ing that the testator intended his grand-nephews (and they might be numerous) of one family to take each as much as a nephew or niece was to get, which would be the result of a division *per capita*. I think the contrary is the plain intention. Each nephew and niece is to share equally, and the children of a predeceasing nephew or niece are to take among them such a share as a nephew or niece would get. That is my view also of the meaning of the clause of devolution.

LORD MONCREIFF—I am of the same opinion. I think it is plain that the intention of the testator was that each family of his nephews and nieces should take an equal share of residue. I do not think that he intended that the children of any of his deceased nephews and nieces should take more than their parent's share. Almost conclusive proof of this is to be found in the words at the close of the clause. The testator leaves the half of the residue of his estate to his nephews and nieces and others named, "and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue, their deceased parent's share equally among them." I cannot believe that the testator intended that while the issue of such of the nephews and nieces named as survived him should only take their parent's share, each one of the issue of those who predeceased the making of the will, should have an equal share with the brothers and sisters of their parents.

Mr Blackburn very properly pressed upon us the fact that two of the grand-nephews are called *nominatim*. This would have been important if each of these grandnephews had been one of a family. But we find that each of the grandnephews so called was the only child of his deceased parent. It is therefore to be assumed that the testator gave him one share as representing his parent.

As regards the clause of devolution, I agree that the children of nephews and nieces who predeceased the making of the will, and whose children are expressly called, are entitled *per stirpes* to a share of the portion of the estate which would have fallen to Patrick Simpson if he had survived the period of vesting.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"Recal the Lord Ordinary's interlocutor of 4th November 1898: Vary his Lordship's interlocutor of 24th August 1898 to the extent of finding that the children of the deceased William Simpson and Charles Still Simpson are entitled as primary legatees to equal shares *per stirpes* of the fund *in medio* along with the nephews and nieces and grandnephews of the truster named in the settlement: Therefore sustain the second alternative of the claim of William Gordon Simpson, Mrs Margaret Catherine Simpson or Maclure, and Miss Helen Mary Simpson."

Agents for the Pursuers and Nominal Raisers—Dundas & Wilson, C.S.

Counsel for the Claimants Mrs Sinclair, the Assignee of Alexander Simpson, George Simpson, Mrs Matheson, and Simon Simpson—Guthrie, Q.C.—W. Brown. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Claimants Helen Simpson, James Oughterson, and Alan Matheson—Kennedy. Agents—Pringle & Clay, W.S.

Counsel for the Claimants the Children of Charles Still Simpson—Dundas, Q.C.—Blackburn. Agents—Cadell & Wilson, W.S.

Friday, February 3.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.

M'GREGOR v. DANSKEN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 1 (1) *and* (2), 4, 7 (1) *and* (2), *and Second Schedule*, 14 (c)—"*Workman*"—"*Undertaker*"—*Independent Contractor.*

Held (*diss.* Lord Young) that a claim under the Workmen's Compensation Act 1897 made by an independent contractor against the undertaker of the work which he had contracted to do, was impliedly excluded by the terms of section 4 of the Act.

Opinion per the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff—(1) that an independent contractor, even although he himself works at the work which he has contracted to do, and is injured while so working, is not entitled to the benefits of the Workmen's Compensation Act 1897, and (2) that the benefits of that Act are confined to persons employed under a contract of service.

Opinion per Lord Young *contra*.

Opinion per Lord Trayner—that a person who employs someone to repair a building for him, not having himself undertaken such repair, is not the "undertaker" of the repairs within the meaning of the Workmen's Compensation Act 1897.

Opinion per Lord Young *contra*.

Opinion per Lord Moncreiff — that the 4th section of the Workmen's Compensation Act 1897 does not give any right of compensation to a contractor's servants against an owner of property who employs a contractor to repair his house, but does not himself engage in or undertake the work.

Opinion per Lord Young *contra*.

This was an appeal from the Sheriff Court of Lanarkshire at Glasgow upon a stated case in the matter of an arbitration under the Workmen's Compensation Act 1897

between Malcolm M'Gregor 14 Dick Street, Glasgow, appellant, and John Dansken, measurer, 141 West George Street, Glasgow, respondent.

The case stated for the opinion of the Court by the Sheriff-Substitute (SPENS) was as follows:—"This is an arbitration brought, under the Workmen's Compensation Act 1897, before the Sheriff of Lanarkshire, at Glasgow, in which the said Sheriff is asked to find that the appellant is entitled to compensation from the respondent in terms of said Act; to fix the amount of weekly payments which the respondent is bound to pay to the appellant as compensation for the injuries condescended on, and the date from which such payments shall run; to find the respondent liable in expenses, and to make any other findings or decrees necessary under said Act. I appointed a diet, and the following facts were then established:—1. That the appellant was injured on 5th September 1898 while engaged working at slater work on a building in Swan Lane, over thirty feet in height, of which respondent was the 'undertaker' in the sense of the Workmen's Compensation Act. 2. That the appellant had contracted to do the slater work of the said building, and that he received the payments vouched for by receipts produced for five successive weeks onwards from said 5th September, and inclusive of said day. I held that the 4th section of the Act barred a contractor claiming compensation under the Act for personal injury to himself when working under the contract. (I may add that I did not determine any other questions of law, and I understand there were other defences on the merits, into which I did not enter in respect of my ruling). The question of law for the opinion of the Court is:—Whether the appellant, being a contractor, and injured when himself working at said contract, is or is not excluded from claiming compensation by the terms of the 4th section of the Workmen's Compensation Act?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts as follows:—Section 1 "(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act. (2) Provided that—(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed." . . . Section 4—"Where, in an employment to which this Act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies: Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively." Section 7 (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined, on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. (2) In this Act . . . 'undertakers' . . . in the case of a building means the persons undertaking the construction, repair, or demolition. . . . 'Workman' includes every person who is engaged in any 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." Section 9—"Any contract existing at the commencement of this Act whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act." . . . First Schedule—"(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 after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound. (2) In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity. Second Sche-

dule—*Arbitration.*—The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration. . . . . (14) In the application of this schedule to Scotland . . . (*c*) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the 52nd section of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time, and in accordance with the conditions prescribed by Act of Sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced."

Argued for the appellant—(1) Section 4 of the Act had no bearing upon the present case. It gave a right of compensation to the workman employed by an independent contractor against the "undertaker," but there was nothing in it to exclude the claim of the contractor himself. Whether therefore he was entitled to the benefits of the Act or not, the appellant's claim was in either view not excluded by section 4. If this were so, the Sheriff-Substitute's decision upon the only question of law decided by him was erroneous. The Court could not consider any other question—Workmen's Compensation Act 1897, Second Sched., 14 (*c*). Before that could be done there must be a remit to the Sheriff, so that his decision might be obtained upon such other questions, and if necessary another appeal taken—*Durham* v. *Brown Brothers*, Dec. 13, 1898, 36 S.L.R. 190. The Sheriff-Substitute's decision assumed that the appellant was injured while engaged upon work falling within the scope of the Act, and that the respondent was the "undertaker" of the work upon which the appellant was engaged when he was injured. It was not competent for the Court to consider and decide upon this case whether the respondent was the "undertaker," or whether this was work to which the statute applied, for no questions of law had been stated for the opinion of the Court upon these matters. (2) If the Sheriff-Substitute's decision was to be read as determining that by implication an independent contractor could not claim the benefit of the Act against the person with whom he contracted, still his decision was erroneous. A "contractor," if in fact a "workman" was not excluded from the benefits of the Act. The appellant here was in fact a "workman" within the meaning of the definition of that word—sec. 7 (2). The benefits of the Act were not confined to persons engaged under a contract of service. The words "or otherwise" in the definition, *cit.*, covered contracts of employment other than contracts of service if the persons contracted with were otherwise eligible. If the respondent's contention on this point was correct, then it would be easy for employers to evade the provisions of the Act by "contracting" with all their workmen instead of employing them in the ordinary way.

Argued for the respondent—The meaning of the Sheriff-Substitute's decision was that by implication from the terms of sec. 4 a "contractor" had no claim under the Act. That decision was correct. The benefits of the Act were confined to persons working under a contract of service, and did not extend to contractors like the pursuer, whose engagement—whether in fact they worked themselves or not—was not to work themselves, but to get certain work done and see that it was done. Moreover, here the respondent was not the "undertaker" within the meaning of the Act. The owner or occupier of a building, who contracted with some-one to repair the roof of it, was not the "undertaker" of the repair. This was not work to which the Act applied. It was not found that scaffolding was being used—see sec. 7 (1). The claim here was also excluded by the last sentence of section 4, even if the respondent was the "undertaker," because the work at which the appellant was engaged when he was injured was "no part of or process in the trade or business carried on by" the respondent.

At advising—

Lord Justice-Clerk—This case is not satisfactorily stated, but I think it desirable, if it can be done, to decide it as it stands. The Sheriff-Substitute finds in fact that the appellant was injured while working at slater work on a building more than thirty feet in height, and that the appellant had contracted to do the slater work, and the sense in which he employs the word is indicated by his finding on the 4th section of the Act that it excludes a contractor, and therefore excludes the appellant, he being a contractor. Accordingly the question put is practically whether, it being the fact that the appellant was a contractor, he can legally claim compensation under the Act or is excluded from doing so in respect of what is contained in section 4.

The question put before us is thus confined to section 4, but that section must be read in the light of the other provisions of the Act, and in consistency with these other provisions. Having perused the whole Act and relative schedules with care, it appears to me that it relates only to workmen who are engaged as servants of an employer—that it is only where there is this relation of servant to a master for hire that the provisions of the Act apply. In sub-section (*a*) of section 1 "the workman" is to have no compensation unless he is disabled for more than two weeks from "earning full wages at the work at which he was employed." I hold that these words which I have quoted must mean "full wages" as at the time were being paid to workmen working under a contract of service with an employer engaging working men for stipulated wages. In accordance with this the first and second sections of the schedule relating to "scale and condi-

tions of compensation" proceed throughout upon the assumption that the person claiming damages is serving an employer who has engaged him on a contract as between master and servant in the sense in which these words have been used in legal language for a very long time. They speak throughout of the earnings of a workman under an employer from week to week as the basis on which compensation is to be estimated at a calculation of so many weeks, and sub-section 2 expressly refers to these as "wages" by saying that any payment "not being wages," which shall have been given to the workman in respect of his injury, is to be considered in fixing the amount of compensation still to be paid to him on a calculation of his earnings. This indicates that the relation between the parties is assumed to be an engagement to work for stipulated wages. I can find nothing to the contrary in the Act, and I hold that the Act applies to claims of persons working under a contract of service. Now, the Sheriff-Substitute has found as matter of fact that such a relation did not subsist between the parties to this case. He holds that the appellant was not a workman under a contract of service, but a contractor. Of course every person who makes an agreement with another for the doing of work is a contractor in a general sense, but in questions relating to compensation for injuries to workmen the words "contractor" and "workman" have come to have a more restricted and distinctive meaning, and this is shown in the Act under consideration, which in section 4 uses the word "contractor" in the sense of one who makes an agreement to carry out certain work specified, but not on a contract of service. He contracts to have the work done, but he may work at it himself or do the work by men under him, or may both work and use other men to assist him, the person for whom the work is being done being bound to take over and pay for the work if satisfactorily done, and having no say as to the individuals by whose labour it is to be accomplished or the conditions on which they shall do their work. This is so well established that while the Act plainly refers to contractor as distinguished from workman, it does not give any definition of the word "contractor."

Coming now to section 4, with which the Sheriff-Substitute deals, it is clear that the section was passed to enable an injured workman, in cases where portions of work were given out to different contractors, to proceed against the undertaker of the whole work, where the circumstances are such that if the workman had been directly employed by the undertaker there would have been a direct claim against the undertaker himself, giving to the undertaker a right to be indemnified by any person who would have been liable if that section had not been passed. The Sheriff-Substitute has held in fact that the respondent in this case was the undertaker, and I shall proceed on the assumption that this is the fact, although I must say that I gravely doubt its correctness. There has been no inquiry into fact in this case, and before I should be prepared to decide such a matter I should wish to know the exact facts. For if a private individual makes a contract with another to do certain work not in his own business, then I think the contractor is the undertaker. But I assume that the respondent was what the Act calls "the undertaker." Now, it is plain that if he is in that position, although he would be primarily liable to a workman under section 4, he would be entitled to recover any compensation he might have to pay to a contractor's workman from the contractor himself. But if it is the contractor himself who is injured, and if a contractor is entitled to compensation under the Act, then if the undertaker had to pay the compensation he could have no relief, for he cannot demand to be relieved by the contractor for that which he has paid to the contractor himself. If he could it would render the compensation entirely illusory. Conversely, the undertaker is only liable to pay to a workman under him. If the contractor works himself he cannot be liable in compensation to himself for injury happening to himself, and it is only where someone else is finally liable in compensation that an undertaker under section 4 is liable primarily to provide that compensation which another is liable to relieve him of. Had it been contemplated by the Act that a contractor as distinguished from a workman in service should be entitled to compensation for an injury happening to himself, it would, I think, have been expressed, especially as the general tenor and scope of the Act is to deal only with claims of persons in the relation of workmen serving a master for wages. I am of opinion that the Sheriff-Substitute was right in holding that the appellant being in fact a contractor and not a servant cannot have a claim against the undertaker under section 4.

I wish to add that if the opposite view were to be held, this case could not, in its present shape, be decided on its merits, for the matters of fact on which other legal questions depend have not been found. Thus it would be necessary to have the facts ascertained and found, whether the work on which the appellant was engaged was in the words of section 4 "merely ancillary or incidental to" and "no part of or process in the trade or business carried on by" the undertaker, and also whether in this case, the work being the repair of a building, the conditions of section 7, sub-section 1, were present.

LORD YOUNG—The question of law determined by the Sheriff, and on which he has stated the case before us, is—"Whether the appellant, being a contractor, and injured when himself working at said contract, is or is not excluded from claiming compensation by the terms of the 4th section of the Workmen's Compensation Act?"

The Sheriff's decision thereon is thus expressed—"I held that the 4th section of the Act barred a contractor claiming compensation under the Act for personal injury

to himself when working under the contract."

We are required by the statute "to determine the same finally and remit to the Sheriff with instruction as to the judgment to be pronounced."

I am of opinion that sec. 4 of the Act does not bar a contractor claiming compensation under the Act for personal injury to himself when working under the contract, and that we ought to remit to the Sheriff with an expression of our judgment to that effect, and instruction to proceed in and determine on that footing the application before him as arbitrator.

The Sheriff informs us that in respect of his ruling on this question he abstained from determining "other questions of law," or entering upon "other defences on the merits" which he understood were intended to be maintained. The Sheriff is by the Act required and authorised to state a case to this Court only "*on any question of law determined by him*," and we, of course, can determine no other.

The question whether the appellant's claim (or indeed any claim presented for consideration under the Act) is barred or not by the 4th section of the Act, must, of course, be considered and decided on the footing that it is, or may, otherwise (*i.e.*, outside and irrespective of that section) be good. Although not barred by sec. 4, it may be bad in whole or in part on some other ground in fact or in law which we cannot now consider, but which the arbitrator may have to consider and determine should the ruling in respect of which he has hitherto abstained from so doing be set aside by this Court, as I think it ought to be.

The Sheriff has, I think, misapprehended the 4th section of the Act, and also the appellant's claim, which is certainly not made upon it. That section relates exclusively to "sub-contracting," and its purpose is, not to relieve from any liability or to bar any claim which would otherwise exist, but, on the contrary, to create a liability and give a corresponding claim under the Act which otherwise would not exist, and which must accordingly, if made, be based on that section. By the 1st section of the Act it is enacted that where personal injury by accident is caused to a workman in the course of his employment, "his employer shall, subject as hereinafter mentioned, be liable to pay compensation," and till sec. 4 no liability is put upon or claim given against any other. This section, which relates, as I have said, to "sub-contracting," gives an injured workman a claim under the Act, not against his employer, but against the employer of his employer. The case thus contemplated and provided for is that of "undertakers" in the sense of the Act, contracting "with any person for the execution *by or under* such contractor of any work," and the import of the provision is that in such case the undertakers shall be directly liable to an injured workman employed, not by them, but by the contractor with them, provided they would have been liable if the workman "had been immediately employed by them."

How this section has any bearing on the claim before the Sheriff I am unable to see. The appellant's claim against the respondent is for personal injury by accident arising out of and in the course of the direct and immediate employment of him by the respondent. The work and the employment of the appellant to execute it were *prima facie*—that is, on the face of the statement in the case—such as the Act applies to. The work was on, in, or about a building which exceeds 30 feet in height, &c., and was being executed on the employment of the respondent, who was the undertaker in the sense of the Act. If there is room for doubt about this, and I see none, and the Sheriff has indicated none, the question of law on which alone the case is stated does not entitle, or indeed enable, us to deal with it, or even to know what it is. The appellant has clearly and admittedly no claim on section 4 of the Act. Whether outside and irrespective of that section he has or has not a good claim in fact and law, the Sheriff as statutory arbitrator has not determined, and we cannot determine on the case before us. All that the Sheriff has determined is that it is unnecessary to determine or enter upon the questions of fact or law on which the validity and just amount of the claim may depend, inasmuch as any claim is legally barred by this sec. 4, and in my opinion we can do no more than decide whether this is right or wrong.

The work mentioned in the case was "slater work," on a building over 30 feet in height. Whether this was "construction, repair, or demolition" is not stated and does not signify, for it must have been one or more of the three, and the statute applies to all and each of them, and whichever it was the respondent was the "undertaker" in the sense of the Act. The Sheriff states this as a fact. It was argued to us by the respondent that an undertaker in the sense of the Act must be a trader of some sort, and that any employment of workmen by him must be for work which is part of or process in the trade carried on by him. I am not, as at present advised, prepared to assent to this view, but assuming it to be sound, I must also assume that the Sheriff had due and proper regard to it when he stated it as a fact, established to his satisfaction, that the respondent was the undertaker in the sense of the Act of the slater work on this building at which the appellant was working. If the respondent thought that this statement involved a legal error, it was for him to bring it under the Sheriff's notice, and desire him to determine it, and on an adverse determination to require him to state a case upon it. As matters stand we are quite ignorant of the facts on which it could be determined whether or not the respondent is a trader, and whether or not the work on which the appellant was employed was part of or process in, or had any and what relation to his trade. We have no information regarding him beyond this, that he is designed in the case as "measurer, 241 West George Street, Glasgow;" and that regarding the slater work on the 30 feet high building referred to he "was the

undertaker in the sense of the Workmen's Compensation Act."

Your Lordship said that you greatly doubted the correctness of the Sheriff's finding that the respondent was the undertaker of the repairs on the building at which the appellant was engaged when injured—or (to use the words of the Act) was the person "undertaking the construction, repair, or demolition" of the building on which he was working when injured. But your Lordship did not state the ground of your doubt, and none occurs to me. The words "undertaker" and "undertaking" may not be the happiest that could have been used in the statute—for they are words familiarly used in various senses. But the sense in which they are used in this Act is, I think, plain and even indisputable —"undertaking" meaning the work to be done, and "undertaker" the person in whose interest or for whose behoof it is to be done on his property, or property in which he is interested, and who consequently employs workmen, or enters into contracts—no matter what—to have it done on his account and as his business. It is the business of the owner of a house to have the needful slater work of the roof done or repaired, just as it is the business of a railway company to have their lines of rails laid, lifted, and repaired, or the roofs of station buildings slated or repaired.

I have been unable to appreciate, or indeed to understand, the argument upon the word "contractor" urged in support of the Sheriff's judgment. In every contract there must be at least two "contractors." Here one was the "undertaker" (the respondent), the person whose business and undertaking was to have the slating on the roof of his house repaired, and the other the appellant, a working slater whom he employed (or with whom he contracted) to do it by time-work at the rate of 9½d. an hour. When a working man is employed to be paid by the hour I should infer a *delectus personæ*, and that it was meant that he should do the work himself, as the appellant appears to have done except when he was disabled by the accident. It is improbable that the work of every slater is paid for at the same rate per hour. But the appellant was certainly entitled himself to work at the specified wage per hour, as he was according to the statement in the case in fact doing when the accident occurred, and why he should not be allowed to prove his whole case as stated, and to establish his claim if he can, I have been unable to understand.

Having regard to the general interest and importance of the questions regarding the import and meaning of the Workmen's Compensation Act, and especially of the 4th section, raised by the arguments addressed to us for the respondent, it is perhaps proper that I should express my opinion, on some of them at least, more distinctly than I have yet done, although for the reasons which I have stated the case ought to be decided on the limited grounds which I have, I hope, sufficiently explained.

The Act entitles a "workman," but no person other than a "workman," to compensation for "personal injury by accident" not attributable to fault. The claim, which prior to the Act had no existence, and irrespective of the Act has none now, is given against "his employer," although such employer, and everyone for whom he is responsible is blameless. But the employment must be one "to which this Act applies," to be ascertained by reference to sec. 7, which says—"This Act shall apply only to employment by the undertakers as hereinafter defined," from which it follows that the only employers on whom this exceptional liability is imposed are "undertakers" as defined in the Act. Other employers remain liable as before for their own fault or that of others for whom they are responsible, but no liability whatever is put upon them by this Act. I have sufficiently, I hope, explained my understanding of the meaning of the words "undertaker" and "undertaking" as used in the Act.

It had not, I confess, occurred to me that there was or could be any doubt as to the meaning of the word "workman" as used in the Act with or without the aid of the definition clause. A contractor may be a workman or not. If he is not he can have no claim under this Act. If he is a workman, as, for example, a working slater, and his contract is to work "at slater work on a building in Swan Lane over 30 feet in height," of which his employer—that is to say, the person with whom he contracts, is "the undertaker in the sense of the Workmen's Compensation Act"—I am unable to see force or even meaning in the argument on the word "contractor." It was put thus, as I understood it, that the "undertaker," (the respondent) did not employ the working slater (the appellant) as a workman, but contracted with him to become the employer of himself as a workman, and consequently that if personal injury by accident was caused to him in the course of the employment, such as to give him a direct claim under the Act against the undertaker, he, as his own employer in pursuance of his contract, was bound to relieve the undertaker of such claim. If this is sense and law, it is manifest enough that undertakers employing workmen to execute work for them at wages by time or piece, may always evade the Act by calling the workmen contractors who employed themselves as workmen.

I do not dwell further on this topic, beyond pointing out that an undertaker who under section 4 of the Act satisfies the claim of a workman not immediately employed by him has very clearly no right of relief against the contractor who immediately employed him, or indeed against anyone not responsible for the accident and liable independently of this section. It was perhaps unnecessary to point this out further than I had already done by noticing that the whole policy of the Act is to give limited rights of compensation to workmen for accidents (not caused by their own fault) against blameless employers, but confined to the undertakers of specified work of a dangerous character. To give

these undertakers, on whom alone this exceptional liability is imposed, a right of relief or indemnity from others to whom fault or negligence is not imputed, would obviously be to extend the statutory liability to people on whom it is not imposed by the statute. The statute imposes no liability on contractors or other employers who are not undertakers in the sense of the Act.

The appellant was working at slater work for 9½d. an hour when the accident happened. Whether or not he sustained injury which disabled him for a period of at least two weeks from earning the same full wages at the work at which he was then employed, is a question of disputed fact as to which we have no information. If he did, his claim seems to me to be as plain a one under the Act as could be figured for the purpose of illustration. That a workman who is paid by the hour is not earning wages is to me a very novel idea.

LORD TRAYNER—The case presented to us is very meagre in its statement, but it contains enough, I think, to enable us to answer the question of law with which it concludes.

The respondent entered into a contract with the appellant for the repair of a certain building. The appellant personally engaged in the work to be performed, and in the course thereof received injuries for which he claims to be compensated by the respondent. Whether the appellant was the only person engaged in the work, or only took part in it with others in his employment, does not appear. The Sheriff has found that the respondent was the "undertaker" of the work in the sense of the Act, and I assume that finding to be sound for the purposes of this case, although I am not to be held as assenting to it. In these circumstances the Sheriff has held that in law the appellant's claim is excluded by the terms of the 4th section of the Act, and we are asked to say whether that finding in law is correct. I am of opinion that it is.

The liability of an "undertaker" under section 4 is limited. He is only liable to pay "to any workman employed in the execution of the work any compensation" payable to the workman by the contractor—that is, the man in whose immediate service he is. If the appellant was a workman, he was a workman employed by or in the service of himself. Whatever compensation he may be bound to pay himself is the amount which the "undertaker" (the respondent) is bound to pay him. But as the appellant is not liable to pay himself anything the respondent's obligation is *nil.* Then, again, as the workman injured in the course of his employment, who has a claim against his employer, may proceed directly against the undertaker, so the undertaker has a claim for indemnity against the employer. Accordingly, if the respondent was made liable to the appellant as a workman, the appellant, as employer, would be liable to indemnify the respondent as undertaker. What therefore he got as workman he must restore as employer. No claim can therefore exist if that claim is immediately answered by one for indemnity of equal amount. Lastly, the undertaker is not liable to the contractor's workman where the work, in the performance of which the injury was sustained, is "merely ancillary or incidental to, and is not part of or process in the trade or business carried on by" the undertaker. It is not found as matter of fact that the work performed by the appellant was any "part of or process in" the respondent's business, without which being affirmed no claim arises.

For these reasons I think the appellant's claim is excluded by the 4th section of the Act. But while I am of that opinion I think it right to add that it would have been more in accordance with my view of the Act if the Sheriff, instead of holding that the claim was excluded by section 4, had held that the statute in question did not confer or recognise any claim at the instance of the appellant against the respondent in the circumstances under which the claim is made. It may appear at first sight paradoxical to say that the appellant has no claim under the statute, and then to say that his claim is excluded by the statute. But it is not so. The Act may confer no claim, and yet by its terms may show that a claim not conferred is excluded if made. As the 4th section of the Act has not until now been the subject of judicial construction, I think it not out of place, and it may be useful to say what I regard to be its purpose and effect.

It appears to me that the purpose and effect of section 4 was to secure to workmen an additional security for the recovery of compensation which might be due to them. It sometimes happened that persons engaged in a particular business contracted with others (in or not in their employment) to perform certain work connected with and forming part of that business, as independent contractors, not for wages but for a slump sum, or at a rate named. These persons in their turn employed others to do or aid in doing the work contracted for. If a workman so employed was injured, his claim was held to be only against his immediate employers, who not infrequently were unable to meet or satisfy the workmen's claim. Accordingly the person for whom the work was done—the work forming part of the business which he carried on—escaped liability, and the workman's claim was defeated. Examples of this kind of case I am referring to will be found in *M'Gill*, 18 R. 206, and *Sweeny*, 19 R. 870. It was to introduce a remedy in such cases that the 4th section of the Act under consideration was passed, giving the workman injured a claim against the person for whom as part of his proper business the work was done, and giving that person a claim of relief against the immediate employer of the injured workman. The kind of case, and the only kind of case, provided for in the 4th section, according to my view of it, may perhaps be made clearer by an example. A, a builder, contracts with B to erect a house for him.

He gives out, say, the joiner-work, to C (a sub-contractor), who contracts to perform it. If in the course of his work at the house a workman in the employment of C sustains injuries which entitle him to compensation, he may claim them from C, as formerly, if he pleases. But he has also a claim (now sanctioned for the first time) for compensation against A, who is the undertaker in the sense of the Act, A, in turn, having his claim for indemnity (if he can make it good) against C. Beyond this, the 4th section of the Act, in my opinion, does not go. It affords no warrant for the opinion that in the case supposed the injured workman would have any claim against B, for whom the house was being built.

With regard to the meaning and application of the Act generally, it appears to me that it has reference only to claims for compensation by workmen who have sustained injuries while engaged in work under a contract of service. The words in the interpretation clause descriptive of workmen, "whether his agreement is one of service or apprenticeship *or otherwise*," do not appear to me hostile to or inconsistent with my view. No doubt they are very comprehensive words, but they appear to me to comprehend only different degrees or characters of service. They could not reasonably be read as comprehending an agreement, *ex. gr.*, of partnership, although "or otherwise" in its broadest signification would cover that too. I think it is service of all kinds and degrees—manual labour or skilled labour, foreman, journeyman, or apprentice — regular employment for a stated period at a fixed wage—or the most incidental employment for a trifling return —but still in every case an agreement for service. If I am right in this, an independent contractor for work has no claim under the Act for injuries he may have sustained in the execution of his own contract against his co-contractor. No such claim exists at common law, and it can scarcely be supposed that it was intended to create such a claim by an Act intended only to extend the right of workmen to compensation for injuries sustained in the course of their service, and to facilitate the recovery of such compensation.

I said in the outset of my opinion that I did not assent to the finding of the Sheriff-Substitute that the respondent was the "undertaker," in the sense of the Act, of the work at which the appellant was engaged when he was injured. I think he was not, and that in reference to the work done by the appellant for the respondent there was no "undertaker" in the sense of the statute unless it was the appellant himself. "Undertaker . . . in the case of a building, means the persons undertaking the construction, repair, or demolition." That is the statutory definition. But how can it be said that the respondent undertook (in any sense of the word) the repair of the house where the appellant was injured. It was the appellant who undertook to repair the house in return for a certain payment. The person who undertakes to do anything lies under obligation to do it. But the respondent was under no obligation to repair the house; it was the appellant. If the respondent had undertaken or contracted to repair the house, and through inability to perform the work himself had sub-contracted with the appellant to do it, then the respondent would have stood in the position of "undertaker" towards the appellant's workmen. But he could not, in my opinion, have stood in that relation to the appellant himself.

The appellant's counsel maintained that the Act conferred a right to compensation on every workman who was injured while engaged in work against the person for whom the work was being done. In a sense that is true, but only in a limited sense. If "the person for whom the work is being done" means the workman's immediate employer, or (if his employer is a sub-contractor under another contractor) the person designed in the statute as the "undertaker," I assent. If it means more, and is extended so as to include the person who instructed or contracted with the "undertaker," I dissent. There is no liability to the workman for his claim for compensation imposed on anyone but his employer or the "undertaker" with whom the employer contracts. The person for whom a house is being built or repaired (reverting to the illustration I used a little ago) is neither the employer of the workman nor the "undertaker," and underlies no obligation to compensate the workman either under the statute or at common law.

Lord Moncreiff—This case is not stated in a very satisfactory way in some respects, and the question of law submitted is not happily expressed. The Sheriff-Substitute finds, first, that the respondent was the "undertaker" in the sense of the Workmen's Compensation Act, that is, "the person undertaking the repair of the building;" and secondly, that the appellant was a contractor, having contracted to do the slater work of the building. While the latter finding is, I think, substantiated by the documents produced, I must say in passing that as far as I could judge from what was stated at the hearing, the respondent was not an "undertaker" in the sense of the Act, because he did not himself undertake to execute the repairs on his house. He simply employed the appellant to do so. However, I take the case on the footing that the respondent was an "undertaker," and that he gave off the slater work to the appellant under a contract or sub-contract.

On the facts so found the Sheriff-Substitute has stated this question of law for our opinion—"Whether the appellant, being a contractor, and injured when himself working at said contract, is or is not excluded from claiming compensation by the terms of the 4th section of the "Workmen's Compensation Act?"

I think it would have been more satisfactory if the question had been put in more general terms, viz., Whether under the statute an independent contractor has

any claim of compensation against the "undertakers." The 4th section does not in terms exclude a claim at the instance of a contractor; indeed, it does not directly apply to such a claim at all, but to a claim at the instance of the contractor's servants against the "undertaker." But what I understand the Sheriff-Substitute to mean is that such a claim is excluded by implication; because the terms of the 4th section are inconsistent with the existence of such a right in a contractor, and indeed demonstrate that there is no such right. If this is what he means I agree with him, and I think we may treat the case as sufficiently raising the real question on which our judgment is desired. This 4th section is the only one in which a contractor is mentioned — "Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work." This plainly applies to an independent contract. Therefore it might have been expected that if any such right were for the first time to be conferred on a contractor, it would be done here. But while section 4 alters the existing law to the effect of giving the contractor's servants in certain circumstances a right to receive compensation from the "undertakers," the contractor himself is given no such right. On the contrary, he remains liable for the compensation due to his servants and is expressly bound to indemnify the "undertakers" in the event of their paying compensation to his, the contractor's servants. This no doubt may extend the "undertakers" liability, because sometimes sub-contractors are unable to pay; but it does not in my opinion alter the rights and liabilities of contractors and "undertakers" as between themselves or confer upon a contractor any right which he did not possess under the law as previously existing.

I am therefore prepared to answer the question put to us in the affirmative. But in the view which I take of the statute, the 4th section simply illustrates and confirms the broader view that the statute does not alter the law as to an independent contractor. Apart from the exception introduced by section 4, the statute is confined to claims made by or competent to a workman, who is a servant, against his own immediate master; and its provisions do not apply to any case where the relation of master and servant does not exist. A contractor or sub-contractor is not the servant of the person who employs him. There is "employment," and there is a "contract" between them, but it is not a contract of service, or of the nature of a contract of service. At common law the employer of a contractor is not responsible for the acts of the contractor, or his servants, the reason being that in the execution of the contract the contractor is not bound to do the work with his own hands, though he may do so if he chooses, and is not subject to the supervision of his employer. In short, he is not a servant.

The statute certainly does not expressly alter the law in this respect; neither, in my opinion, does it do so by implication. It would require express words, or at least unmistakeable indications of intention, to make the employer of a contractor liable to the contractor for injuries sustained by the latter in the execution of his contract through no fault of the employer.

Apart from the indications afforded by section 4 that no new rights are conferred on contractors, the language of the rest of the Act and schedules bears out the view which I take of its scope. Section 1 (2) (*a*) speaks of a workman being disabled from "earning full wages." Section 2 speaks of a workman voluntarily leaving the employment in which he was injured—language which does not seem to apply to an independent contract.

Again, the language of section 3, which relates to contracting out, plainly applies to the case of a servant and not that of a contractor.

And in section 9 we find the very expression "the workman's contract of service."

The appellant relied on the definition of the word "workman" (section 7)—"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."

Those words, in my opinion, simply apply to a workman engaged under a contract in which the relation of master and servant exists, and who is bound to do the work himself.

I would only add that, in my opinion, the 4th section does not even give any right to a contractor's servants against an owner of property who employs a contractor to build or repair his house but does not himself engage in or undertake the work.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the stated case by the Sheriff-Substitute of Lanark, on behalf of Malcolm M'Gregor, 14 Dick Place, Glasgow, Answer the question therein stated by declaring that the said Malcolm M'Gregor is excluded from claiming compensation by the terms of the 4th section of the Workmen's Compensation Act 1897; and in conformity with the foregoing judgment remit to the said Sheriff-Substitute to discuss the petition and dispose of the question of the expenses in the Sheriff Court, and decern: Find the respondent entitled to expenses in this Court, and remit the same to the Auditor to tax and to report to the said Sheriff-Substitute, to whom grant power to decern for the taxed amount of said expenses."

Counsel for the Appellant—G. Watt—Guy. Agents—Clark & Macdonald, S.S.C.

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