this is at all the sort of restriction of appeal that is dealt with in the cases that were cited to us, and I think the appellants' contention on this point is untenable.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Affirm the deliverance dated 23rd May 1905 appealed against: Refuse the appeal, and remit to the Sheriff-Substitute to proceed as may be just, and decern."

Counsel for the Appellant—Crabb Watt, K.C.—D. P. Fleming. Agent—William C. Morris, Solicitor.

Counsel for the Respondent—D. Anderson. Agents—A. M. Campbell & Son, S.S.C.

Thursday, July 13.

FIRST DIVISION.

[Sheriff Court at Lanark.

PATERSON *v.* LOCKHART.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—"*Workman*"—*Contractor—Quarryman Engaged to Quarry Stone on Estate for Estate Requirements.*

A, a quarryman, was engaged to quarry stone blocks for wire fences and stones for farm buildings in such quantities as might be directed, at the rate of 5s. a-day for such days as he chose to work, the quarry being on the employer's estate, and the quarrying being done to meet estate requirements. A might, if he desired it, employ assistants to be paid for through him at the same rate, and for the first eight days he so employed his son (his name alone, however, appearing in the estate books), but for four weeks preceding the accident he worked alone. He was told where he was to work, but was entitled to exercise his own judgment as to where the excavation in the quarry should be made. Tools for the work were provided partly by himself and partly by the estate, and the estate forester visited the quarry and kept a note of the days on which he worked. A having been injured by an explosion while engaged in his work claimed compensation under the Workmen's Compensation Act 1897.

Held that A was a workman in the sense of the Act, and not a contractor, and that he was entitled to compensation.

Opinion reserved (*per* Lord President and Lord M'Laren) whether a man could or could not at the same time be a contractor and a workman in the sense of the Act.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—"*Undertaker.*"

Question (*per* Lord M'Laren) whether a proprietor who has a quarry worked on his estate purely for estate purposes is an "undertaker" in the sense of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7, enacts—"(2) In this Act" . . . 'Undertakers' in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshops Acts 1878 to 1895. '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. . . ."

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Lanark between James Paterson, quarryman, residing at Roadmeetings, Carluke, claimant, and Sir Simon Macdonald Lockhart, Bart., Lee Castle, Lanarkshire, respondent, the claimant craved decree for 15s. a-week in respect of permanent disablement due to an accident which occurred to him on 9th May 1904 while working at a quarry on the respondent's estate.

The Sheriff-Substitute (SCOTT-MONCRIEFF) decided in favour of the respondent, finding in law (1) that the place in which the accident occurred was a quarry within the meaning of the Quarries Act 1894 and the Workmen's Compensation Act; but (2) that at the time of the accident the claimant was a contractor and not a servant or workman of the respondent in the sense of the Act.

A case for appeal was stated. The facts found proved were as follows:—"That the appellant has done work for the respondent on various occasions in both quarrying and draining operations, and it was admitted that he, at so much the chain or rood, did the draining work by contract, employing at times other men, but denied that he ever contracted for the quarrying work. That in February 1904 he was engaged by the respondent's factor to quarry a certain number of stone blocks for wire fences, and thereafter stones for farm buildings, in such quantities as the said factor should direct; that for this work he was to be paid at the rate of 5s. per day, and that the appellant was not paid daily. That, if he desired it, he might employ assistants to be paid for through him at that rate, and that he so employed his son on the first eight days at 5s. per day, appellant's name alone appearing in the estate books; that for this work he got a pick, shovel, barrow, and four boring irons from the estate, otherwise he provided his own tools and materials, but charged and was paid for the sharpening of the tools, and for blasting powder. That the respondent's forester visited the quarry and kept a note of the days on which the appellant worked. That the appellant was entitled to exercise his own judgment as to where the excavation in the quarry was to be made. That the usual way quarrying is contracted for is so much per stone, or so much per cubic yard. That the place at which appellant worked was on the respondent's estate, and that the quarrying was

done to meet estate requirements. That said place was of a crescent shape, the deepest part of the face or bank from which stone could be taken being over 20 feet in height, but that at either side of the deepest part the height was less, and at the spot where the accident to the appellant occurred it was only about 14 feet. That previous to working in the above place he was instructed to take stones from other places, the stones from which, on examination by the respondent, his factor, and forester, were condemned, and he was sent to the place before stated (where the accident happened). That he started work about the end of March 1904; that at the time of the accident and for four weeks before he was working alone. That the accident, which was caused by an explosion, severely injured the appellant. That after the injury the respondent's factor called at the appellant's house, and requested the appellant's two sons to quarry on the same terms as to time and payment as the appellant, and that on the second day they were stopped, as the stone was not satisfactory to the respondent."

The question of law was—"Was the appellant at the time of the accident a servant or workman of the respondent in the sense of the Workmen's Compensation Act?"

Argued for the appellant—The appellant was a worker in the sense of the Act, not a contractor. He was paid wages as a worker by his employer. The definition of workman given in the Act was a wide one. The criteria in determining the question were (1) that he should work; (2) that he should be subject to the orders of his employer; and (3) that he should be paid wages at a fixed rate. The claimant fulfilled these three conditions. He never got more nor less than 5s. a-day. In these circumstances he was a workman in the sense of the Act—*M'Cready* v. *Dunlop & Company*, June 16, 1900, 2 F. 1027, 37 S.L.R. 779; *Evans* v. *Penwyllt Dinas Silica Brick Company*, November 13, 1901, 18 T.L.R. 58.

Argued for the respondent—The Act did not apply to sub-contractors, and the Sheriff-Substitute had found that the claimant was a sub-contractor. The claimant was not bound to give personal service. His contract was to do the whole job, and he could not have been stopped and sent to another piece of work till his contract was finished. Moreover, he was the person in the occupation of the quarry, and was therefore an undertaker and not a "workman"—*M'Gregor* v. *Dansken*, February 3, 1899, 1 F. 536, 36 S.L.R. 393; *Hayden* v. *Dick*, November 26, 1902, 5 F. 150, 40 S.L.R. 95; *Vamplew* v. *Parkgate Iron and Steel Company, Limited*, [1903] 1 K.B. 851.

LORD PRESIDENT—The only question that has been submitted to us here is whether the appellant was a servant or workman of the respondent in the sense of the Workmen's Compensation Act. The Sheriff-Substitute has decided that he was not, holding that he was in point of fact a contractor. Now, I had occasion to point out in the course of the argument, and I am still of the same opinion, that although it may be convenient in the course of an argument to see whether the injured man was a contractor or not, still the only point that is material for the decision of the case is whether he was a workman in the sense of the Act. The question whether a man may be at the same time both a contractor and a workman in the sense of the Act is one no doubt of much difficulty, and it is just the point raised in the case of *M'Gregor* v. *Dansken*, on which the Second Division were divided in opinion. On that point I desire to reserve my opinion. It does not arise for decision in a case where we find that the injured man was clearly a workman. On considering the facts stated here by the Sheriff-Substitute I see nothing to make me doubt that this was an ordinary case of the employment of a servant. The appellant was employed as a quarryman, he was in receipt of a daily wage, and was subject to the behests of Sir Simon Lockhart's factor, who gave him orders as to where he was to quarry and what stone was to be got, and who could, I have no doubt, dismiss him at any moment. I have come to the conclusion without any difficulty that he was a workman. It appears to me that it is just a case of the ordinary employment that would occur on any large estate where quarrying is to be done to meet the estate requirements and a labourer is engaged to do it. It is true that there are no strict regulations as to the hours he is to work, but no doubt the ordinary working hours on the estate would be taken as the measure, and the employer had the remedy in his own hands, for he could dismiss him if he found he was not working long enough. I think the case ought to be sent back to the Sheriff, with the opinion of the Court that the appellant here was a workman in the sense of the Workmen's Compensation Act.

LORD ADAM—I am of the same opinion. The appellant here met with an accident while working at a quarry on the respondent's estate. He made a claim for compensation under the Workmen's Compensation Act, and the Sheriff-Substitute has found (first) that the place where the accident happened was a quarry within the meaning of the Quarries Act of 1894, and the Workmen's Compensation Act, and (second) that at the time of the accident the appellant was a contractor and not a servant or workman in the sense of the Act.

There is no question as to the first finding. The second finding, however, raises the point whether on the facts stated in the case the appellant was a servant or a contractor in the sense of the Act. I agree with your Lordship that the facts disclose a contract of service. The facts are these—In February 1904 the appellant was engaged by the respondent's factor to quarry stone blocks for wire fences, and also stones for farm buildings; he was engaged at a

daily wage, and he was bound to work where he was required, and to quarry such stones as the factor might direct. But we are told that he might employ assistants. No doubt he might, but even if he did they were paid not by him but by the employer, who paid them through him at the rate of 5s. a day.

So far as I can see, the respondent's factor was not bound to find the appellant continuous employment. On the contrary, the appellant was bound to do only such work as the factor might think necessary, and in accordance with the requirements of the estate. On the facts stated I am of opinion that the appellant was a workman in the sense of the Act.

LORD M'LAREN—I agree with the conclusion to which your Lordships have come. At the same time I am not clear that this decision does complete justice between the parties, because I have a strong impression that the respondent is not an undertaker in the sense of the statute. I read the Act as intended to apply solely to commercial undertakings, and I do not wish to be understood to assent to what has been taken as common ground, namely, that a landed proprietor who works a quarry on his own estate for estate purposes is properly described as an undertaker in the sense of the Act. On this point I wish to reserve my opinion.

The only point that arises in this case for decision is, whether the appellant was a workman or a contractor. I agree that the important consideration here is that the Act by no means makes it a condition of a claim for compensation that a contract of service must be proved, because it is stated in the Act that the agreement may be one of "service or apprenticeship or otherwise." It is enough to satisfy the conception of "employment" under the Act of Parliament if work is being performed which is ordinarily done under a contract of service. It would be a serious restriction of the scope of the Act if it were possible by introducing some condition into the agreement to take it out of the category of a pure contract of service, and so to avoid liability under the Act. These words "or otherwise" seem to have been put into the Act for the purpose of preventing this, and appear to me to cover every case where for practical purposes the work done was that of a workman, though not strictly under a contract of service. However, I am far from saying the employment in this case was not under a contract of service. I think the appellant was a servant. He was paid a daily wage, and was liable to dismissal, and though he had the right to employ assistants that did not prevent his being a servant himself. It is quite in accordance with custom for a superior workman to choose his own assistants. An engineer may choose his own fireman or a mason his hodman. But that does not prevent their being servants paid by a common employer.

I also wish to reserve my opinion on the question in the case of *M'Gregor*, 1899, 1 F. 536, as to whether a man can be a workman and a contractor at the same time. There is much force in Lord Young's remarks on that point, but I desire to keep an open mind on the question.

LORD KINNEAR was absent.

The Court recalled the decision of the arbiter *quoad* the second finding, answered the question of law stated in the case in the affirmative, and remitted to the arbiter to proceed in terms of the statute, and decerned.

Counsel for the Claimant and Appellant —W. Thomson. Agents — Macpherson & Mackay, W.S.

Counsel for the Defender and Respondent Campbell, K.C.—Chree. Agents—John C. Brodie & Sons W.S,

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Tuesday, July 18.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

SINGER MANUFACTURING COMPANY *v.* CLELLAND.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule* I, *sec.* 12—*Review of Weekly Payment—Nominal Award—Competency.*

In an application under the Workmen's Compensation Act 1897, Schedule I, section 12, to have the weekly payment reviewed, it is not competent for the arbitrator to suspend the compensation by awarding a nominal sum; but he must consider the facts as existing at the date of the application, and must either end, diminish, or increase the payment — *Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; and *Ferrier* v. *Gourlay Brothers & Company*, March 18, 1902, 4 F. 711, 39 S.L.R. 453, *reconsidered.*

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*Amount of Compensation—Principles of the Valuation of the Compensation.*

Opinion (*per curiam*) in a stated case on an application under the Workmen's Compensation Act 1897, Schedule I, section 12, to have the weekly payment reviewed, that it is no answer to the claim for compensation that the workman is at the moment in receipt, possibly from his old employer, of as high a wage as prior to the accident, but the arbiter must, on the facts existing at the time of the application, decide whether, and if so to what extent, the workman has been injured in his wage-earning capacity in the open market.

Principles of the valuation of compensation as stated in *Freeland v. Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599, *approved.*