and called upon the shareholder to pay, the shareholder's answer would be, "You are seeking to extend my obligation. My contract was only to pay the uncalled portion of the capital due by me as and when the governing body of the company called it up. You have no power to call up my capital, and therefore your demand is incompetent." It might be possible by proper legal clauses in the articles of association to enable an assignee or mortgagee to go directly against the shareholders, but plainly in this case it could not be done. At the date of the assignment the so-called assignee was not put in the place of the cedent, and therefore I think the assignation was worthless, because it was not such an assignation of a right as the law of Scotland will recognise. The result is that these bondholders who claim a preference are in no better position than if they were ordinary shareholders.

LORD KINNEAR—I am of the same opinion. I think, for the reason your Lordship has given, that this is a case of bungled conveyancing which has not successfully created any right of security in any part of the property, either in the uncalled capital or in anything else.

LORD PEARSON was absent.

The Court answered the first and second questions in the negative.

Counsel for the Petitioners—Orr, K.C.—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for 1903 Debenture Holders—Blackburn, K.C. — Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Trustee for 1903 Debenture holders—Chree. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff-Substitute at Edinburgh.

ZUGG *v.* J. & J. CUNNINGHAM, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 4 (1)—*Sub-contracting—Work "Undertaken" by the Principal.*

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—Section 4—"*Sub-contracting*—(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him. . ."

A, a chemical manufacturer, contracted with B to do certain tarring work on his (A's) premises. B employed C to assist him in the work and authorised him to employ a labourer D. D having been fatally injured while so employed, his widow claimed compensation from A under section 4 (1) of the Workmen's Compensation Act 1906.

Held that, as the work of tarring the premises was not work "undertaken" by A in the sense of section 4 (1), he was not liable to pay compensation.

Mrs Isabella Dickson or Zugg, widow of Alfred Dennis Zugg, labourer, claimed compensation under the Workmen's Compensation Act 1906 from J. & J. Cunningham, Limited, manure merchants, 44 Bernard Street, Leith, in respect of the death of Alfred Dennis Zugg.

The matter was referred to the arbitration of the Sheriff-Substitute (GUY) at Edinburgh, who awarded compensation, and at the request of the defenders stated a case.

The facts admitted or proved, as stated by the Sheriff-Substitute, were—"(1) The appellants are manufacturers of sulphuric acid, chemical manures, and feeding stuffs at their works in Salamander Street, Leith, of which they are the owners as well as the occupiers; (2) part of said works consists of large chambers which are used in the manufacture of sulphuric acid, enclosed and protected by corrugated iron and wood; (3) it is necessary to have the corrugated iron and wood tarred over about once in every two years for the purpose of preserving them from the weather and keeping the chambers within wind and water-tight, the tarring of one half being done one year and of the other half the following year; (4) the chambers are about 20 feet in height and about 40 feet from the ground level, and the said work of tarring is done by workmen, who use a hanging scaffold; (5) the appellants have never had this work done by any of their servants, but have always contracted for it to be done at so much a square yard; (6) in the month of July 1907 the appellants contracted with James Aimers, who had had a similar contract with the appellants during the years 1902, 1903, and 1905, to do a portion of this tarring work, he being paid one penny per square yard—Aimers supplying the tackle and scaffolding and the appellants supplying the tar; (7) Aimers employed a man George Laing to assist him in the work, and authorised Laing to employ Alfred Dennis Zugg, who was accordingly employed and paid wages at the rate of 7d. per hour; (8) on 14th August 1907 a rope accidentally slipped from the hanging scaffold on which the said George Laing and Alfred Dennis Zugg were working, with the result that Zugg fell to the ground and was so injured that he died in Leith Hospital on the same day. It was also admitted or proved that the respondent was the widow of the said

Alfred Dennis Zugg, and was wholly dependent upon his earnings at the time of his death and was the only person so dependent; that if compensation was payable the amount thereof was £245, 14s."

The Sheriff-Substitute further stated—"On these facts I held in law that within the meaning of said Act (1) the appellants were principals in relation to said work; (2) that the said work was undertaken by the appellants in the course of and for the purpose of their trade or business; and (3) that Zugg was a workman within the meaning of said Act, and that the said accident arose out of and in the course of his employment as such; and (4) that the respondent was entitled to compensation from the appellants under the said Act in the said sum of £245, 14s., and I ordered the appellants to consign said sum with the Sheriff Clerk, and found the appellants liable in expenses."

The questions of law were—"(1) Whether the work contracted for was work undertaken by the appellants as principals in the course of or for the purposes of their trade or business, all within the meaning of the Workmen's Compensation Act 1906; and (2) Whether the appellants are liable to the respondent in compensation under the said Act."

Argued for appellants—Under the Workmen's Compensation Act 1897 the claimant would have had no claim. Neither had she any under this Act. Section 4 on which she founded was inapplicable. There was no "sub-contract" here in the sense of that section, for the appellants had not "undertaken" any work. They had merely employed a firm of "riggers" to tar one of their buildings. It was not the business of the appellants to erect or repair buildings. They were manufacturers of chemicals and did not "undertake" the repair of buildings. They had not "undertaken" anything here, and section 4 was therefore inapplicable.

[Counsel for the appellants was proceeding to develop his argument when the Court called on counsel for the respondent.]

Argued for the respondent—The question fell to be decided under section 4 (1) of the Act of 1906. Upon a sound construction of that section the appellants were persons who had "in course of or for the purposes of their trade or business" contracted with Aimers for the execution of part of the work "undertaken" by them, and they were accordingly liable to pay compensation to the respondent. The words of the section were as wide as possible, and obviously included under the expression "work undertaken" everything incidental and in any way pertinent to the business. It was suggested that the respondent would have had no claim under the Act of 1897. Even if that were so it was immaterial, because, firstly, the respondent was under the Act of 1906, and secondly, the object of the Act of 1906 was to extend still wider in favour of the workman the provisions of the Act of 1897. But even under the latter Act it was by no means clear that she would not have had a claim. The appellants were "undertakers" in the sense of that Act—*Stalker* v. *Wallace*, July 10, 1900, 2 F. 1162, 37 S.L.R. 898; the respondent could only therefore have been excluded by the proviso at the end of section 4 (*sub-contracting*), which provided that the section should not apply to contracts which were merely ancillary or incidental to the trade of the undertaker. It was, however, at least doubtful whether the contract in the present case could be so described, and it was further noticeable that there was no corresponding proviso in the Act of 1906. It was upon the proviso at the end of section 4 in the Act of 1897, that any decisions, at first sight adverse to the respondent, had proceeded. See *Bee* v. *Ovens & Sons*, January 25, 1900, 2 F. 439, 37 S.L.R. 328; *Burns* v. *North British Railway Company*, February 20, 1900, 2 F. 629, 37 S.L.R. 448; *Dundee and Arbroath Joint Railway Company* v. *Carlin*, May 31, 1901, 3 F. 843, 38 S.L.R. 635; *M'Govern* v. *Cooper & Company*, November 14, 1901, 4 F. 249, 39 S.L.R. 102; *Dempster* v. *Hunter & Sons*, February 26, 1902, 4 F. 580, 39 S.L.R. 395; *Stewart* v. *Dublin and Glasgow Steam Packet Company*, November 4, 1902, 5 F. 57, 40 S.L.R. 41.

LORD PRESIDENT—This stated case sets forth that the appellants, chemical manufacturers, have in their works certain structures enclosed and protected by corrugated iron and wood. These structures require protection against weather just as other parts require slates or paint. The business of the appellants is not that of painters or slaters, but that of manufacturers of sulphuric acid, chemical manures, and feeding stuffs. Therefore when from time to time these structures require retarring, the appellants have to employ for that purpose one whose business it is to do such work. Indeed, the Sheriff-Substitute finds in fact that "the appellants have never had this work done by any of their own servants, but have always contracted for it to be done at so much a square yard." Accordingly in July 1907 the appellants did contract with Aimers to do a portion of this work at a penny per square yard, he being supplied with tar. Aimers employed another man to assist him in the work, and authorised him to employ Zugg, who was accordingly employed upon the job. Unfortunately whilst Zugg was so employed he fell from the scaffold on which he was working and was killed. Zugg's widow brought this claim for compensation against the chemical manufacturers. There is no question that Zugg was not the servant of the appellants, and accordingly the claim is brought under the 4th section of the Act. Section 4 (1) of the Workmen's Compensation Act 1906 provides (*here his Lordship quoted the terms of section* 4 (1)). Now, the Sheriff-Substitute, after finding the facts as above narrated, holds in law "that the said work was undertaken by the appellants in the course of and for the purposes of their trade or business." I am of opinion that the Sheriff-Substitute has misunderstood the

section. The whole point turns on whether this was work "undertaken" by the appellants. It is not out of the way to consider what is the place of the section—that is to say, what is its position in the scheme of the Act—and for this purpose it is perfectly proper to look at the rubric. You may look at the rubric of the section in examining the position of the section in the Act, though you cannot do so in order to put an interpretation upon the actual words of the section. Now the rubric is "sub-contracting." The Act had dealt with the ordinary relations between employer and employee; it goes on to provide for cases where a middleman or sub-contractor is introduced. It seems to me that what is in the section is clear enough. When a person has undertaken as principal to perform a piece of work, and then enters into a contract with another for the performance of the whole or part of the work, he will be liable to the workmen employed by that other contractor, but always provided he has undertaken to perform the work. Now undertaking as a principal must mean undertaking on the order of someone else, *i.e.*, a customer. In other words, to get the state of affairs contemplated by the section there must be an undertaking by A to perform the work for B, and a sub-contract between A & C (whose immediate servant the workman is) to perform the work undertaken. Now when we come to look at the facts here we find that there was no undertaking by the appellants and no sub-contract. The appellants ordered the work for themselves, and it was Aimers and Aimers alone who "undertook" to perform the work. Accordingly there is no room for the application of this section. The absurd length to which the opposite doctrine would lead may easily be seen. I suggested the illustration of a doctor, who for the purposes of his practice required that an electric power installation should be fitted up in his consulting room, and who employed a firm of electrical engineers to fit the installation. The idea that he should be liable for injuries received by a servant of the firm so engaged shows the absurdity of such a view of the section. Such a construction would be entirely foreign to the central idea that prompted the Workmen's Compensation Acts, namely, that injuries to workmen should be looked upon as part of the expenses of the work which their employers carried on. I have no difficulty in holding that the Sheriff-Substitute was wrong, and that there is no claim against the appellants. I accordingly think that both questions should be answered in the negative.

LORD M'LAREN—I am of the same opinion. If Zugg had been directly employed, I take it he would have had no claim against Messrs Cunningham, because "workman" is so defined in the Act of Parliament as to exclude people who are merely casual labourers. The applicant's claim accordingly is founded on the fact that there was an intermediary, to wit, Aimers. To establish the claimant's argument it is necessary in the first place to put a construction on the word "undertaken." I think that word may receive some shade of colour or meaning from the word "undertaking" which is used in other clauses of the statute. To illustrate what I mean, take the case of a railway company which arranges to build its own engines or to lay out its own sidings. In such a case the company would be held to have undertaken the work, though it was under no contractual obligation to do so. Similarly where a builder by profession has undertaken to erect or repair a building, it may be for his own occupation, if he delegates the whole or a part of the work to another he would be liable to pay compensation in the event of an accident happening to one of the sub-contractor's workmen.

In the present circumstances I am unable to see that the work of tarring the building in question was work undertaken by the appellants, whose business is not the erection or repair of structures but the manufacture of chemicals. I am therefore of opinion that the fourth section of the Act is inapplicable, and that the determination of the Sheriff should be reversed.

LORD KINNEAR—I agree with your Lordships.

LORD PEARSON was absent.

The Court answered both questions in the case in the negative, recalled the interlocutor of the Sheriff-Substitute as arbiter, and remitted to him to proceed accordingly.

Counsel for Pursuer and Respondent—Blackburn, K.C.—J. B. Young. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders and Appellants—Morison, K.C.—Dunbar. Agent—R. S. Rutherford, Solicitor.

Saturday, May 23.

SECOND DIVISION.

MACLEAN *v.* MACLEAN.

Succession—Special Legacy—Ademption.

A testatrix disponed her whole estate to her daughter "with the exception of Three hundred pounds stg. of mine which my son Alick has invested for me and which I do hereby leave and bequeath to himself." At the date of the will Alick had in his hands £300 belonging to her, but he subsequently repaid it to her and it was immixed with her estate. *Held* that the bequest to him was a special legacy and was adeemed.

This was an action at the instance of Alexander MacLean against his sister Flora MacLean, in which the pursuer sought to have the defender ordained to produce an account of her intromissions as executrix-nominate of their mother Mrs Flora MacLeod or MacLean with the executry estate.