Tuesday, December 4.

SECOND DIVISION.

[Sheriff Court at Greenock.

BELL *v.* ADAM & COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*Factory—Undertakers—Occupiers—Contractor Removing Plant from Another's Factory is not the Occupier—Construction, Repair, Demolition of Building—Temporary Removal of Floors and Opening of Wall to Remove Machinery—Section* 7, *sub-sections* 1 *and* 2.

The Workmen's Compensation Act 1897 provides, section 7 (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . factory . . . and to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ." (2) "In this Act 'Undertakers' in the case of . . . a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895 . . . and in the case of a building means the persons undertaking the construction, repair, or demolition."

A firm of coppersmiths were executing a contract for the dismantling and removal of a vacuum pan from a building over 30 feet in height, used as a sugar refinery. Solely in order to facilitate operations a scaffolding had been erected and portions of the floors removed and an opening made in the main wall of the building measuring 11½ feet by 11. One of the workmen employed by the firm of coppersmiths was injured while lowering a portion of the pan.

Held, in a stated case on appeal under the Workmen's Compensation Act 1897, (1) that, assuming the building to be a "factory," his employers were not the occupiers, and, as such, "undertakers" in the sense of section 7, sub-section 2.—*Wrigley* v. *Whittaker & Sons*, [1902] A.C. 299, *followed*; and (2) that the building was not being constructed or repaired by means of a scaffolding, or being demolished, in the sense of section 7, sub-section 1.

In an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute of Renfrew and Bute at Greenock, between Mrs Annie M'Farlane Rennie or Bell as an individual and as tutrix and administratrix-in-law for her pupil children, and William Adam & Company, coppersmiths, Greenock, the Sheriff-Substitute (NEISH) refused the application for compensation.

A case for appeal was stated.

The case gave the following facts as admitted or proved:—"(1) The appellants, Mrs Bell, Frank Bell, aged seven, Etta Bell, aged five, Flora Bell, aged three, and John Bell, aged one year and seven months, are the widow and children of the deceased Robert Galbraith Bell, and were wholly dependent upon his earnings at the date of his death. (2) If the appellants are entitled to compensation, the parties are agreed that the amount to be awarded is £293, 19s. 3d. (3) On 29th January 1906 Bell was in the employment of the respondents William Adam & Co., coppersmiths, Dock Breast, Greenock. (4) The Roxburgh Company, Limited, and the respondents contracted for the dismantling and removal by respondents, in sections, of a vacuum pan from a disused sugar refinery in Roxburgh Street, Greenock. (5) On said date Bell was employed by respondents, along with other workmen, in the work of removing the said vacuum pan. (6) The said refinery is part of a range of buildings known as the 'Roxburgh Refinery,' belonging to the Roxburgh Company, Limited. (7) The building in which the vacuum pan was situated is distant one mile from the respondent's works, consists of nine flats, and is over 30 feet in height. (8) The vacuum pan was made of copper, with a bottom jacket of cast-iron, having 4 cast-iron feet which rested upon an iron beam covered with a layer of cement in order to make it level. The cement had to be broken in order to remove the pan. (9) The top of the pan reached to nearly the ceiling of the fourth flat, and an iron beam, upon which the bottom of the pan rested, was situated about half-way between the second and third floors. (10) For one week prior to 29th January 1906 workmen in the employment of respondents had been engaged in said building disconnecting portions of the pan and laying them upon the floors of the building, prior to their being lowered to the ground. (11) Chain and rope tackling and relative blocks required for the purpose of lowering the portions of the pan, and in use at the time of the accident after mentioned, were brought to said building from respondents' works, and belonged to respondents. (12) On said date Bell and his fellow-workmen were engaged in lowering, through an opening in the different flats made by the removal of another vacuum pan, the top of the pan, known as the 'swan neck.' (13) The 'swan-neck' was lowered as far as the second flat by block and chain tackle. (14) Owing to the chain-tackle being too short, it was found necessary to transfer the load to a block and rope tackle, which was fastened to an iron beam on the fourth flat. (15) When the load had been transferred to the rope-tackle, the chain-block was released from its hold to the fourth flat, and a guide-rope attached to enable it to be lowered along with the 'swan-neck.' (16) Bell was standing on a plank across an opening on the fourth flat, paying out the guide-rope. (17) None of the weight which was being lowered, except the chain-block, was upon the guide-rope. (18) The fall of the rope and block tackle, which carried the weight, was cast round a pillar on the second flat, and was being paid-out by one of Bell's fellow-

workmen. (19) The rope-tackle gave way owing to the standing part of the rope being passed through the thimble attached to the lower block, instead of round the thimble, with the result that the thimble opened out. (20) When the tackle gave way the 'swan-neck' fell to the ground. (21) Immediately thereafter Bell fell to the ground and was killed. (22) The respondents' workmen continued in said building for some weeks after the accident, completing the work of disconnecting and removing the pan. (23) Mr Leckie, as partner of respondents' firm, daily visited the building and the work during the whole period over which the work extended. (24) The building in which the accident occurred was part of a Customs bonded warehouse, No. 27, which also included adjacent buildings. It was about one mile distant from the dock. (25) The said building had been used for the storage of sugar in bond, but at the time the accident occurred no goods were in fact stored in this part of the bonded warehouse, and no persons but respondents' workmen were in this part of the bonded warehouse. (26) At the date of the accident the Roxburgh Company were bound to accept for storage in said bonded warehouse goods in bond tendered to them by the public. (27) There was in the building, when the accident occurred, a hoist for the purpose of facilitating the storage of sugar in the various flats. (28) The hoist was worked by a winch supplied with steam from a boiler in an adjacent building, which also belonged to the Roxburgh Company. Steam was supplied from the said boiler to other adjacent buildings belonging to the Roxburgh Company. (29) The hoist was not used for the purpose of lowering the vacuum pan, but some days after the accident the hoist was raised by steam clear of the ground in order to take it out of the way of the 'swan neck.' (30) No machinery driven by steam, water, or other mechanical power was used for the purpose of removing the said pan. (31) In order to remove the said pan, (1st) a scaffolding, formed of planks on barrels, about 4 feet high had been placed on the second floor, before the accident, for the purpose of disconnecting the steam pipes attached to the pan; (2nd) portions of the floors of the building, which were formed of brick and cement, and the said iron beam on which the pan rested, were removed; and (3rd) an opening was made in the main wall of the building, measuring 11½ feet by 11 feet. (32) The operations numbered 2 and 3 in the above finding were not performed by the respondents, but by a firm of bricklayers—Alexander Whitelaw & Company. (33) Whitelaw & Company were instructed to do this work by the respondents through Mr Leckie, who is a director of the Roxburgh Company, and also a partner of the respondents' firm. (34) Whitelaw & Company were paid for the work they did by the Roxburgh Company, their account having been previously initialled by Mr Leckie. (35) Previous to the operations connected with the accident the Roxburgh Company had sold and removed nearly the whole of the plant and utensils in the said building, which were connected with its original use as a sugar refinery, with the result that large open spaces were left in the various floors, where the plant and utensils had stood, and that there had been some interference with the brick and cement structure of the floors in order to remove the plant and utensils. The effect of removing the pan in question was to leave an additional number of open spaces in the third and fourth flats of the building. Neither at the time of the accident nor at any other time was there any interference with the structure of the building except for the purpose of removing the plant and utensils. (36) Neither at the time of the accident nor at any other time had the directors of the Roxburgh Company resolved to demolish the building in which the accident occurred."

Upon these facts the Sheriff found—"(1) That the said Robert Bell was killed by an accident arising out of and in the course of his employment. (2) That the accident was not attributable to the serious and wilful misconduct of the deceased. (3) That the building in which the accident took place was a factory within the meaning of the Workmen's Compensation Act 1897. (4) That the respondents were not the undertakers within the meaning of the said Act. (5) That the said deceased Robert Bell was not employed at the time of the accident in or on or about a building which was either being constructed or repaired by means of a scaffolding, or being demolished. (6) That if it be held that the removal of a portion of the floors and the iron beam, and the making of a hole in the wall (all as set forth in finding 31) amounted to a demolition of the building, the defenders were not the undertakers within the meaning of the said Act."

The Sheriff accordingly refused the application.

The questions of law for the opinion of the Court were as follows:—"1. Was the building in which the accident took place a factory within the meaning of section 7 of the Workmen's Compensation Act 1897? 2. If the immediately preceding question is answered in the affirmative, were the respondents at the time of the accident occupiers of the factory, and, as such, undertakers within the meaning of the said section? 3. Was the building at the time of the accident being constructed or repaired by means of a scaffolding, or being demolished, within the meaning of section 7, subsection 1, of the Act. 4. If the immediately preceding question is answered in the affirmative, were the respondents persons undertaking the construction, repair, or demolition, and, as such, undertakers within the meaning of section 7, sub-section 2, of the Act?"

Argued for the appellants — (1) The building in question was a warehouse and so a factory—*Green* v. *Britten & Gilson*, [1904] 1 K.B. 350. It was not necessary that a warehouse should be used in connection with a dock to be a factory—*Willmot* v. *Paton*, [1902] 1 K.B. 237; *M'Ewan* v. *Magistrates of Perth*, March 16, 1905, 7

F. 714, 42 S.L.R. 456—but this was so used, being a bonded warehouse used for storing imported sugar. It was a "tenement factory" under sections 11 and 149 of the Factory and Workshop Act 1901 (I Ed. VII. cap. 22). (2) The respondents were the occupiers of the factory, and therefore the undertakers. It was not necessary to have exclusive occupation — *Raine* v. *Jobson*, [1901] A.C. 404; *Merrill* v. *Wilson*, [1901] 1 K.B. 35; *Bartell* v. *Gray*, [1902] 1 K.B. 225; *Weavings* v. *Kirk & Randall*, [1904] 1 K.B. 213. The cases of *Wrigley* v. *Whittaker & Sons*, [1902] A.C. 299; *Francis* v. *Turner*, [1900] 1 Q.B. 478; *Cooper & Greig* v. *Adam*, May 30, 1905, 7 F. 681, 42 S.L.R. 562; and *Purves* v. *Sterne & Co., Limited*, May 22. 1900, 2 F. 887, 37 S.L.R. 696, were distinguishable, being cases of access without use or occupation. (3) The building was being demolished; demolition could be partial. Construction, demolition, and repair covered everything which could be done to a building. If the work being done was not demolition, it was construction or repair—*Hoddinott* v. *Newton, Chambers, & Co.*, [1901] A.C. 49, *per* Lord Macnaghten; *Dredge* v. *Conway, Jones, & Co.*, [1901] 2 K.B. 42. The respondents were the undertakers of the work. Whitelaw & Company were sub-contractors under them. The work was not "merely ancillary" to their trade—*Bee* v. *Ovens & Co.*, January 25, 1900, 2 F. 439, 37 S.L.R. 328; *Burns* v. *North British Railway Co.*, February 20, 1900, 2 F. 629, 37 S.L.R. 448.

Argued for the respondents—(1) The building was not a factory. Section 104 of the Factory and Workshop Act 1901 referred only to warehouses used in connection with docks—*M'Ewan* v. *Magistrates of Perth, supra; Colvine* v. *Anderson & Gibb*, December 18, 1902, 5 F. 255, 40 S.L.R. 231. (2) The respondents were not occupiers or users of the factory—see *Francis* v. *Turner, supra; Wrigley* v. *Whittaker & Sons, supra; Houlder Line, Limited* v. *Griffin*, [1905] A.C. 220; *Malcolm* v. *M'Millan*, January 30, 1900, 2 F. 525, 37 S.L.R. 383; *Purves* v. *Sterne & Company, Limited, supra; Cooper & Greig* v. *Adam, supra; Stewart* v. *Darngavil Coal Company, Limited*, January 14, 1902, 4 F. 425, 39 S.L.R. 302. *Weavings* v. *Kirk & Randall, supra*, was inconsistent with the other decisions. The respondents could not be fined if they did not carry out the regulations imposed by the Secretary of State on occupiers in the case of dangerous trades—see sections 79 and 105 of the Factory and Workshop Act 1901. (3) This was not a case of demolition. Lord Macnaghten's remark in *Hoddinott* was unnecessary. The including of trifling partial demolition was contrary to the spirit of the Act. Demolition was such operation as would destroy the physical characteristics of the building as such. (4) The respondents were not the undertakers of the work of demolition, but merely contractors for a coppersmith job. The work of demolition was "merely ancillary" to that of the coppersmiths—Workmen's Compensation Act 1897, section 4; *Bush* v. *Hawes*, [1902] 1 K.B. 216.

LORD JUSTICE-CLERK—In this case I am of opinion that the Sheriff's decision is right and ought to be adhered to.

The person injured was engaged in removing a vacuum pan from a disused sugar refinery as the servant of the respondents, who had contracted to do the work.

I am unable to see any ground for holding that the respondents in doing this work were the occupiers of a factory. They had no factory there, and the work they were doing had nothing about it which would constitute the place at which it was being done a factory occupied by them in any sense. The case of *Wrigley* v. *Whittaker*, following on the case of *Francis*, seems to me conclusive on this point.

That being so, the next question is, whether what was being done was either construction, repair, or demolition of a building. I am of opinion that it was not any one of these things. There was no construction of a building going on, and there was nothing that could be called repair of a building going on. Therefore if the clause relating to building, &c., is to apply it must be under the head of demolition.

This was the ground of claim which Mr Moncrieff placed in the forefront of his argument. I have considered this matter, and have come to a decided opinion that the work being done cannot be held to fall under the head of demolition. "Demolition" is a very emphatic and clear expression, and must, I hold, be taken in its natural sense. Here there was no intention to demolish the building, but only to take out of it some bulky copper fittings which were not part of the structure, except it may be in a legal and technical sense, but I think plainly not in a sense applicable to a clause dealing with the construction, repair, or demolition of buildings. It does not, in my opinion, make any difference that, for the purpose of removing the pan, it was necessary to make a slap in the wall. That was not in any sense demolition.

A great deal of argument was addressed to the Court on the question whether this case fell under the Act in respect it took place in a "warehouse." The views I have expressed make it not necessary to deal with this matter. But I may say that the appellant admitted in argument that he could not maintain that if the place were a "warehouse" that necessarily brought it under the Act in respect of the importation of the clause of the Factory Act which brought in a warehouse as a place to which the Act applied. It was frankly admitted by the appellant that if this was to be held, it could only be if the place was a warehouse in respect of its relation to a "dock." Then the fact is that the building, which had been part of a sugar refinery, was not in juxtaposition with any dock, the nearest dock being a mile off. It would seem to be the true reading of the clause in the Factory Act that the warehouse must be connected with a particular place used as a dock, not a warehouse in the sense only that what it was used for was similar to the use made of a warehouse in or at a dock.

In any case I should not be able to hold, even if this were a warehouse in any true sense, that it was occupied by the respondents as being a warehouse when they were removing this pan.

LORD STORMONTH-DARLING — The employers here are a firm of coppersmiths in Greenock, and they were, at the time of this fatal accident to one of their workmen Robert Bell, in course of executing a contract for the dismantling and removal in sections of a vacuum pan from a disused sugar refinery in Roxburgh Street, Greenock. There is no dispute that the accident was one arising out of and in the course of his employment. The building in which it occurred is distant one mile from the respondents' works, and is over thirty feet in height. It is also one mile distant from the dock, but it had been used as part of a Customs bonded warehouse, and although at the time of the accident no goods were in fact stored in that part of the warehouse where the accident occurred, the owners were still bound to accept for storage goods in bond tendered to them by the public. The nature of the operations for the removal of the pan, in the course of which the accident occurred, are described by the Sheriff, who adds that neither at the time of the accident nor at any other time was there any interference with the structure of the building except for the purpose of removing the plant and utensils.

These being the material facts, the questions of law which arise are really only two in number:—(1) Were the respondents at the time of the accident persons undertaking the construction, repair, or demolition of this building, and as such "undertakers" within the meaning of section 7, sub-sections (1) and (2), of the Workmen's Compensation Act 1897? and (2) Assuming the building to have been a factory within the meaning of the said section, were the respondents at the time of the accident occupiers thereof and as such undertakers in the sense of that section? If both of these questions are answered in the negative, as I think they must be, the Sheriff was right in refusing the application of the widow and children for compensation as dependants of the workman.

First, I take the operations on the building viewed simply as a building. It was of the required height of over thirty feet, so no difficulty arises on that head. It contained an internal scaffolding about four feet high, and the use of a scaffolding is made a condition of the liability of undertakers by section 7 (1) wherever a building is being either constructed or repaired; but it has been decided by the House of Lords in *Hoddinott's* case, [1901] A.C. 49, that the scaffolding may be either external or internal and may be of quite simple construction, so no difficulty arises upon that head either. But the appellants must still make out that this building was undergoing construction, repair, or demolition. I think in the able argument on their behalf most stress was laid on demolition. Now, I am wholly unable to assent to the view that in any reasonable sense this building was being "demolished." There was no interference with the structure, except for the limited and temporary purpose of removing some of the plant and utensils which had been connected with its original use as a sugar refinery. But nothing was further from the mind of its owners than to demolish it, for they intended to make it more useful than it had been as a bonded store or warehouse. In my view it is equally vain to say that it was either being "constructed" or repaired." There is no fact found by the Sheriff which would entitle us to hold that the building was even partially worn out or in need of "repair." Then as to "construction," stress was laid on a passage in Lord Macnaghten's opinion in *Hoddinott's* case, in which he said—straying for the moment perhaps rather into the region of epigram—"construction, repair, demolition, these three operations cover, I think, every varying phase in the life of a building from its beginning to its end." But the facts there were, that a building believed to be complete had been found, when it came to be used within six months of its erection, to require some stiffening, and it was put into the hands of contractors for the insertion of some heavy iron stays between the girders and the pillars which supported it. What the House of Lords rejected was the notion that construction must be limited to original construction, or that you must have construction "as a whole." But how can the operations on this building be reasonably assimilated to operations intended, like those in *Hoddinott's* case, to make the original structure more firm and substantial? I find it impossible therefore to hold that this building at the time of the accident answered any one of the statutory requirements of being constructed, repaired, or demolished.

When I turn to the separate question of whether the respondents were occupiers of this building as a "factory," I am of opinion that the question is concluded by the judgment of the House of Lords in *Wrigley* v. *Whittaker & Sons*, [1902] A.C. 299, where it was held that the reference in section 7 (1) to employment by the undertakers on or in or about a factory means on or in or about their own factory, and consequently that a workman who was sent by his employers on their business to a factory in respect of which they were not the occupiers, and therefore not the undertakers within the meaning of the Act, was not entitled to compensation from them for an injury which he received there. This case expressly approved a decision of the Queen's Bench Division delivered by A. L. Smith, L.J., in *Francis* v. *Turner Bros* [1900], 1 Q.B. 478, and it was followed by the First Division of this Court in *Cooper & Greig* v. *Adam*, 7 F. 684.

These conclusive authorities make it quite unnecessary to consider questions which have been raised as to "the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part

thereof," being thereby deemed to be the occupier of a factory, and therefore an undertaker. Whether the respondents here were in the actual use or occupation of this warehouse, or whether it was a warehouse at all in the sense of the Act, matters not. The place where the accident occurred was not a factory of theirs, and section 7 (1) applies "only" to employment by the undertakers in or about their own factory.

LORD LOW—The first question of law which is stated in this case is—"Was the building in which the accident took place a factory within the meaning of section 7 of the Workmen's Compensation Act 1897?"

I do not think that the facts which are stated in the case are sufficient to enable us to answer that question, but assuming that the building was a factory within the meaning of the Act, I think that we are in a position to answer the second question, namely—"Were the respondents at the time of the accident occupiers of the factory, and, as such, undertakers within the meaning of the said section?"

I am of opinion that that question must be answered in the negative. It is settled by the House of Lords in the case of *Wrigley* v. *Whittaker & Sons*, [1902] A.C. 299, that the enactment in section 7 (1) of the Workmen's Compensation Act, namely —"This Act shall apply only to the employment by the undertakers as hereinafter defined on or in or about a factory"—means employment on or in or about their own factory. Here the building in which the accident took place was not the factory of the respondents. Even, however, if the building had been a factory within the meaning of section 7 (1), I should have been prepared to hold that the respondents were not the occupiers thereof within the meaning of the Factory and Workshop Acts, and were therefore not the "undertakers" in the sense of the statute.

The third question is—"Was the building at the time of the accident being constructed or repaired by means of a scaffolding, or being demolished within the meaning of section 7 (1) of the Act?"

The provisions of the Act which are there referred to are, that the Act shall apply to employment by the undertakers "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."

It was argued that the building in question was being demolished when the accident occurred, because in order that the vacuum pan which was being removed might be taken out of the building, it was necessary to make an opening in the main wall measuring 11½ feet by 11 feet.

I think that the word "demolished" in the Act must be read according to its ordinary and natural meaning, and if so, it is plain that the building in question was not being demolished.

LORD KYLLACHY (who was present at the hearing) was absent at the advising.

The Court pronounced this interlocutor—

"Find it unnecessary to answer the first question: Answer the second and third questions in the negative, and find that this supersedes answering the fourth question."

Counsel for the Appellants — Hunter, K.C. — Moncrieff. Agents — Laing & Motherwell, W.S.

Counsel for the Respondents—Constable — Jameson. Agents — Bonar, Hunter, & Johnstone, W.S.

Tuesday, December 4.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

SINCLAIR'S TRUSTEES AND OTHERS *v.* LANARKSHIRE MIDDLE WARD DISTRICT COMMITTEE.

Road—Reparation—County Council—Property—Powers of Road Authority—Maintenance and Repair—Rights of Frontager to Road—Title to Sue—Ultra vires—Alteration of Road by Road Authority Giving Right to Frontager to Sue for Damages or Compensation—Turnpike Roads Act 1831 (1 *and* 2 *Will. IV, cap.* 43) *—Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51)*—Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 50).

A county road authority deviated latterly, and raised the level of, one of its roads. Certain subjects described as "bounded" by the road, while still having immediately in front an uncovered portion of the old roadway, had beyond that a high retaining-wall and embankment, and had as their access only the uncovered portion of the old roadway back to where the deviation began. The alteration had been carried through by the road authority in agreement with a tramway company incorporated by Act of Parliament, whose Act, incorporating the Lands Clauses Act 1845, had empowered the company, to contribute a certain sum to the road authority for the execution of certain specified works and any other improvements, widening or diversion of highways adjacent to the tramways, and to purchase and convey to the road authority so much as was required therefor of the land delineated on a plan. The land used for the deviation and levelling of the road in question was delineated on the plan and had been acquired and conveyed to the road authority under the Act, but the alteration of the road in this place was not among the specified works.

The owners of the subjects having sued the road authority for damages for injury to their property, or alternatively for compensation for injurious affection thereof, the road authority