the pursuer incapacitated only for work as a stonebreaker, and not for work of any other kind.

I am not surprised that the first question should have been raised, nor am I surprised that work, in consequence of the passing of this Act, should be given out by contract, but in the present case there are no facts from which it may be inferred that the pursuer stood in the position of a sub-contractor. The Sheriff-Substitute finds that the pursuer was employed by the defender and appellant in breaking stones for road metal. The defender had entered into a contract for the supply of road metal with the road authority of the County of Ayr, and he employed the pursuer at a fixed rate per cubic yard of the road metal broken by him. However the hierarchy of labour may be arranged, you must come down eventually to the man who does the work with his hands, and the Sheriff-Substitute has held that the pursuer was in that position. It is not suggested that the duty of supplying material devolved upon the pursuer. He had merely to break the stones in consideration of a fixed rate for his labour.

Now if one turns to the definition given in section 13 of the Act under the head "workman," it amounts to this, that, save in the excepted cases, anyone who enters into a contract of service is covered by it. We are not here in any of the excepted cases, so the definition does not help us much. The Sheriff-Substitute's finding amounts to this, that the pursuer has only to do the work, and has nothing to do with the supply of material, and he therefore holds that the pursuer is a "workman" in the sense of the Act. This, in my opinion, is a sound conclusion from the facts of the case.

Coming to the second point, the ground of the Sheriff-Substitute's award is that the pursuer is permanently incapacitated from work. His finding is "that in consequence of said injury the pursuer and respondent is permanently incapacitated for work at his trade as a stonebreaker," Now! that must be compared with the words of Schedule I (1) (*b*) of the Act, which are—"Where total or partial incapacity for work results from the injury. . ." The statute does not say "incapacity for work of any description," but uses language of a more general nature, and which I think has been properly chosen, because otherwise it might be open to an employer to state in defence some fanciful work which the injured workman might get and might be supposed to be capable of performing. What therefore the Sheriff-Substitute had to consider was whether this was a substantial case of incapacity for work for a man in the grade of a stonebreaker. He is satisfied that this man is not fit for stonebreaking, and I can quite understand his taking the view that, if not fit for that, he is not fit for any other description of unskilled labour.

But I am satisfied to reject this second objection on the ground that it has been the practice of the Court not to interfere with a Sheriff's judgment when any possibility of injustice can be obviated by subsequent application for review, as would be permissible here on the part of the employer if there was any reason to suppose that the man was at any time fit for work.

LORD PEARSON—I am of the same opinion on both points.

The first point is completely answered by the Sheriff-Substitute's finding under head 1. The Sheriff-Substitute says that the pursuer was employed by the defender to break stones for road metal, and he goes on to say that he was so employed at a fixed rate per cubic yard of metal, the pursuer being under the defender's orders as to where he should work, and subject to dismissal by him. This seems to me to amount to a relevant statement that the pursuer was a workman in the sense of the Act.

On the second point I agree with your Lordship, and do not think it necessary to add anything.

LORD DUNDAS—I agree with your Lordships, and have nothing to add.

The Court answered the first and third questions in the affirmative, found it unnecessary to answer the second question, and dismissed the appeal.

Counsel for the Appellant—Morison, K.C.—Lippe. Agent—T. M. Pole, Solicitor.

Counsel for the Respondent—Constable, K.C.—Cochran-Patrick. Agents—Simpson & Marwick, W.S.

Friday, November 6.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

[Sheriff Court at Lerwick.

JAMIESON *v.* CLARK.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (1) *and* 7 (1)—"*Workman*"—*Service, Hiring, or Joint-Adventure—Boatman—Remuneration by Share of Gross Earnings of Boat.*

A firm of fish curers engaged A to work a "flitboat" belonging to them, and authorised him to find another man