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.

There were other conclusions in the action as brought which the pursuer did not maintain.

The parties' mother, Mrs Maclean, died on 31st July 1901, leaving a general disposition and settlement dated 13th June 1898, by which she appointed the defender sole executrix. On 4th November 1901 the defender was confirmed as executrix.

By her said disposition and settlement Mrs MacLean disponed to the defender her "whole means and estate, heritable and moveable, 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."

In a letter dated "Friday 1901," and sent by the pursuer to his mother and the defender, the pursuer wrote—"If mother is strong enough, Flo, tell her that I don't want to have this £300 as I am not in need of it and don't want people to think that I am in debt to you or mother, and to oblige me tell Mr MacCallum to alter the will and allow me to return this £300, and since you are to be trustee, Flo, I wish to be straight—I won't take one cent." Thereafter Mrs Maclean executed a codicil, which, however, was invalid.

The pursuer averred that the said £300 was money which had belonged to his father, who had predeceased his mother, the income of which was paid by the pursuer to his mother during her lifetime, and the capital of which was paid over to her by him some time before her death. The defender averred that at the date of the general disposition and settlement the said sum belonged to her mother, but was in the hands of the pursuer and was returned by him to his mother on 7th March 1901 and was thereafter immixed with her estate.

The defender pleaded, *inter alia*—"(4) The pursuer is barred by his actings from insisting in the present action. (5) Said legacy of £300 having been adeemed, the defender is entitled to absolvitor from the conclusion for payment thereof."

The parties renounced probation.

On 6th July 1907 the Lord Ordinary (MACKENZIE) pronounced the following interlocutor—"Repels the 1st, 2nd, 3rd, and 5th pleas-in-law for the defender: Ordains the defender to lodge an account of her intromissions as executrix-nominate of her mother Mrs Flora MacLeod or MacLean with the whole means and estate of her said mother, and that within fourteen days: Finds that the legacy of £300 bequeathed to the pursuer under the will of the said Mrs Flora MacLeod or MacLean, dated 13th June 1898, has not been adeemed; and continues the cause: Grants leave to reclaim."

Opinion.—[*After stating the facts*]—"The first question is whether the legacy of £300 was a special legacy. Unless it is held to be a special legacy the question of ademption does not arise. In my opinion the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific *corpus*. In such a case the legacy is general, to be made good out of the general fund, though the money should have been uplifted—Bell's Prins., sec. 1886. None of the cases cited by the counsel for the defender were like the present. In all of them there was either a specific subject, or in the case of money a particular bond, bill, deposit-receipt, or insurance policy. Here the bequest is of money which at the time happened to be in the pursuer's hands, but which he subsequently handed back. That, I think, is different from the case of a specific investment. I am accordingly of opinion that the defender's 5th plea-in-law should be repelled, and that there should be a finding that the legacy has not been adeemed. The 4th plea will stand over."

The defender reclaimed, and argued—The sum of £300 was not disponed to the defender as part of the testatrix's estate, but was severed from the estate and directly bequeathed to the pursuer, and, accordingly, it must be treated as a special bequest. This being so, when the sum was repaid to the testatrix and immixed with her estate it was adeemed—*Pagan* v. *Pagan*, January 26, 1838, 16 S. 383; *Jack* v. *Lauder*, July 27, 1742, M. 11,357; *Anderson* v. *Thomson*, July 17, 1887, 4 R. 1101, 14 S.L.R. 654; *Davidson's Trustees* v. *Davidson*, November 14, 1901, 4 F. 107; 39 S.L.R. 106; *Davies* v. *Morgan*, 1839, 1 Beavan 405. The fact that the proceeds of the subject were extant as part of the general estate did not exclude ademption if the subject itself had ceased to exist—*Manton* v. *Tabois*, 1885, 30 Ch. Div. 92.

Argued for pursuer (respondent)—The bequest to the pursuer was a general legacy and consequently there was no ademption. There was a strong presumption that the mention of a security in connection with a bequest was only to specify the amount, and that the bequest was not dependent on the security—*Chalmers* v. *Chalmers*, November 19, 1851, 14 D. 57, at p. 60. In the present case the words "which my son Alick has invested for me" merely gave the reason why the testatrix had fixed on the sum of £300; they referred to a past event, and there was no condition implied that the sum should be found so invested at her death. Hence the legacy was general—Bell's Prins (10th ed.), sec. 1886; and the cases quoted by the defender—in each of which there was either a bill or a bond or a deposit-receipt—were not applicable.

LORD LOW—The first question in this case appears to me to be whether the legacy of £300 left to the pursuer by his mother was a special legacy? The Lord Ordinary has answered that question in the negative, holding that "the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific *corpus*." I confess that I am unable so to read the bequest. The testatrix left to her daughter her whole means and estate "with the exception of £300 sterling of mine which my son Alick has invested for me, and which I do hereby leave and bequeath to himself." The parties have renounced probation, but it appears from the pleadings that they are agreed that at

the date of the will the pursuer had in his hands £300 belonging to his mother, which he subsequently repaid to her.

The pursuer's argument was that the words "which my son Alick has invested for me" are to be regarded as being no more than a statement of the reason which led the testatrix to fix the amount of the legacy at £300. That argument is ingenious, but I do not think that it is in accordance with the natural meaning of the language used. No doubt the fact that the pursuer had £300 of his mother's money in his hands when she made her will was the reason why she bequeathed that sum to him, but the bequest was of the very sum which he had in his hands and no other. It cannot be assumed that if the pursuer had not had the £300 in his hands his mother would have left him a legacy of that amount, or of any amount.

Now, of course, a will operates at the date of the testator's death, and the question comes to be whether at Mrs MacLean's death there was any sum of £300 answering the description in the will? Plainly, there was not, and accordingly I am of opinion that the pursuer's claim to the legacy cannot be sustained.

LORD ARDWALL — The only question argued in the debate in this reclaiming note is whether the legacy of £300 bequeathed to the pursuer under the will of Mrs Flora MacLeod or MacLean, dated 13th June 1898, has or has not been adeemed. In this case it is not the facts constituting ademption and the legal effect of these that are in dispute so much as the question whether the above-mentioned legacy was or was not susceptible of ademption, and the solution of this question depends on the further question, viz., whether or not the legacy was a general or a special legacy.

I am of opinion that the legacy was a special legacy of a specific sum of money. The parties have renounced probation, and I think it unfortunate that they have not adjusted a minute of admissions of facts which must be known to both of them and which could not admit of dispute, the admission of which would have tended to simplify the discussion and the determination of the case. From the words of the deed itself in so far as they designate the subject of the bequest neither party takes much benefit. On the one hand, it tells in favour of the defender's contention that the sum bequeathed is excepted altogether from the *universitas* of the testatrix's estate disponed to Mrs MacLean. For the pursuer, again, it may be urged that the description "which my son Alick has invested for me" seems to point to this, that the testatrix regarded the £300 as simply a portion of her estate which had been invested on her behalf and in her name by her son the legatee. But the question whether a legacy is a legacy of a specific sum or not is one of fact, and on the record as it stands the facts appear to be as follows —At the date of Mrs MacLean's settlement a sum of £300 belonging to her was in the hands of her son the pursuer. The income of this sum was then being paid by the pursuer to his mother. It is an inference in fact from the statements of parties, and the terms of the letter dated Friday 1901, that the pursuer had not invested this sum in his mother's name, but either invested it in his own name or made use of it in his business. But this fact is clear, that it was a sum which was in the pursuer's hands at the date of the will, and which he was bound to account for and pay to his mother if requested to do so. It was thus a sum due by the pursuer to his mother, and thus constituted a debt due by him to her. Accordingly on 7th March 1901 the pursuer paid to his mother the said sum of £300, apparently in cash or its equivalent, and not by transferring shares or other investments to her.

On these facts, I am of opinion that the legacy was the bequest of the specific sum of £300 due to the testatrix by her son at the date of the execution of her will. This being so, the subject of the bequest ceased to exist by the payment of the £300 to the testatrix and the merging of it in her general estate. Then at the death of the testatrix the subject of the bequest being no longer in existence, the legacy must be held to have suffered ademption.

The question as to whether a legacy has been adeemed or not is purely one of fact. This has been settled in a variety of cases both in Scotland and England, several of which were cited to us at the debate. They are reviewed in Lord Ormidale's judgment in the case of *Anderson* v. *Thomson*, 1877, 4 R. 1101, who in referring to the judgment of Lord Thurlow in the cases of *Ashburne* v. *M'Guire* and *Stanley* v. *Potter*, says that it is firmly established in England "that the test of ademption is whether the specific thing bequeathed by a testator continued to exist at his death or had been converted into something else, and this independently altogether of the *animus adimendi*, a consideration which has been discarded on the ground that it is calculated to create confusion and uncertainty," and he thereafter points out that there are Scotch cases to the same effect.

I am therefore of opinion that the Lord Ordinary's interlocutor, in so far as it finds "that the legacy of £300 bequeathed to the pursuer under the will of the said Mrs Flora M'Leod or Maclean, dated 13th June 1898, has not been adeemed," ought to be recalled, and that the Court should find that said legacy has been adeemed, and remit the cause to the Lord Ordinary to proceed therewith.

LORD STORMONTH DARLING—I concur.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor in so far as it found that the legacy to the pursuer had not been adeemed, and sustained the fifth plea-in-law for the defender.

Counsel for Pursuer and Respondent—MacRobert. Agents—Young & Falconer, W.S.

Counsel for Defender and Reclaimer—Chree. Agent—A. Ross, S.S.C.