six years he continued to be a lunatic but was never in the Barony Parish. The Court held that he had failed to retain his settlement in the Barony Parish. It will be observed that in that case, as in this, the pauper was a lunatic during the whole period of his absence from the parish of his residence.

I cannot distinguish these cases from the present. It is true that they were decided under the 76th section of the Poor Law Act of 1845, and that this case is under the 1st section of the Poor Law Act of 1898, but the two sections are identical as regards this question.

I am therefore of opinion that the first question should be answered in the negative, and the second in the affirmative.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent at advising.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Party — Salvesen, K.C. — W. Brown. Agents — Alexander Morison & Company, W.S.

Counsel for the Second Party — Clyde, K.C. — Deas. Agent — Charles George, S.S.C.

Thursday, November 14.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

COOPER AND COMPANY *v.* M'GOVERN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 4 *and* 7 — *Railway Company's Carter Injured near Factory while Collecting Goods for Conveyance—Work Ancillary or Incidental to the Business of a Factory —On In or About a Factory.*

A carter in the employment of a railway company was injured near the entrance to a factory while he was engaged collecting goods from the factory for conveyance on his cart to the station and thence by rail to the sale premises of the occupiers in other places. The occupiers of the factory did not do their own carting but contracted with the railway company to do it, and the railway lorries called daily at the factory. The rates paid to the railway company covered the collection of the goods at the factory in Glasgow and the delivery at the warehouse in Leeds or London belonging to the firm, as well as the railway transit. At the time of the accident the carter's lorry was standing on the opposite side of the street from the factory, 32½ feet therefrom, and the carter carried goods to it, but did not enter the pend close of the factory. The accident occurred at the lorry. Upon a claim under the Workmen's Compensation Act 1897, *held* (1) that the occupiers of the factory were undertakers of the work on which the carter was employed; (2) that the cartage was part of the business carried on in the factory, and was not merely ancillary or incidental thereto; and (3) that the accident occurred "about" a factory—Lord M'Laren *dissenting* upon the first point, and *reserving* his opinion as to points (2) and (3).

In a case stated for appeal under the Workmen's Compensation Act 1897, at the instance of Cooper & Company, in a claim against them by Helen M'Groary or M'Govern, widow, as an individual and as tutrix-at-law for her pupil child, the Sheriff-Substitute (BALFOUR) stated the following facts as admitted or proved:—"(1) That on 28th November 1900 Edward M'Govern (who was employed as a carter with the Glasgow and South-Western Railway Company) was lifting goods with his lorry from the appellants' premises in James Watt Street, Glasgow, to be taken to the College Street Station, and thence carried to Leeds or London. (2) That the appellants' premises in James Watt Street are occupied as sausage works, and they are a factory within the meaning of The Workmen's Compensation Act. (3) That about half-past four o'clock on the afternoon in question M'Govern was at the appellants' premises in James Watt Street, and he loaded certain goods there on his lorry, but he was not in the pend close of the appellants' premises, but remained on the street with his lorry and transferred the goods in question from the appellants' premises to his lorry, which was standing on the opposite side of the street close to the appellants' premises, the street being 32½ feet broad from kerb to kerb. (4) That while M'Govern was engaged in this work he got jammed between his own lorry and another lorry standing close to it, and he sustained injuries from which he ultimately died, after being removed to the infirmary. (5) That the goods which M'Govern carried to the College Station belonged to the appellants, and were being conveyed from their Glasgow premises to their Leeds and London premises by the Glasgow and South-Western Railway Company. (6) That the carrying of their goods from their premises in Glasgow to their premises in Leeds and London is part of the business of the appellants. (7) That the appellants do not themselves cart their goods from their premises in Glasgow to the railway station in Glasgow, but they have an arrangement with the Glasgow and South-Western Railway Company for carting, and the railway company's servants call at the appellants' premises in James Watt Street daily and lift the goods and carry them to the railway station, and on the said 28th November 1900 M'Govern lifted goods from the appellants' premises in James Watt Street under the contract. (8) That the railway company charged the appellants with rates which included collection at their warehouse and delivery in London or Leeds.

(9) That the respondent and her pupil child Mary M'Govern were totally dependent upon the said Edward M'Govern for their support, and that they were his sole dependents. (10) That the said Edward M'Govern was earning a weekly wage of 22s."

In these circumstances the Sheriff-Substitute (BALFOUR) found:—"(1) That the said Edward M'Govern received injuries from an accident arising out of and in the course of his employment with the Glasgow and South-Western Railway Company while engaged carting goods belonging to the appellants, whose business it was to have these goods carted. (2) That the accident happened on in or about a factory occupied by the appellants within the meaning of The Workmen's Compensation Act; and (3) That the appellants were the undertakers on the occasion in question in the sense of the said Act."

In these circumstances the Sheriff-Substitute found the appellants liable under the Act.

The Workmen's Compensation Act 1897, section 4, enacts—"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. . . . 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 enacts—"This Act shall apply only to employment by the undertakers as hereinafter defined on in or about (*inter alia*) a factory . . ." —"Undertakers . . . in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895."

The questions of law for the opinion of the Court were as follows:—"(1) Whether the appellants were undertakers of the work in which the deceased Edward M'Govern was engaged at the time of the accident within the sense of The Workmen's Compensation Act 1897? (2) Whether the work in which the deceased Edward M'Govern was engaged at the time of the accident to him was part of the trade or business carried on by the appellants, or was merely ancillary or incidental thereto? (3) Whether said accident to the deceased occurred on in or about appellants' factory in the sense of The Workmen's Compensation Act 1897?"

Argued for the appellants—Distribution was no part of the work of a sausage factory but merely ancillary to it. The Sheriff had relied on *Bee* v. *Ovens*, 2 F. 439, 37 S.L.R. 328; but that case was to be distinguished because (*a*) there was a regular contract of cartage, while in this case the cartage was merely collection for a railway company; (*b*) the carter was employed at that work only, while here he was engaged carting for many people; (*c*) such carting had been decided to be part of the business of a railway company — *Greenhill* v. *Caledonian Railway Company*, 2 F. 736, 37 S.L.R. 524. The cartage was no more part of the factory occupiers' business than the railway carriage was.

Argued for the respondent—The employment here was the loading of a lorry with goods from the yard of the sausage factory, and that was clearly employment on in or about a factory and came under section 7 — *Powell* v. *Brown* [1899], 1 Q.B. 157. Had the man been employed directly there could have been no question as to liability, and the Act (section 4) put him in the same position as if he had been. Carting here was a very important process in the business, being the conveyance between the factory and the sale warehouse, and could by no means be termed "ancillary or incidental to" it. What was meant by these terms was rightly interpreted in such cases as *Wrigley* v. *Bageley*, [1901] 1 Q.B. 780. This case was ruled by the decision in *Bee* v. *Ovens & Sons*, *cit. supra.*

LORD PRESIDENT—About half-past four o'clock on the afternoon of 28th November 1900, Edward M'Govern, who was a carter in the employment of the Glasgow and South-Western Railway Company, was lifting goods with his lorry from the appellant's premises in James Watt Street, Glasgow, to be carted to the College Street Station, and thence conveyed by railway to Leeds or London.

These premises are occupied by the appellants as sausage-works, and it is found by the Sheriff as a fact that "they are a factory within the meaning of the Workmen's Compensation Act."

At the time above mentioned M'Govern was not in the pend close of the appellants' premises, but he remained on the street with his lorry and transferred the goods from the appellants' premises to his lorry, which was standing on the opposite side of the street close to the appellants' premises, the street being 32½ feet broad from kerb to kerb.

While M'Govern was engaged in this work he got jammed between his own lorry and another lorry standing close to it, and sustained injuries from which he ultimately died.

The goods which M'Govern carted to the College Street Station belonged to the appellants, and were conveyed from Glasgow to their Leeds and London premises by the Glasgow and South-Western Railway Company.

The Sheriff has found as a fact "that the carrying of their goods from their premises in Glasgow to their premises in Leeds and London is part of the business of the appellants."

The appellants do not themselves cart their goods from their premises in Glasgow to the railway station in Glasgow, but they have an arrangement with the Glasgow and South-Western Railway Company for carting, and the Railway Company's servants call at the appellant's premises in James Watt Street daily, and lift the goods and cart them to the railway station; and on the day in question M'Govern lifted goods from the appellants' premises in James Watt Street under the contract produced in process.

The railway company charged the appellants with rates which included collection at their premises in Glasgow and delivery in London or Leeds.

Upon these facts three questions of law are submitted for the opinion of the Court—(1) Whether the appellants are undertakers of the work in which the deceased Edward M'Govern was engaged at the time of the accident within the sense of The Workmen's Compensation Act 1897? (2) Whether the work in which the deceased Edward M'Govern was engaged at the time of the accident was part of the trade or business carried on by the appellants, or was merely ancillary or incidental thereto? and (3) Whether the said accident to the deceased occurred on in or about appellants' factory in the sense of The Workmen's Compensation Act 1897?

The answer to the first of these questions depends upon the construction and effect of sections 4 and 7 of the Workmen's Compensation Act 1897. It is by section 7 provided that "undertakers" in the case of, *inter alia*, a factory "means the occupier thereof within the meaning of the Factory and Workshops Acts 1878 to 1895;" and the appellants were the occupiers of the factory near to which the accident occurred within the meaning of these Acts. It is by section 4 of the Act provided—[*His Lordship read the section ut supra.*]

The effect of this section is, in my judgment, to provide that where an employer does not himself perform a particular work, but substitutes another person for himself in the performance of it, he incurs the same liability to the workman of the person whom he so substitutes as if that workman was in his own employment. I am therefore of opinion that the appellants incurred the same liability to or in respect of Edward M'Govern as if he had been in their employment.

Secondly, I am of opinion that the work in which the deceased Edward M'Govern was engaged at the time of the accident was part of the trade or business carried on by the appellants, and was not merely ancillary or incidental thereto. It is stated as matter of fact in the case that the carrying of the appellants' goods from their premises in Glasgow to their premises in Leeds and London "is part of the business of the appellants," and this statement would, in my judgment, have been sufficient to conclude the question. Apart, however, from the terms of this finding, I think that such carting is part of the trade or business carried on by the person on whose behalf it is done. This view was taken in England in the case of *Powell and Brown* [1899], 1 Q.B. 157), which related to an accident which occurred to a workman in the employment of the owners of a factory while engaged in loading a cart near the factory. Lord Justice A. L. Smith said that the workman "was as much engaged on the business of the factory as if he had been carrying the timber to stow it on the cart"; and Lord Justice Collins said —"I agree that the business carried on at this factory did embrace, as part of, or as a process in the trade or business carried on, the stowing of timber taken from the factory into carts owned by the factory owners, and it was in the course of that operation that the accident took place while the cart was physically contiguous to the factory." For the reasons already given, I consider that the fact of the workman who was injured having been in the employment of the Railway Company does not vary the case.

The appellants' counsel stated at the hearing before us that the appellants manufactured the sausages in the premises in James Watt Street, and merely forwarded them to Leeds and London for sale, and upon this they contended that their Glasgow premises were their only factory in the statutory sense. Even assuming this to be so, I think that the carting of the sausages from the place where they were made, in which M'Govern was engaged, was part of the trade or business carried on by the appellants, and was not merely ancillary or incidental thereto.

Thirdly, I am of opinion that the accident to M'Govern occured on in or about the appellants' factory in the sense of the Workmen's Compensation Act, 1897. The cart was within a distance of 32½ feet from the factory, apparently the nearest convenient place for loading it, and therefore I think that it was sufficiently near to be "about" the factory in the sense of being in proximity to it. Further, if the word "about" comprehends the idea of concernment with the business of the factory as well as proximity to it, the cart was in my judgment being loaded in execution of that business.

I may add that the views now expressed are in accordance with the decisions of the Second Division in the cases of *Bee* v. *Ovens* (2 F. 439), and *Greenhill* v. *Caledonian Railway Company* (2 F. 739).

LORD ADAM—I concur.

LORD M'LAREN—I regret that I am unable to concur in the judgment proposed, being of opinion that the first question in the case ought to be answered in the negative.

The question is, if I may say so, quite correctly stated, but to make my meaning clear I shall put the question in a slightly different form, viz., Did the relation of undertaker and contractor, in the sense of

the statute, subsist between Messrs Cooper and the Glasgow and South-Western Railway Company whose carter was injured while loading Messrs Cooper's goods?

I assume, in accordance with the Sheriff's finding, that Messrs Cooper's curing establishment in Glasgow is a factory. I shall also assume, because it is perfectly clear to my mind, that the curing establishment in Glasgow and the sale-rooms in London and Leeds are not parts of one factory. I do not think that two manufacturing establishments in towns as distant as Glasgow and Leeds are capable of being treated as a single factory under the Factory Acts, and in any case I should have thought it impossible to maintain that salerooms in Leeds and London were parts of a factory in Glasgow.

Still less can I admit that the conveyance of goods from Messrs Cooper's works in Glasgow to Leeds or London, under a contract of carriage with a railway company, is a part of the "employment" which the "occupier" of the factory carries on through the medium of a "contractor." But unless the affirmative of this is maintained I do not see how Messrs Cooper could be made responsible for the accident by which the Railway Company's servant lost his life.

Section 4, which affixes liability to a class of persons called "undertakers," defines the conditions under which this liability attaches, and it begins with the words, "Where in an employment to which this Act applies," the undertakers . . . "contract," &c., and, as I conceive, these words limit the liability of the undertaker in relation to the contractor's servants to cases where the work done by the contractor is part of the "employment" or organisation of labour which is carried on in an establishment of the nature defined, *i.e.*, in the present case in a factory.

This construction of the section is further supported by the words which immediately follow, "and where 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." These words seem to me to exclude all cases where the work contracted for could not be executed by workmen "immediately employed" by the undertakers. Now, I find myself unable to admit the possibility of the carriage of goods by rail from Glasgow to London or Leeds being performed by workmen "immediately employed" by Messrs Cooper. The conditions of railway transit make it impracticable for manufacturers to carry their own goods in their own trains. Then there is the further limitation that it must be an accident "arising out of and in the course of the employment"—that is, the employment under a factory. I think that on a sound construction of section 4 the triple relation of undertaker, contractor, and workman will only hold where all three are members of an organisation of labour which in a large sense may be called a "factory," "railway," "engineering work, or the like. A factory under the statute is one thing, a railway is another. The employment under a factory ends when the goods are delivered to the railway company's servants, and I cannot hold that the work done by the railway servants is part of the employment or organisation of labour of the factory.

Where a manufacturing firm are in the practice of carting their own goods to a railway station, the carter may properly be described as part of the organisation of labour of the factory, and if the carter is injured while within the factory or in proximity to it, *e.g.*, in loading or unloading goods, I do not doubt that the employer would be liable in compensation. It may well be that if a carting contractor were employed to execute the work by his workmen the manufacturer would be liable as an undertaker, because in the case supposed the manufacturers are doing through a contractor work which in the language of section 4 might be "executed by workmen immediately employed by them." But in the present case the Railway Company were employed to carry goods to England under a contract of carriage which included terminal carting, and the contract (which we are not at liberty to vary or decide) is one which could not be executed by Messrs Cooper's workmen.

I am not at all embarrassed by the finding of the Sheriff "that the carrying of their goods from their premises in Glasgow to their premises in Leeds and London is part of the business of the appellants." Messrs Cooper, as I understand, are not only makers but sellers of their goods, and if their goods are sold in Leeds and London, whether as finished in Glasgow, or it may be after some further work has been performed upon them, the carriage is part of their business because the cost of carriage must affect their profit and loss account. The same thing may be said of a manufacturer who sends his goods to India for sale. But I fail to see how this circumstance should bring the servants of the Railway Company in the one case or of the shipowner in the other into the relation of workmen carrying on the manufacturers' trade through a contractor. If this conclusion is involved in the Sheriff's finding, then his finding assumes the very question which he has referred to the Court. But I do not think he meant this, but only that in the conduct of Messrs Cooper's business it was necessary that the goods or part of them should be sent from Glasgow to England for sale.

As in my opinion the first question referred to us ought to be answered in the negative, it is unnecessary that I should express my opinion on the second and third questions which presuppose an affirmative answer to the first question.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Answer the three questions in the case in the affirmative: Refuse the

appeal: Find the appellants liable in the expenses of the appeal, and remit," &c.

Counsel for the Appellants—Campbell, K.C. — Hunter. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Clyde, K.C. —T. B. Morrison. Agent — Alexander Wylie, S.S.C.

Thursday, November 14.

FIRST DIVISION.

DAVIDSON *v.* DAVIDSON.

Succession — Legacy — Special Legacy — Ademption—Policy of Insurance—Policy Paid and Merged in General Estate.

D. took out a policy of insurance on the life of his wife, and executed a trust-disposition and settlement, by the fourth purpose of which he directed his trustees to keep up the policy, and on the death of his wife to divide the proceeds among all his children, sons and daughters; he further directed his trustees to divide the residue of his estate among his sons. The truster was predeceased by his wife, and shortly before her death he became insane, and a *curator bonis* was appointed to him. The proceeds of the policy referred to were received by the *curator bonis*, and administered by him along with the rest of his ward's estate, a portion of these proceeds being utilised towards meeting a balance of expenditure over income in the curatory, and the remainder being invested. The truster never recovered his mental capacity. After his death, *held* that the bequest of the proceeds of the policy of insurance was a special legacy and had been adeemed, the policy having been discharged and the proceeds merged in the testator's general estate during his lifetime, and that consequently the proceeds did not fall to be dealt with in terms of the fourth purpose of his trust-disposition and settlement, but formed part of the general residue of his estate.

Sir David Davidson died on 18th May 1900, leaving a trust-disposition and settlement, dated 7th November 1898, by which he conveyed his whole estate, heritable and moveable, to trustees, and provided, *inter alia*, as follows — "(*Fourth*) I direct my trustees out of the income of my estate to pay the premiums necessary in order to keep in force a policy of assurance for £4000, dated 27th November 1849, numbered N—5654, effected in my name on the life of my said wife with the North British Insurance Company, and upon the death of my said wife to divide the proceeds of the said policy of assurance equally among all my children then alive, the issue then alive of each of my children who may have died leaving such issue being entitled to the shares which their respective parents would have taken had they survived; and further, I direct my trustees to pay to my said wife during all the days of her life the whole remaining free yearly income arising from the residue and remainder of my means and estate." The truster further provided—"(*Fifth*) At the first term of Whitsunday or Martinmas happening after the death of the survivor of my wife and myself, I direct my trustees to make payment of" legacies of £1000 to one of his daughters and £200 each to two other daughters, and "thereafter to divide the whole residue and remainder of my means and estate into five equal parts, and to pay one-fifth to each of my four surviving sons, Thomas St Clair Davidson, David Albert Davidson, Charles Davidson, and William Davidson, and to set apart and invest the remaining one-fifth and pay the free yearly income thereof to the widow of my deceased son Henry Chisholm Davidson, so long as she remains unmarried, for her alimentary use, exclusive of the rights of creditors, and on her death or marriage to pay, convey, and make over the capital of said fifth to the issue of the said Henry Chisholm Davidson." The settlement contained no provision for daughters, other than the general bequest to children in the fourth purpose, and the legacies provided by the fifth purpose.

On 4th November 1899 a petition was presented for the appointment of a *curator bonis* to Sir David Davidson, who had become of unsound mind and incapable of managing his own affairs, and Mr George Dalziel, W.S., was appointed to that office.

Sir David Davidson's mental condition remained unchanged until his death. He was predeceased by his wife, who died on 12th November 1899, and the sum of £4000 payable under the policy on her life, mentioned in the fourth purpose of his trust-disposition and settlement, was received by his *curator bonis* on 14th December 1899, and was administered by him along with the rest of Sir David's estate.

During Sir David's curatory the total expenditure by his curator on the debts and maintenance of the ward, and the expenses of management, exceeded the total income, and the surplus expenditure was met out of the capital of the ward's estate, and to the extent of £698 out of the proceeds of the policy referred to. The balance of the proceeds was placed on deposit-receipt, and was uplifted on 30th May 1900 so far as necessary to pay for certain stocks which the curator had purchased immediately before his ward's death. In encroaching on capital and making payments out of the proceeds of the insurance policy the curator acted on his own responsibility.

Sir David Davidson was survived by four sons and five daughters, and by the widow and children of a predeceasing son.

After his death, questions having arisen with regard to the £4000 for the disposal of which he made provision in the fourth purpose of his settlement as quoted above, a special case was presented for the opinion and judgment of the Court.