Tuesday, July 10.

SECOND DIVISION.

[Sheriff-Substitute Edinburgh.

STALKER *v.* WALLACE.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 4 *and* 7 (1) and (2)—"*Undertaker*"—*Construction of Building—Building Contractor Constructing Building for Himself—Work on Building Partly Performed by Workmen of Owner, Partly by Workmen of Contractors with Owner—Injury to Workman of Contractor.*

A tenement of houses was being constructed by a builder on his own ground and for his own behoof, the mason and joiner-work being executed by his own men. He entered into contracts with various contractors for the execution of other branches of the work on the tenement, such as, plaster-work, plumber-work, and painting-work, and he had no control over the workmen employed by these contractors. A workman in the employment of the plasterer was accidentally injured while engaged on the plaster-work of the building. The building was then over 30 feet in height, and scaffolding was being used in its construction. *Held* (*dub.* Lord Justice-Clerk) that the builder was the person "undertaking the construction" of the building in the sense of the Workmen's Compensation Act 1897, section 7 (2).

Section 4 of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), enacts as follows:—"When in an employment to which this Act applies the undertakers, as hereinafter defined, contract with any person for the erection 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 the Act to those workmen in respect of any accidents 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."

By section 7, sub-section (2) of the Act, "undertakers" "in the case of a building means the persons undertaking the construction, repair, or demolition."

Richard Wallace, building contractor, Edinburgh, appealed from the decision of the Sheriff-Substitute at Edinburgh (MACONOCHIE) in an arbitration under the Workmen's Compensation Act 1897, between Mrs Anna Elizabeth Betts or Stalker, widow of Knox Stalker, plasterer, Edinburgh, as an individual, and as legal guardian and administrator-in-law of her pupil child Bernard Edward Stalker, and the said Richard Wallace, in which the claimant Mrs Stalker claimed, on behalf of herself and her child, compensation from the appellant for the death of her husband.

In the case stated for appeal by him the Sheriff-Substitute stated as follows:—At the proof it was admitted . . . that the deceased at the time of the accident in question was engaged in an employment to which the provisions of the Workmen's Compensation Act applied; that the accident arose out of and in the course of the employment; and that the sum sued for was the sum due under the Act by the person who should be found liable to pay compensation. The other facts admitted or proved are as follows:—A tenement of dwelling-houses was being constructed by the appellant at 8 Heriot Hill Terrace, Edinburgh. On 10th March 1900, when the accident to Stalker occurred, the tenement was over 30 feet in height, and scaffolding was being used in its construction. The tenement was being constructed by the appellant on his own ground and for his own behoof, the mason and joiner work being executed by his own men. He is a builder and public works contractor, and never undertook to build houses for private persons, his business, except in so far as he built houses for himself, being entirely confined to the execution of public works. In July 1899 Messrs Meldrum & Son offered to execute the plaster work on said tenement at certain rates, and on 24th July the appellant accepted their offer. Other contractors offered to execute other branches of the work, such as the plumber work, painting work, asphalting, bellhanging, and gasfitting, of said tenement, and the appellant accepted offers by separate contractors for such branches. The appellant supplied the battens for Messrs Meldrum & Son's scaffolding, but Messrs Meldrum & Son supplied the trestles on which the battens were laid, and themselves erected the scaffolding and shifted the same. Messrs Meldrum were engaged in carrying out their said contract for the plaster work on 10th March 1900, when the deceased Knox Stalker, one of the workmen in their employment, fell from the landing of the first flat and received injuries from which he died on the same day. The appellant had no control over the workmen employed by Messrs Meldrum on the plaster work, or over the workmen employed by any of the other contractors. The respondent is the widow of the said Knox Stalker, and she and her pupil child, Bernard Edward Stalker, were wholly dependent on his earnings at the time of his death.

In these circumstances the Sheriff-Sub-

stitute found in law that the appellant was the person undertaking the construction of said tenement within the meaning of the Act, and that he was liable in compensation to the respondent, decerned against him for the sum claimed, viz., £300—payable £100 to the respondent and £200 to her pupil child Bernard Edward Stalker; and found the appellant liable to the respondent in expenses.

The question of law for the opinion of the court was—Whether upon the facts proved or admitted, the deceased was at the date of his death engaged in work of which the appellant was the undertaker within the meaning of the Act?

Argued for the appellant — He was not the undertaker in the sense of the Act. If a building owner employed his own servants to do the work of construction he was then the undertaker *de facto*—*Malcolm* v. *M'Millan*, January 30, 1900, 37 S.L.R. 383. And where a person who wished to have a building erected gave off contracts for specific portions of the whole work to different independent contractors, then these contractors were "undertakers"—*Mason* v. *A. R. Dean, Limited* [1900], 1 Q.B. 770; but if he contracted with one contractor to construct the building, and that contractor sub-contracted with various sub-contractors for the execution of various parts of the work, then the contractor, and not the sub-contractors, was the "undertaker"—*Cass* v. *Butler* [1900], 1 Q.B. 777; in other words the "undertakers" were the persons who contracted directly with the person, for whom as owner the building was being erected, for the performance of the whole or any specific portion of the work to be done. In the present case the appellant, who was the owner of the building, had given off a specific portion of the work, viz., the plaster-work, to an independent contractor, viz., Messrs Meldrum & Sons, and the latter, who had undertaken this portion of the work and employed in executing it their own men, over whom the appellant had no control, were the proper "undertakers" in the sense of the Act, and the appellant, who was the owner of the building was not the "undertaker" in that sense:—*Macgregor* v. *Dansken*, February 3, 1899, 1 F. 536; *Mason* v. *A. R. Dean, Limited* [1900], 1 Q.B. 770, opinion of Romer, L.J. 776; *Pearce* v. *London and South Western Railway Company*, [1900] 2 Q.B. 100.

Argued for the claimant and respondent —The appellant was the undertaker in the sense of the Act—*Burns* v. *North British Railway Company*, February 20, 1900, 37 S.L.R. 448. The cases of *Macgregor* and *Mason* quoted on the other side, supported the claimant's view by contrast. In these cases the person who wished the building erected had taken no part in the building operations, but had let out the whole work to independent contractors. But here the appellant undertook and executed the work himself, and merely contracted with another for a portion of the work. He was therefore liable under section 4 of the Act. Messrs Meldrum & Sons were not the undertakers, they were in the same position as the sub-contractors in the case of *Cass*.

LORD YOUNG—The part of this statute under which this case is raised is sub-section 1 of section 7, in terms of which the Act applies to employment by undertakers on, in, or about any building which exceeds 30 feet in height, and is being constructed by means of a scaffolding. Now, there is no doubt that the man who was injured here was engaged at the time that the injury happened in work on the employment of an undertaker (if the appellant here was an undertaker) in or about a building exceeding 30 feet in height. We are told in the case as matter of fact that the building was being constructed at the time by the appellant on his own ground and for his own behoof, the mason and joiner work being executed by his own men. The man who was injured was employed, not by the appellant, but by a firm of plasterers, Meldrum & Son, who contracted with the appellant to execute the plaster work on that building, and they having so contracted to execute the plaster work, employed the workman who suffered the injury. Now, there is no doubt that the injured man was not employed by the undertaker, if the appellant was the undertaker, but he was employed by a contractor with whom the undertaker contracted to execute the plaster work. The case therefore falls under clause 4 of the statute, again I say if the appellant was the undertaker. Now in my opinion he was the undertaker with reference to this building over 30 feet in height which was being constructed by him on his own ground and for his own behoof, and constructed by himself, the mason and joiner work being executed by his own men. If he was not the undertaker, there was no other undertaker in regard to the construction of this building. It was not being repaired or demolished, but it was being constructed, and in its construction it had reached a height of over 30 feet, and it was being constructed by him. Well, then, if he was the undertaker he was certainly not the employer of the workman who suffered here; but a contractor with him as undertaker was his employer, and that brings in in my opinion distinctly and clearly enough section 4, which says—"Where in an employment to which this Act applies"—that is, employment in, on, or about a building over 30 feet in height—"the undertakers as hereinafter defined"—I assume the appellant to be the undertaker as hereinafter defined—"contract with any person for the execution by or under such contractor of any work." Now, the firm of plasterers were just the persons with whom the undertaker contracted for the execution by or under such contractor of plaster-work upon this building. The statute goes on to provide that if the workman employed by such contractors suffers injury in the course of the work, and if his employers would have been liable if the statute had applied to them —that is to say, had they been the

undertakers — then the undertaker is to be responsible just as if the man had been employed by himself. He has relief against the employer of the workman who employed him under contract with himself as undertaker, if there is a ground of relief such as is specified in clause 4. Whether there was or not here we do not know, and have no occasion to inquire, but the workman who suffered was engaged in an employment coming within the Act, because it was employment in, on, or about a building over 30 feet in height, although he was employed, not by the undertaker, but by the contractor with the undertaker, and clause 4 makes the undertaker responsible. That leads exactly to the decision which the Sheriff has pronounced, and which I am of opinion therefore ought to be affirmed.

LORD TRAYNER — I am of the same opinion. In the case of *Macgregor* v. *Dansken*, referred to in the course of the debate, I used an illustration in the course of my opinion upon which the appellant in the present case to some extent founded. But in doing so I think he did not give full attention to the particular terms of the illustration. I repeat it. If A wishes to have a house built for him, and contracts with B to do it, B is the undertaker to build and not A. In this case the two characters in my supposed illustration, A and B, separate in the case I then put, are united. The statement of facts upon which we are to proceed given us by the Sheriff points this out well enough. This is a house which the appellant is building for himself—building for himself in the sense not merely that he is to pay for it, but building for himself in the more strict sense that he is actually constructing it, and his own men are doing the mason and joiner work of the tenement. He is therefore not merely what is called in some of the cases the building owner, or as I should prefer to put it, the owner of the building when built, but he is the builder of the house. He has undertaken to build a house for himself. He is the undertaker, and the persons that are assisting him in his work, although direct contractors with him, stand very much in the same position as the subcontractor mentioned in the statute. He is himself building this house, and he has contracted with others to do for him that which he cannot do for himself, such as the plumber and plaster work. I take it to be quite clear upon the statement of facts before us that the appellant is the undertaker in the sense of the statute, and that therefore the Sheriff's judgment ought to be affirmed.

LORD JUSTICE-CLERK—I have felt myself in this case very much in the same difficulty as was expressed by Lord Justice Romer in the case of *Lysons*, which was brought under our notice in an earlier part of the day, and I think I cannot do better than express myself in the same words—"I feel very great doubt upon this point, but I am not prepared to differ from the judgment of the rest of the Court."

LORD MONCREIFF was absent.

The Court answered the question in the affirmative.

Counsel for the Claimant and Respondent —Salvesen, Q.C. — D. Anderson. Agent — James Ayton, S.S.C.

Counsel for the Appellant—W. Campbell, Q.C.—Hunter. Agents — Dove, Lockhart, & Smart, S.S.C.

Thursday, July 12.

SECOND DIVISION.

[Lord Pearson, Ordinary.

KINCAID SMITH *v.* CAMERON.

Nuisance — Water Pollution — Superior Permitting Feuar's Sewage to Run through his Lands on to Property of Another — Superior and Vassal — Joint Delinquents—Interdict.

A superior feued part of his ground to a feuar, the titles providing that the superior was to be at no expense whatever in connection with drains, drainage, or sewage, except to provide a proper outlet for the same. The feuar sent his sewage through pipes on to the superior's lands, under an arrangement to the effect that the superior was to dispose of it by means of cesspools, but he failed to do so efficiently, and the sewage flowed down through a pipe, which the feuars had been allowed to lay in the lands of a neighbouring proprietor for the purpose of carrying off surface water only, into a water course upon that proprietor's lands, and polluted the water therein to his nuisance.

Held that, in a question with the injured third party, the feuar who produced the nuisance, and the superior who allowed it to pass through his land on to the other's property, were joint wrongdoers, and were both liable to interdict.

Major Ronald Kincaid Smith of Polmont House, Stirlingshire, presented a note of suspension and interdict against William Cameron, farmer, Crossgatehead, in the parish of Polmont, the School Board of Polmont Parish, and Mrs Jane Baxter or Grant, Alexander Hunter, and James Baxter, all residing there, in which the complainer prayed the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, and all others acting by their authority, from sending or discharging on, to, or upon the complainer's lands of Polmontside, in the parish of Polmont and county of Stirling, or into the drains or ditches within the complainer's said lands, or into the streams of water passing