expenses due to or by either party; and decerns."

The petitioners appealed to the First Division, and argued that what they proposed to make was not "a new street or part thereof or court"—*Mair* v. *Thomson*, December 14, 1897, 25 R. 238: *Taylor* v. *Metropolitan Board of Works* [1867], L.R., 2 Q.B. 213, at 221; *Queen* v. *Fullford* (1864), 33 L.J. (M.C.) 122.

At advising—

LORD PRESIDENT—Upon the information before us it appears to me very doubtful whether the space in question is a "court" within the meaning of the Burgh Police (Scotland) Act 1892, and upon the whole I am disposed to think that it is not. Section 4 (10) of that Act declares that "court," where by the context it applies to a "space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto." It does not appear to me that the lodging-house will constitute or contain premises separately occupied in the sense of this definition, as I understand that the lodgers will merely have a right to occupy separately for a night, or for a longer period, a bedroom, cubicle, or bed, while they will also have the use of other rooms and conveniences in common. Their position will thus be very similar to that of guests in a hotel. It appears that buildings abut upon each side of the space where it enters from Church Street, but I understand that it does not at present form an access to any of these buildings, although it might come to do so if doors were opened in them.

I am, however, of opinion that the space in question is a "street" within the meaning of section 152 of the Act of 1892. The definition of "street" in section 4 (31) of that Act is very large, and it, in my judgment, includes a "private street," which the definition of "street" in the Burgh Police Act of 1862 did not include. I also think that it is not necessary that a space should be a thoroughfare in order to bring it within the definition, nor is it, in my judgment, requisite that the public should have a right of access to it. Where the space enters from Church Street, houses abut upon it at each side, and apparently back buildings nearly approach it on the north or north-east side, while, as it is continued inwards to the proposed lodging-house, it will form an access for the large number of persons who will occupy that house, or who will go to it seeking accommodation, or taking supplies, or to visit lodgers. From the nature of the place there will evidently be in fact a large resort of the public to it, and even although a gate should now be placed across the entry from Church Street, and the existing wall should be kept up, or a gate placed at the other end to shut the space off from the public bleaching-green, there is no security, and little probability, that these barriers will be maintained. In any view it may be assumed that a considerable number of persons other than actual lodgers will use the space. But even if a gate should be placed and maintained at the Church Street entrance, and the space should remain closed to the public bleaching-green, it appears to me that it will satisfy the definition of "street" in the Act of 1892.

I may add, that having regard to the use of the space in connection with the lodging-house, as well as to the other uses to which it may be afterwards put in connection with the adjoining properties and the public green, it seems to me that the considerations of policy which led to the enactment of section 152 of the Act of 1892 apply to it.

I therefore think that the interlocutor of the Dean of Guild should be recalled in so far as it contains the words "or court" in the second and fifth findings, and that *quoad ultra* it should be affirmed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Find that the space in question is a 'street' within the meaning of section 152 of the Burgh Police (Scotland) Act 1892: Recal the said interlocutor in so far as it contains the words 'or court' in the second and fifth findings thereof: *Quoad ultra* affirm the said interlocutor, and decern: Find the petitioners and appellants liable to the respondents in the expenses of the appeal," &c.

Counsel for the Petitioners — Chree. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents — Cullen. Agents—Carmichael & Miller, W.S.

Thursday, January 25.

SECOND DIVISION.

[Sheriff-Substitute of Lothians.

BEE *v.* THOMAS OVENS & SONS.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 4—*Liability of Occupier of Factory to Employee of Carting Contractor Injured in Factory.*

A carter in the employment of a carting contractor was injured within the precincts of a factory when he was bringing raw material to the factory for use therein. He had for some time prior to the date of the accident been employed almost daily doing carting work in connection with the business of the factory, and his immediate employers the carting contractors were under contract to do all the carting required in connection with the factory business. The raw material for use in the factory was all brought to, and the finished product was all taken away from it in carts. *Held* (1) that the work of carting in which the workman was engaged was not merely ancillary or

incidental to, but was part of the trade or business carried on in the factory, and (2) that the occupiers of the factory were bound, under section 4 of the Workmen's Compensation Act 1897, to pay compensation to the workman notwithstanding that he being employed as a carter by a carting contractor, was not directly employed in an employment to which the Act applied, and consequently had no claim under the Act against his immediate employers, the carting contractors.

This was an appeal upon a case stated in the matter of an arbitration under the Workmen's Compensation Act 1897 between Robert Bee, carter, Leith, claimant and respondent, and Thomas Ovens & Sons, manufacturers of sulphuric acid and chemical fertilisers, Leith, appellants.

The facts stated by the Sheriff-Substitute (SYM) were as follows:—"The appellants are manufacturers of and dealers in feeding stuffs and chemical manures. They import and store in their own stores, or those of others, the raw materials, make them up in their works, and deliver them to their customers, or to a common carrier for their customers. Part of their raw material is brought by sea to Leith Docks, and thence carted to their stores or their factory. Another part is brought by rail to various railway stations in Leith, and this part is carted from the ordinary goods stations in or near Leith.

"The works of said Thomas Ovens & Sons form a factory in the sense of the Factory and Workshop Acts.

"The appellants have no carts or horses of their own. They do not cart for profit, but simply to give delivery to their customers or take delivery from merchants when carting is needed for these purposes. In order to have their carting done they have a contract with Cowan & Company, carting contractors. It is constituted by letters by which they (the appellants) 'agree to give you' (Cowan & Company) 'our cartage' at certain rates, Cowan & Company 'always to keep us well supplied with carts.' Sometimes, *e.g.*, when a ship has to be discharged, the appellants require numerous carts. At other times they have little carting to be done, but nearly always they require the services of at least one cart, and therefore one of Cowan & Company's carters goes to them almost every morning, and when required is employed there in miscellaneous carting for them.

"The customers of the appellants sometimes have their goods put free on rail for them at one of the Leith stations. The carriage is then paid altogether by the appellants. Sometimes the contract is that the customer pays carriage, in which case he is charged with cartage to the station by the carts supplied to the appellants by Cowan & Company, as well as with railway freight.

"For some time before June 1899 Robert Bee, the respondent, one of the carters employed by Cowan & Company, had been engaged in the work of the appellants almost daily, obeying the directions of their foreman as to the work which he had to do.

"The respondent's wages were 21s. per week.

"On 5th June 1899 the respondent in the course of his ordinary duties drove a cart of maize from a store in Leith to the appellant's factory, and while taking it to the hoist to be sent up into the mill he was accidentally crushed between the near or left shaft of the cart or lorry and the wall of the building, part of the factory into which he was leading his horse. In this manner he received severe injury to his collar-bone and right arm, whereby he has been, and will for some time be, incapacitated for his work as a carter.

"The appellants denied liability, under the Workmen's Compensation Act 1897, to pay compensation to the respondent, whom they did not employ, although he was injured 'in or about' their factory, on the grounds that carting was not an essential part of their work as makers of and dealers in manures and feeding stuffs, and section 4 of the Workmen's Compensation Act 1897 did not apply to the case. In any view, they maintained that carting was merely 'ancillary or incidental to, and no part of or process in the trade or business carried on by them,' and therefore that section 4, assuming that it would otherwise have applied, was excluded."

The Sheriff-Substitute was of opinion that the appellants were the undertakers in the sense of the Act; that the case was the same as if the respondent had been in the employment of the appellants; and that the work of putting the material into the mill, or giving delivery of the finished article by cart to the customer was a part of the business which they carried on. He accordingly gave decree for 10s. 6d. per week from 19th June 1899 till further orders of Court.

The questions of law for the opinion of the Court were:—"(1) Whether the appellants are in respect of section 4 of the Workmen's Compensation Act 1897 liable to pay compensation to the respondent for the injury which befel him on 5th June 1899 when delivering maize at their works, which are a factory within the meaning of the Workmen's Compensation Act 1897, he not having been in the appellants' employment but in that of Messrs Cowan & Company, who had contracted to perform carting work for the appellants? (2) Whether the work in which the respondent was engaged at the time of the accident in question was 'merely ancillary or incidental to, and no part of or process in the trade or business carried on' by the appellants as manufacturers of sulphuric acid, chemical fertilisers, and feeding stuffs, and dealers therein, at Timber Bush, Leith, within the meaning of the exception in said section 4 of the above-mentioned Act?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts as follows:—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 con-

tractor 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."

Argued for the appellants—(1) The respondent could only have a claim under section 4 of the Workmen's Compensation Act 1897 if he was engaged in an employment to which that Act applied. The respondent was not so employed. He was employed to work as a carter. That was not an employment to which the Act applied, and the respondent therefore had no claim under section 4. (2) No workman could have a claim under section 4 against an undertaker unless he had a claim either apart from or under the Act against his own immediate employer the contractor — *M'Gregor* v. *Dansken*, Feb. 3, 1899, 1 F. 536. The appellant here had no such claim against his own employer. He had no such claim apart from the Act, for fault was not averred or proved, and he had no such claim under the Act, for the employment in which he was engaged to work by his own employer was not an employment to which the Act applied. Consequently the respondent had no claim against the appellants under section 4. (3) Apart from these grounds of defence, the delivery of goods to the factory was work which was "merely ancillary or incidental to, and was no part of or process in the trade or business carried on" by the appellants in their factory. That was the work which the respondent was engaged in when he met with his accident, and that was the work which his employers the carting contractors had contracted to execute. This case therefore fell under the exception in the last paragraph of section 4, and that section consequently did not apply.

Argued for the respondents—The sole question here really came to be whether the respondent was employed in work which was part of the business carried on in the factory. It had been decided that carting was part of the business carried on in a factory, and was not merely ancillary or incidental to it, and that consequently a carter in the employment of the occupier of a factory, who had been injured while working as a carter on, in, or about the factory was entitled to compensation under the Act—*Powell* v. *Brown* [1899], 1 Q.B. 157. The carting work upon which the respondent was employed was essential to the carrying on of the business of the factory. Therefore the exception in the last paragraph of section 4 did not apply here. Apart from that exception, the result of section 4 was that the occupier of a factory was liable to a workman not immediately employed by him who was injured while working on, in, or about the factory, and engaged in work which his immediate employer had contracted to execute for the occupier of the factory, just as if such workman had been directly employed by such occupier himself. That was the position of the respondent here, and as the occupier would have been liable if the respondent had been immediately employed by him, the respondent was entitled to compensation, and the judgment of the Sheriff-Substitute should be affirmed.

LORD JUSTICE-CLERK — The appellants carry on business as manufacturers and dealers in feeding stuffs and chemical manures. There is a considerable amount of carting to and from their works, both to bring material which they have purchased to the works for manufacture, and to take out goods after manufacture. For this work they do not use carts and horses of their own, but contract with a carting company. Their works are a factory in the sense of the Factory and Workshops Act, and therefore the Workmen's Compensation Act applies. The appellants were the undertakers in the sense of the Act. The respondent is a carter who was regularly and practically daily engaged in the appellants' work under directions of their foreman. These being the facts, as stated by the Sheriff, raising the question of law, I am of opinion that the work upon which the respondent was engaged was not merely ancillary or incidental to, but was part of the trade or business carried on by the appellants. This being so, in my opinion the appellants as the undertakers are liable in compensation to the respondent, that being, as I read it, the proper construction of the statute. It is a different question, and one which is not before the Court in this case, whether the undertakers being required to pay the compensation awarded have any claim for relief against the respondent's direct employers, and upon that question I express no opinion.

I would propose, therefore, to answer the first question in the affirmative and the second in the negative.

LORD TRAYNER — I think the decision of the Sheriff-Substitute is well founded, and that the appeal should be dismissed.

The respondent when carting to the appellants' premises was, in my opinion, engaged in what was a part of their business, and not merely ancillary or incidental to it. The carting was so much a part of the appellants' business that without it, according to the statement of facts before us, that business could not be carried on. The appellants being undertakers in the

sense of the Act, and the injury to the respondent having been occasioned when he was employed in or about the appellants' factory, they are liable to him in the compensation fixed by the Sheriff-Substitute. I would answer the questions as your Lordship proposes.

LORD MONCREIFF—This case raises two questions on the construction of the 4th section of the Workmen's Compensation Act 1897. To deal first with the second question, I am inclined to agree with the Sheriff-Substitute that the carting under the carting contract which the appellants had with Cowan & Co. was a material part of the trade or business carried on by the appellants, and was not merely "ancillary or incidental to their business."

But it was argued that, granting this, the appellants as occupiers of a factory, and therefore undertakers, are not liable, because Cowan & Co., the immediate employers of the workman injured, were not liable to him in compensation. The appellants' argument as I understand it is this. Under the 4th section the undertakers are only liable to pay to a contractors' workman who is injured any compensation which is payable by (that is for which a claim would lie against) the contractor, the workman's immediate employer, whether under this Act or in respect of personal negligence or wilful act independently of this Act . . . or would be so payable if such contractor were an employer to whom this Act applies." Now, say the appellants, the contractors, were not liable at common law nor under the Employers Liability Act 1880, because fault is not averred or proved—and under this Act there is no liability laid on an employer of labour who is not an undertaker —therefore, as the appellants as undertakers are only liable in compensation if such compensation is payable by the contractor, no compensation is due.

This argument is ingenious, but it proves too much. If it were sound, there could be no case of liability on an undertaker under the 4th section except where the contractor is also liable. If the Act applied to all employers, whether undertakers or not, there would be no difficulty, because the undertaker if sued would be bound to pay the compensation payable to the workman by his immediate employer under the Act. But it is a condition of the appellants' argument that an employer who is not an undertaker is not liable under the Act. In this I agree, because reading the 1st, 4th, and 7th sections together the application of the Act is in my opinion limited to employment by undertakers as defined in the 7th section. I shall take another opportunity of stating my views more fully upon this point.

But assuming that employers who are not undertakers are not liable under the Act, I read the 4th section as meaning that even in that case and where there is no liability on the contractor at common law or otherwise, the undertakers may still be liable to the contractors' workman if injured while working in their premises. Their liability is not measured by that of the contractor, because it will be observed that the undertakers are liable to pay such compensation as would be payable by the contractor "*if* such contractor were an employer to whom this Act applies," which in the case supposed he is not.

It was argued that as the undertakers are entitled to indemnification this excludes the idea of their being liable where the contractor is not liable, because it is said if the undertakers were entitled to be indemnified by the contractor although the latter is not directly liable under the Act, this would have the effect of saddling him indirectly with ultimate liability, which cannot have been intended. Therefore it is argued the undertakers' right to indemnification, and also his liability to the contractors' workmen, is commensurate with the contractors' direct liability. I do not think that in the case supposed the undertakers would be entitled to be indemnified by the contractor. The only provision as to indemnification is confined to a claim against any person "who would have been liable independently of this section." But the fact that there is no one from whom they can claim indemnification does not, in my opinion, free the undertakers from liability to the contractors' workmen.

I am unable to explain the expression which occurs in the fourth section as to a contractor being liable "under this Act." I can find no liability laid on anyone but an undertaker, and the expression with which the paragraph concludes, "or would be so payable if such contractor were an employer to whom this Act applies," would be superfluous and unmeaning if the contractor were liable *qua* employer under the Act.

Therefore on the whole matter I am prepared to answer the first question in the affirmative and the second in the negative.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the stated case, Answer the first question in law therein stated in the affirmative and the second question in law therein stated in the negative: Therefore affirm the award of the arbitrator, and decern: Find the respondents entitled to expenses, and remit," &c.

Counsel for the Appellants — Solicitor-General (Dickson, Q.C.)—Younger. Agents —Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—G. Watt—T. Trotter. Agents—Stirling & Duncan, S.S.C.