

missioners, even although a person may dwell in such house or tenement for the protection thereof. This subsection exempts the occupier, whether he be the owner or a mere tenant of any tenement solely occupied as mentioned. The present case clearly comes within it.

As the result of a careful consideration of this case, I am of opinion that the appellant is entitled to relief from duty in respect of his restaurant premises, being No 49 in Bath Street, upon two separate grounds—1st. That he never was liable to be assessed in respect of it, because if it constituted in itself a separate and distinct house, it was never an "inhabited dwelling-house," and therefore was not assessable. 2nd. That if it ought to be treated as a tenement severed from a larger house, it is by 41 and 42 Vict. c. 15, expressly exempt from assessment to the house duty on the ground that it was and is solely devoted to trade and business, and that a trade or business which was licensed to be carried on only within the licensed area of the ground storey.

The appeal therefore ought to be allowed with costs.

Appeal *allowed*, and judgment appealed against *reversed*, and decision of the Commissioners *restored*.

Counsel for the Appellant—Asquith, Q.C.—Roskill—F. T. Cooper. Agents—Godden, Son, & Holme, for James Purves, S.S.C.

Counsel for the Respondent—Attorney-General (Sir R. Webster, Q.C.)—Lord Advocate (Graham Murray, Q.C.)—Solicitor-General for Scotland (Dickson, Q.C.)—A. J. Young. Agents—J. C. Gore, Solicitor to the Board of Inland Revenue, for P. J. Hamilton Grierson, Solicitor to the Board of Inland Revenue for Scotland.

COURT OF SESSION.

Tuesday, May 22.

SECOND DIVISION.

[Sheriff-Substitute of Lothians.

PURVES v. L. STERNE & COMPANY,
LIMITED.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7 (1) and (2) — "Factory" — "Undertaker" — Occupier of Factory—Factory and Workshop Act 1878 (41 Vict. c. 16), sec. 93, "Non-Textile Factory" 3 (a)—Factory and Workshop Act 1895 (58 and 59 Vict. c. 37), secs. 4 and 23 (1) (b)—Temporary Control by Engineers for Trial of Machinery.

During the preliminary run for testing certain ice making and refrigerating machinery constructed by a firm of engineers in the premises belonging to a cold storage and ice company, the entire control of the machinery was in the hands of the engineers.

The ice made incidentally in the course of the trial in terms of the contract became the property of the ice company. At the date of the trial the machinery was practically completed. During its erection no machinery driven by steam or other mechanical power had been used by the engineers as part of the apparatus for erecting it. *Held* that the engineers' control of the machinery in the premises of the ice company during the preliminary run did not make them liable in compensation, as "occupiers" of a "factory" within the meaning of the Workmen's Compensation Act 1897, for the death of one of their workmen who was killed upon the premises in question while the preliminary run was in progress.

This was an appeal upon a stated case in the matter of an arbitration under the Workmen's Compensation Act 1897 between (1) Mrs Annie Smail or Purves, widow of William Wilson Purves, engine-fitter, Leith, as an individual, and also as tutor and administrator for her pupil children, and (2) and (3) her other children, claimants and appellants, and L. Sterne & Company, Limited, engineers and machinists, the Crown Iron Works, 156 North Woodside Road, Glasgow, respondents.

The appellants claimed £273 from the respondents as compensation for the death of the said William Wilson Purves.

The facts found by the Sheriff-Substitute (HARVEY) to be admitted or proved were as follows:—"The appellant Annie Smail or Purves is the widow, and the other appellants are the children, of the said William Wilson Purves, who was on 14th September 1899 accidentally killed within the premises in Tower Street, Leith, belonging to the North British Cold Storage and Ice Company, Limited, while in the employment of the respondents, and in the course of his employment. Purves had been in the respondents' employment for two weeks and two days immediately preceding said accident, and his wages for said period were at the rate of 35s. per week. The appellants were wholly dependent on Purves at the time of his death, and there were no others dependent on him. The respondents are engineers and machinists carrying on business at the Crown Iron Works, Glasgow. At the time of the accident they were in the course of implementing the contract between them and the North British Cold Storage and Ice Company, Limited, dated 13th September 1898, for the supply, erection, testing, maintenance, and working (for the period after completion therein specified) ice making, refrigerating, and other machinery and plant necessary for carrying on the business of the said company in said premises, all in terms of the said contract, a copy of which was admitted in evidence and is submitted as part of the stated case. At the time of the accident the machinery, with the exception of an ice-crushing machine, was substantially completed, and the 'preliminary run of the plant' referred to in the first paragraph of article 62 of the

general specification incorporated as part of said contract was in the course of being made, and had been commenced three or four days previously. Ice was made during the course of said preliminary run and prior to said accident. By the second paragraph of article 63 of said general specification it is provided—“The ice produced during the running, testing, and working of the plant by the contractor to be the property of the company.” The said company, however, did not take possession of or use the ice so manufactured for the purposes of their business. The primary object of the preliminary run was to test the efficiency of the machinery, and the making of ice was subsidiary to that object. The entire control of the machinery during the preliminary run was in the hands of the respondents. No machinery driven by steam or other mechanical power was used by the respondents as part of their apparatus in erecting the said machinery and plant. At the beginning of their operations the respondents had been allowed to use a small steam-crane belonging to the builders of the premises. It had been used by the respondents’ workmen for hoisting pipes and other lighter parts of the plant to the upper flats of the premises, but it had been removed from the building more than four months prior to the accident. Purves was at the time of the accident engaged with another workman in fixing a rail round the fly-wheel of one of the steam-engines which formed part of the plant erected on the premises by the respondents. A second engine, also forming part of the plant, was in motion at the time of the accident and during the preliminary run above referred to, and while fixing the rail between the two fly-wheels, he was caught by the machinery in motion and killed instantaneously. The notice required by section 75 of the Factory and Workshops Act 1878 was given by the North British Cold Storage and Ice Company, Limited, as occupiers of a factory on 24th October 1899.”

On these facts the Sheriff-Substitute held in point of law (1) that on a sound construction of the said contract, ice manufactured during the preliminary run referred to in article 62 thereof became the property of the Cold Storage and Ice Company, Limited; (2) that the said premises were at the date of the accident a factory within the meaning of the Workmen’s Compensation Act 1897; (3) that the respondents were not at the date of the accident occupiers of said factory or undertakers of the work carried on therein within the meaning of said Act; (4) that the work undertaken by the respondents under said contract, and upon which Purves was employed, was not an engineering work within the meaning of said Act; (5) that the machinery within the premises at the date of the said accident was not itself a factory within the meaning of said Act; and accordingly he pronounced judgment on 29th January 1900, dismissing the petition, and finding the respondents entitled to expenses.

The questions of law for the opinion of the Court were—“(1) Whether the respondents were at the date of the accident occupiers of the said factory or undertakers of the work carried on therein within the meaning of the Workmen’s Compensation Act 1897? (2) Whether the work undertaken by the respondents under the contract above referred to, and upon which Purves was employed, was an engineering work within the meaning of the said Act?; and (3) Whether the machinery within the said premises at the date of the accident was itself a factory within the meaning of said Act?”

The Workmen’s Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts as follows, section 7 (1)—“This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about,” *inter alia*, “a . . . factory . . . or engineering work, . . . (2) In this Act . . . ‘factory’ has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895, and every laundry worked by steam, water, or other mechanical power.” “Undertakers . . . in the case of a factory . . . means the occupiers thereof within the meaning of the Factory and Workshop Acts 1878 to 1895.” . . .

The Factory and Workshop Act 1878 (41 Vict. cap. 16) enacts as follows:—Section 93 . . . “The expression ‘non-textile factory’ in this Act means . . . (3) also any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes or any of them; that is to say, (a) in or incidental to the making of any article or of part of any article, or (b) in or incidental to the altering, repairing, or mounting or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. The expression ‘factory’ in this Act means textile factory and non-textile factory, or either of such descriptions of factories.

The Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37) enacts as follows:—Section 4 (1)—“A court of summary jurisdiction may, on complaint by an inspector, and on being satisfied that any machine used in a factory or workshop is in such a condition that it cannot be used without danger to life or limb, by order prohibit the machine from being used, or if it is capable of repair or alteration, from being used until it is duly repaired or altered; (3) if there is any contravention of an order under this section, the person entitled to control the use of the machine shall be liable to a fine not exceeding forty shillings a day during such contravention.”

Section 23 (1)—“The following provisions, namely” (certain provisions of the Factory Acts, including, *inter alia* (v) the provi-

sions of this Act (the 1895 Act) with respect to the power to make orders as to dangerous machines) "shall have effect as if (a) every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (b) any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building, or any structural work in connection with a building, were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections 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, and the person so using any such machinery, shall be deemed to be the occupier of a factory."

Argued for the claimants—The premises in question here were a factory—Factory and Workshop Act 1878, section 93, "non-textile factory," 3 (a). The respondents were the occupiers of the premises at the time of the accident. The expression "occupier" was not defined in the Factory and Workshop Act 1878, nor indeed was it defined for the purposes of these Acts generally in any of the Factory Acts. But here the respondents had all the occupation necessary to bring them within the term "occupier" as used in the Factory Acts. They had the sole control. If they were "occupiers," then they were "undertakers" within the meaning of the Workmen's Compensation Act 1897, section 7 (2), "Undertakers." Moreover, here the machinery was a factory *per se*. It was machinery which was being used for the purpose of structural work in connection with a building." It was consequently "machinery" to which the provisions of the Factory and Workshop Act 1895, section 4, were applied by section 23 of that Act. It was therefore a "factory" within the meaning of the Workmen's Compensation Act 1897, section 7 (2), "Factory." The occupier of a "factory" in this sense was the person entitled to control the use of, and having the use of such machinery, however temporary his control and use might be. The respondents were in that position here, and they were consequently "occupiers" within the meaning of the Factory Acts, and therefore "undertakers" within the meaning of the Workmen's Compensation Act 1897. The case of *Jackson v. Rodger & Company*, July 4 1899, 1. F. 1053 (first case) decided that the person having the use and control of one of the things enumerated in section 23 was an "occupier," and therefore an "undertaker." So far that decision was not affected by the subsequent decision in the same case (*Jackson v. Rodger & Company*, January 30, 1900, 37 S.L.R. 390). The second decision proceeded upon the ground that

the dock in question there was not a factory, but it did not in any way affect the previous judgment in so far as it decided who were to be regarded as "occupiers" of a factory under section 23 of the Act of 1895. Even if the machinery here was not being used for the purpose of structural work in connection with a building, still the respondents, as the persons having control of it, were occupiers of a factory. The premises in question here were a factory. The machinery therefore was machinery to which the Factory and Workshop Act 1895, section 4, applied. It might be that section 4 would not apply to machinery in course of construction, but this machinery was so complete as to be able to perform the work for which it was designed, and it was therefore machinery within the meaning of section 4. If this were so, then under section 23 the person having the temporary use and control of it was the occupier of a factory, and as such was liable under the Workmen's Compensation Act 1897. The result of sections 4 and 23 of the Act of 1895 and section 7 of the Workmen's Compensation Act 1897, read together, was that a person having the control and use, however temporary, of dangerous machinery, was to be regarded as an "occupier" of a "factory," and consequently was to be liable as an "undertaker."

Counsel for the respondents were not called upon.

Counsel for the claimant conceded that the premises in question here were not an "engineering work" within the meaning of the Workmen's Compensation Act 1897, section 7.

LORD JUSTICE-CLERK—There are several questions put in this case, and very properly put, but I think that the answer to the matter in dispute between the parties on the whole case is not attended with difficulty. I shall assume that machinery by itself may be a factory. That may seem a strong assumption, but I shall assume it may be the case. But the point here is that the work which was being carried on by the employers of this workman was practically the completion of certain machinery in a place which was to be used as a factory by the North British Cold Storage and Ice Company, Limited. Whether that place was a factory or not I do not think there is anything in the statutes which would entitle us to say that this constituted a factory in the occupation of the respondents. Section 23 of the Act of 1895 does not apply, and that is the only section which can be said to make machinery in itself a factory. The place in question here does not come under subsection (a), for it is not one of the places there mentioned. On the other hand, subsection (b) makes it law that if machinery is being temporarily used in any premises for the construction of a building, or any structural work in connection with a building, such premises may be held to be a factory, and the person so temporarily using the machinery may be held to be the occupier

of the premises in the sense of the statute. That sub-section does not apply here at all.

In my opinion the Sheriff-Substitute's judgment was right, and ought to be affirmed.

LORD YOUNG—I am of opinion that what the Sheriff informs us that he held in point of law was rightly so held by him, and that we do not need to concern ourselves with the questions of law put to us. The Sheriff tells us what he held in point of law. I do not need to read his findings at length. I think he was right, and that the appeal should be dismissed.

LORD TRAYNER—I arrive at the same result. I am not prepared, as at present advised, to say that I concur in the Sheriff's second finding in law, but I assume it to be correct. It is sufficient to say that I entirely agree with his third finding. I think that the defenders were not in the occupation of a factory.

LORD MONCREIFF—I am of the same opinion. The crucial points which the appellant has to establish are that the premises were "a factory" in the sense of the Act, and that the respondents were the occupiers of them, and "undertakers." She cannot establish this without the aid of section 23 of the Factory Act of 1895. I greatly doubt whether that section applies at all—[His Lordship read sub-sections (a) and (b), quoted above]. I do not think that these premises come within any of those definitions. But even if they did, those engineers who were simply fitting up this machinery cannot be said to have been occupying the premises temporarily within the meaning of sub-section (b) of section 23 of the Act of 1895. I think that the temporary occupiers there referred to are persons who occupy premises for the purpose of carrying on some trade or manufacture in them. Here the respondents were merely fitting up and testing machinery which was to be used in carrying on the trade for which the premises were designed, and any ice which was made incidentally in the process of fitting up and testing became the property of the owners of the premises, the North British Cold Storage and Ice Company, Limited.

On the whole matter, I am of opinion that the Sheriff-Substitute's findings are right, and that the appeal should be dismissed.

The Court answered the first and second questions in the negative, found it unnecessary to consider the other questions, affirmed the dismissal of the claim, and decerned, and found the respondents entitled to their expenses of the stated case.

Counsel for the Claimants—Baxter—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—W. Campbell, Q.C.—Glegg. Agents—Anderson & Chisholm, S.S.C.

Tuesday, May 22.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

RUSSELL v. FARRELL.

Fraud—Misrepresentation—Concealment—Duty to Disclose—Essential Error Induced by Fraudulent Misrepresentation and Concealment—Discharge of Debt for Part Payment.

A person who is negotiating for the discharge of a debt in consideration of a part payment is not bound to make a full disclosure to the creditor of the true state of the debtor's affairs, and a discharge will not be reduced upon an allegation that he has failed to do so.

In an action for reduction of a discharge of a debt, granted in consideration of a part payment, upon the ground of fraudulent misrepresentation and concealment, and essential error induced thereby, the creditor averred that it had been represented on behalf of the debtor that he was insolvent and absolutely without the means wherewith to settle the claim, whereas he had received and then possessed £700 from the estate of a relative who had died, and that the fact of his succession to this sum had been fraudulently concealed from the creditor. Held that these averments were irrelevant.

The agent of a creditor who was negotiating with reference to the discharge of a debt received a letter from the debtor's agents offering £45, and stating that the debtor was utterly unable to do anything for a living. In reply he wrote saying that he assumed it to be represented that the debtor was absolutely impecunious, and "had no hope or expectation near or remote," and offering to take £50. The debtor's agents replied that they were told £50 was really more than could be afforded, but that the creditor must not rely on them, because they could not be responsible in the matter. The creditor's agent telegraphed to send the £45, and it was sent to and received by him. In the discharge he inserted a statement to the effect that the discharge was given in respect that the present and prospective circumstances of the debtor were stated to be such as to make it impossible for him to pay a higher sum. The debtor's agents replied saying that they could give no assurance of any kind, and that the discharge was granted without any personal responsibility on their part. The creditor retained the money sent. Held that there was nothing in this correspondence importing a representation by the debtor or his agents regarding the debtor's pecuniary position upon which the creditor was entitled to rely as a condition of his accepting the composition.

This was an action at the instance of Jemima Russell, Stonehaven, against