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 for 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.

The mere fact that he had a horse which he used in doing his work, and that the payment made to him included the hire of the horse as well as his own remuneration, did not take the contract out of the category of service. *Paterson* v. *Lockhart*, July 13, 1905, 7 F. 954, 42 S.L.R. 755.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK — I am clearly of opinion that the judgment of the Sheriff-Substitute is sound. On the facts stated here I cannot find anything to indicate that this man was a servant employed by a master and remunerated by wages, that is, at so much per day or per hour or per piece. The present case is a case in which a man who has a horse of his own goes to a firm of timber merchants; they say that they want logs removed from one place to another; he says "I have a horse, I shall bring it and work any day you wish me to do so, and for that you will pay 8s. a-day." There is nothing there of the nature of wages. It would have been the same thing if he had brought twenty horses to do the work instead of one. The contract was that he should get the work done. It was not a contract that he should do the work personally, but that he should do it in the only way in which it could be done by having somebody to lead the horse. That is not a contract of service. The case of *Paterson*, 7 F. 954, was quite different. There the man claiming compensation was bound to do the work himself at so much a day. The only thing in which that case resembles the present was that the workman used his own tools. We know that in many trades a workman is expected to bring his own tools, and these tools are to be used by his own personal power. He does the work; they only are his means for doing the work by his own hands and strength. In that case the work is done by the workman himself using the tools. In the present case the horse is the means by the exercise of the power of which the work is done.

On the particular facts of the case of *Paterson* I think the decision was perfectly right. A servant does not cease to be a servant because he has power to bring in other workmen to assist and do the master's work and earn wages. Paterson was a servant paid for his own bodily labour. The present case is different altogether from that, and I am of opinion that the judgment of the Sheriff-Substitute must be affirmed.

LORD LOW and LORD ARDWALL concurred.

The Court answered the first alternative of the question of law in the negative, and the second in the affirmative.

Counsel for the Appellant — Ingram — Mercer. Agent — R. Arthur Maitland, Solicitor.

Counsel for the Respondents—Watt, K.C. —Munro. Agents—Macpherson & Mackay, S.S.C.

Friday, October 30.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

ALLAN *v.* DUNFERMLINE DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL.

Reparation—Negligence—Precautions for Safety of Public — Unfenced Settling Tank in Private Ground—Access through Unfenced Ground Belonging to Third Party—Accident to Child—Relevancy.

A father brought an action against the owners of a piece of ground for damages for the death of his child, aged six years, who was drowned through falling into a settling tank which the defenders had constructed on the said ground. He averred that there was open access to the tanks through a park belonging to a third party which adjoined the said ground; that the park was unfenced and habitually used by the public; that a footpath ran from the public road near his house through the park and thence through the defenders' ground to another public road; that the path was daily used by members of the public; that his son along with some other children went along this path, stopped to play at the tanks, and while playing fell into one of them and was drowned; that the tanks, which were from 6 to 7¼ feet in depth, were enclosed by flat-topped walls which at one side were level with the ground; that they were unfenced, and within 2 or 3 feet of the path, and in close proximity to both public roads; that the defenders knew of the unfenced and dangerous condition of the tanks, of the use of the path, and took no steps to prevent such use or children playing about the tanks, and were in fault in failing to have the tanks or the ground fenced.

Held that the pursuer's averments were irrelevant. *Prentices* v. *Assets Company, Limited*, February 21, 1890, 17 R. 484, 27 S.L.R. 401, *followed*.

On 20th December 1907 John Allan, miner, Middleton Place, Crossgates, brought an action against the Dunfermline District Committee of the Fife County Council, in which he claimed £250 as damages for the death of his son Peter Baxter Allan, aged six, who was drowned through falling into a settling tank belonging to the defenders.

The pursuer's dwelling-house, which was situated on the north side of Middleton Place, had access, by a back road running north of and parallel to Middleton Place, to a grass park belonging to the Carron Company, Limited. This park opened upon a road (which the pursuer averred was a public road) running in a north-easterly direction from Middleton Place. Adjoining the park was a piece of ground belonging to the defenders and upon which settling tanks had been erected by them in connection with the drainage of Crossgates.