society, or remitted to London. Yearly accounts were prepared on which all the interest on investments in foreign countries was included, and out of the profits shewn by the accounts a dividend was paid yearly to the shareholders. The surplus funds of the society divisible as profits were ascertained by actuarial valuation once in three years, and all the interest on investments in foreign countries was included in the triennial account."

On these facts the Court of Appeal held that all the interest on foreign investments was received in the United Kingdom within the meaning of the 4th Case. They did so on the ground that the terms of the statute were sufficiently satisfied by a receipt in account. All their Lordships held that the Scottish case, *The Scottish Mortgage Company of New Mexico*, was an authority directly in point, and they all agreed in distinguishing the case of *Forbes*. Speaking of the former case, the Master of the Rolls, after stating that in his judgment the true meaning of the 4th case was satisfied by a receipt in account, adds—"And I think that is the reading of it arrived at by the judges in the Scottish case—*Scottish Mortgage Company of New Mexico* v. *Inland Revenue Commissioners*. They did not put this in so many words, but they came to the conclusion in that case that there had been a receipt in account of foreign dividends, and they held, that being so, that the Crown was entitled to income tax upon the dividends so received." Lord Justice Collins is of the same opinion, and he further states that, as he reads the Lord President's opinion, the latter did not proceed on the footing that the corporation was barred from saying that the interest had not been received.

Lord Justice Stirling is of the same opinion. For reasons which I have already stated, I think their Lordships were mistaken as to the import of the decision in that case. No doubt it was decided that in that case the cross-entry in the corporation's books was equivalent to receipt of foreign interest; but that was solely on account of the peculiar circumstances of the case which I have described.

Then as to the decision in the case of *Forbes*, their Lordships all treated it as proceeding on the footing that there was nothing in the case except that the interest appeared in the annual account. But here again I think their Lordships are mistaken.

On the whole matter I am of opinion that the deliverance of the Commissioners, which I have no doubt was greatly influenced by the English cases, is in this respect erroneous.

The Court reversed the determination of the Commissioners in so far as it found the appellants liable to income-tax under Schedule D on the foreign interests amounting to £121,711, 10s., as having been received by the appellants in the United Kingdom: Found that the said foreign interests were not received in the United Kingdom, and accordingly ordained the respondent to repay to the appellants the amount of the income-tax which had been paid on the said sum of £121,711, 10s., with interest from the date of payment at 4 per cent. until repaid.

Counsel for the Appellants — Dundas, K.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Counsel for the Respondent, the Surveyor of Taxes—Solicitor-General (Dickson, K.C.) —A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, May 31.

SECOND DIVISION.

[Sheriff-Substitute at Dundee.

DUNDEE AND ARBROATH JOINT-RAILWAY *v.* CARLIN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 4—*Railway—Work "Ancillary or Incidental to" Business of Undertakers—Erection of Wall for Protection of Signal Cabin.*

A workman in the employment of a sub-contractor, who had a contract with a railway company to construct a stone and lime wall to prevent the soil from the bank of a cutting falling down and obstructing the access to a signal cabin belonging to the company, was knocked down and killed by a passing train.

Held (*diss.* Lord Young) that the work on which the deceased was employed was not part of the business of the railway company, but was "merely ancillary or incidental thereto," within the meaning of section 4 of the Workmen's Compensation Act 1897, and that the railway company were not liable to pay compensation.

Burns v. *North British Railway Company*, February 20, 1900, 2 F. 629, *distinguished, commented on*, and *doubted*.

Pearce v. *London and South-Western Railway* [1900], 2 Q.B. 100, *approved and followed*.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute at Dundee (CAMPBELL SMITH), between the Dundee and Arbroath Joint Railway, appellants, and Mrs Bridget Carlin, widow of James Carlin, mason's labourer, Dundee, claimant and respondent.

The facts stated by the Sheriff-Substitute to be proved were as follows:—"On 22nd June 1900, at the time of receiving his fatal injuries, the deceased James Carlin was working as a mason's labourer in the employment of Robert Sheach, builder, who was sub-contractor for the masonwork of a new station at Stannergate, Dundee, under Messrs D. P. How & Son, contractors with the appellants for the construction of the station buildings and premises. Sheach was at the time employed

by the appellants' company to build a stone and lime screen for the way to and around a signal cabin which the appellants' company had built for themselves on the sloping side of the railway cutting, and furnished with appropriate signalling apparatus and connection with the rails and points, the purpose of said screen being to prevent the soil or 'muck' from the higher ground from blocking up or impeding the access to said signal cabin; that on the night previous to the 22nd there had been a fall of earth or other rubbish into this space which, when finished, the screen was intended to keep clean and unimpeded; that about 7 a.m. the deceased and his neighbour, who were carrying stones on a hand-barrow, were directed by their foreman to remove the fallen earth or dust aforesaid; that they set the barrow on a tub by the side of the line, and were walking towards the said signal cabin outside the line, but close to the outside rail, when the deceased was struck in the back by the engine of the 7 o'clock passenger train from Dundee, carried a few feet by it, and dropped by the side of the line a few seconds before he expired; that the work which the deceased was to do was necessary to the said signal box being and continuing part of the working apparatus of a railway over which trains were running, and involved dangers not distinguishable from the ordinary dangers of active railway service."

In these circumstances the Sheriff-Substitute awarded the respondent compensation.

The question of law for the opinion of the Court was—"Whether the building contract between the appellants and Messrs D. P. How & Son, and the sub-contract between that firm and Robert Sheach junior, were part of or process in the trade or business carried on by the appellants, or were merely ancillary or incidental thereto.?"

The Workmen's Compensation Act 1897 enacts (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 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." By section 7, sub-section 2, 'undertakers,' in the case of a railway, means the railway company.

Argued for the appellants—The work at which the deceased was employed was not part of the appellants' business, but merely ancillary or incidental thereto. Section 4 was confined to the case of an undertaker delegating work which was part of his proper business to a contractor; and such work as the erection of a station or a signal cabin was not in that category—*Pearce* v. *London and South-Western Railway*, 1900, 2 Q.B. 100; *Brennan* v. *Dublin United Tramway Company*, 1901, 2 I.R. 241; *Fullick* v. *Evans & Company*, 1901, 17 Times L.R. 346. Even if a signal cabin was essential, the erection of a wall was not so.

Argued for the respondent—The work on which the deceased was employed was not ancillary or incidental, but was an essential part of the appellants' business. The case of *Burns* v. *North British Railway Company*, February 20, 1900, 2 F. 629, was directly in point. Admitting that a railway company were not obliged to build a station, they were under statutory obligation to erect signals, and the Board of Trade would not sanction the opening of a railway until these were provided. The Sheriff had found as matter of fact that the wall in question was a necessary part of the equipment of the signal-box, and its erection must therefore be regarded equally with that of the signal box as part of the business of the company. If the respondent could not recover compensation from the appellants, she would get none; for the deceased's immediate employer Sheach, being a sub-contractor, was not an "undertaker" under the Act, and was consequently not liable—*Cass* v. *Butler*, 1900, 1 Q.B. 777; *Cooper* v. *Davenport*, 1900, 16 Times L.R. 266. The respondent cited also *M'Gregor* v. *Dansken*, February 3, 1899, 1 F. 536; *Devine* v. *Caledonian Railway Company*, July 11, 1899, 1 F. 1105; *Bee* v. *Ovens & Sons*, January 25, 1900, 2 F. 439.

At advising—

LORD JUSTICE-CLERK—The deceased, for whose death compensation is claimed, was working at a stone and lime screen which a contractor, his employer, was putting up for a way to and around a signal cabin which the defenders had built for the service of their line, the purpose being to prevent soil coming down a bank and blocking the access to the cabin. The death was caused by a passing train when the deceased was walking towards the cabin in the course of his master's work.

The question in the case is, whether the work which was being done was ancillary and incidental to the appellants' undertaking, and thus does not involve liability on their part to the workmen engaged under the Workmen's Compensation Act. I am of opinion that that question must be answered in the affirmative. It has been held that a workman working for a contractor at a railway station could not obtain compensation from the railway company for an injury suffered while engaged on that work. That was decided

in the case of *Pearce* v. *The London and South-Western Railway*. I cannot distinguish that case from the present. The ground being that the building of a station was ancillary or incidental to the business of the company, I think that the same rule must apply to a contract for building a retaining or sheltering wall to a signal-box. I am further confirmed in this view by the decision in the case of *Fullick* v. *Evans & Company*. In that case the work which was being done was the building by a contractor of a signal-box for use by a railway company. In that case the contractor who undertook to build the signal-box was dealt with as the undertaker under the Act, and held liable in compensation for the accident. It does not appear to have occurred to anyone in that case that the railway company were the undertakers and as such liable. The dispute was whether there was any liability, it being maintained that the work was not an engineering work under the definition clause, and that being decided in the affirmative, the contractor was found liable as the undertaker.

The case of *Burns*, decided in the First Division, was founded on in support of the Sheriff's deliverance. In that case the work which was being done was the setting of signal wires and other signalling appliances in connection with a signal-box. This work was being done by a contractor, but the Court held that it was not ancillary and incidental to the business of the railway company, and found the company liable. I am not clear that if the work was preliminary to the line being put in working operation that the decision in that case was sound. But whether it is to be taken as sound or not, I think this case is truly in the same category as that of *Pearce* and not in that of *Burns*. The work being done on a station under a contractor does not involve liability against the company owning the station as undertakers. Neither does work done in a similar manner on an access to a signal cabin.

I am of opinion that the question should be answered in affirmation of the second alternative.

LORD YOUNG—The question here would have been easier, and the answer which I propose to give more satisfactory to myself, but for the decisions; but having regard to the decisions, and considering what weight we ought to give to them, I am of opinion that the Sheriff has here taken the right view. I cannot regard a signal cabin upon a railway, or any work regarding the erection of it or relating to its existence, and the place where it is put, with safety to those who are using the railway—whether servants of the railway company or customers of the railway company—I cannot regard that as other than part of the business of a railway company. I think a railway company is a business company. The companies are created, constituted, by Act of Parliament, and with special powers given to them of constructing railways and also of running trains upon them, in the public interest, the privileges corresponding with the obligations being all in the railway statutes. Now, what is the purpose of this business company created by statute? It is to make a railway. The powers are given to them for that purpose—to make a railway for the convenience of the public, and all the public are by the statutes entitled to use that convenience which is prepared by the statutory company for them. They are entitled to use that convenience just as people in the olden time were entitled to use the turnpike roads on the condition of paying their tolls to the public authorities to whom was committed the duty of constructing and maintaining the roads; and anyone is entitled to put his own locomotives, carriages, or trucks upon the line, and to run them, paying tolls to the railway company, which they are authorised to levy by statute. To provide the line and open it to the public to be used by the public on these terms is part of their trade or business, and, when made, to maintain it so that it may be safely used. They have also the right to act themselves as carriers of goods or passengers, and according to our experience they, although not always, generally do so, and the chief part of their business is to act as carriers upon that public railway which they have created and are keeping up, not only for their own use as carriers but for the use of any others who resort to it and pay them as those who have made it and are keeping it up. Now, I think signal-boxes are very eminently part of their undertaking, part of their business. I assume that those who have the management of the company's affairs erect and maintain only such signalling apparatus as they are of opinion is, if not essential, at least proper for the safe and convenient use of the line. Now, that is their business. I think it is their trade to do that, for which they are paid by those who use the line as carriers by the tolls which they have to pay. And it is also part of their trade—you may say ancillary or incidental to it—just as everything connected with the line which they carry on as carriers is. The locomotives and the trucks and the passenger carriages are all ancillary to the carriage of the goods and the carriage of the passengers. You may say these signal cabins are no part of the trade, and if for any work connected with them the train is stopped, and workmen are set to work to repair the damage there, that is ancillary and incidental to the trade, but it is no part of it. Now, I cannot assent to that reasoning. I do not see any sense in it, and I should be very unwilling to give my countenance, however little value it may be, to the proposition that nevertheless that is the law, and that this Act of Parliament has no application to the construction of the line or anything connected with it, because all that is incidental or ancillary to the business of the railway company, but is no part of it. I cannot assent to that view. I am not called upon to define the sense in which the framers of this statute used these

words "ancillary or incidental to." I should have great difficulty in giving a definition to some other expressions in the Act as well as to this, but I can conceive things which would be no part of their trade or business although incidental thereto. Take refreshment rooms. That is no part of their business. That is not what they are constituted for. Nor is even an hotel for the convenience of passengers who are going by or arriving by their line. There may be great room for saying that that is ancillary to their business, but it is really no part of it. That is not what they are created by statute to provide and execute, although they not unreasonably may do so. But signalling apparatus for the safety of the use of the line for the whole public using it is, I think, if anything can be said to be, part of their business as distinguished from something merely—and the statute uses the word "merely"—incidental or ancillary. I have very great respect for all of the learned Judges, who have expressed views with which I cannot say my own are not in conflict, but with the opinion which I have expressed I am not prepared to follow those decisions, and upon them to reverse the judgment of the Sheriff which is now before us. I therefore differ from your Lordship's opinion that this appeal ought to be sustained, and think, on the contrary, that the view of the Sheriff-Substitute should be affirmed.

LORD TRAYNER—I think the work in which the deceased was engaged at the time when he was killed was not any part of or process in the work or business carried on by the appellants, but was only incidental thereto, and that therefore the judgment of the Sheriff is wrong. My view is borne out by the authorities cited to us, which it is unnecessary to review. The case of *Pearce* is *a fortiori* of the present. I offer no remark on the decision in the case of *Burns* except this, that it can, I think, be distinguished from the present case, and does not form a precedent which I am here bound to apply.

LORD MONCREIFF—This case raises a question of principle in the construction of the fourth section of the Act of 1897. That section is, in my opinion, confined to cases in which the undertaker delegates to a contractor the execution of work which forms a part of or process in the proper business or trade carried on by the undertaker, and does not apply to cases where the undertaker engages another tradesman or contractor to execute work which, however essential to the conduct of the trade or business, is not part of or a process in it, and is not in use to be performed by the undertaker himself or his own workmen.

The object of this remedial statute being to give a right to compensation to workmen who are obliged to work in or about any of the dangerous organisations of labour to which the Act applies, it would not have been surprising if the right to recover compensation from the undertaker without proof of fault on his part had been extended to workmen who are called in to execute works of repair or construction, and who are exposed to the same dangers as the servants of the undertaker. For instance, to the construction and carrying on of a factory it is essential that there should be buildings, machinery, and light; and accordingly the undertaker, that is, the occupier of the factory, requires from time to time the services of masons, carpenters, glaziers, gasfitters, engineers, and other workmen. These workmen may run just as great risks as the servants of the occupier of the factory. But the concluding paragraph of the 4th section, as I read it, expressly exempts the undertaker from any such claim, because the work which they are called in to execute, however essential and indispensable, is not part of or a process in the trade or business carried on in the factory.

In the present case I accept the Sheriff's finding that the erection of the stone screen was necessary to the proper use of the signal-box, and also that the work on which the deceased was engaged involved dangers as great as the ordinary dangers of active railway service; but, for the reasons which I have stated, I think he has arrived at a wrong conclusion in law.

I therefore agree in the views of the Judges in the English case of *Pearce*, L.R. (1900), 2 Q.B. 100.

I confess that I am unable to distinguish the circumstances of this case from those in the case of *Burns* v. *North British Railway Company*. That case was decided before the case of *Pearce*, and the Lord President disposes in a very few words of the question now before us, the other Judges adding nothing on that point. But when all is said, the decision is adverse to the appellants, unless it is held that the Court took the view that the erection of signals was work usually performed by the Railway Company's own servants.

That, however, does not appear from the opinions, and if the ground of judgment was that all work in connection with the equipment or repair of a railway, including the station-buildings, signal-cabins, retaining-walls, and so forth, is part of the business carried on by the Railway Company, and not merely ancillary to it, I cannot agree.

If this claim were admitted, I do not see how a claim by a glazier or gasfitter called in to repair the signal-cabin could be excluded.

The Court answered the question of law by declaring that the building contract between the appellants and Messrs D. P. How & Son, and the sub-contract between that firm and Robert Sheach junior, were not part of or any process in the trade or business carried on by the appellants, but were merely ancillary or incidental thereto; recalled the award of the arbitrator; and remitted to him to dismiss the claim.

Counsel for the Appellants — Guthrie, K.C. — Glegg. Agent — James Watson, S.S.C.

Counsel for the Respondent — Salvesen, K.C.—Gunn. Agents—Mackay & Young, W.S.

Saturday, June 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HENDERSON *v.* HENDERSON'S TRUSTEES.

Process — Expenses — Withdrawal of Reclaiming-Note — Respondent Printing after Communication with Reclaimer.

A reclaiming-note was sent to the Summar Roll on 16th May. On June 1, before the case had been put out for hearing, the reclaimers moved that the reclaiming-note be refused, and that they should be found liable in £2, 2s. of expenses. The respondents moved for full expenses, on the ground that after an interview on 27th May between the parties' agents, at which the reclaimers' agents had rejected a proposal for a joint print, and at which no indication had been given of any prospect of the reclaiming-note being withdrawn, the respondents had printed certain documents. The Court *allowed* £6, 6s. of expenses.

Alexander Henderson and others brought a petition for the sequestration of the trust estates administered under his marriage-contract trust. Answers were lodged for the trustees William John Menzies, W.S., and John Henry Robertson, stockbroker.

On 4th April 1901 the Lord Ordinary (PEARSON) pronounced an interlocutor, whereby he sequestrated the said estates.

Against this interlocutor the trustees reclaimed.

On 16th May 1901 the case was sent to the Summar Roll.

On June 1 the reclaimers enrolled the case in the Single Bills, and moved the Court to refuse the reclaiming-note, and to find them liable in £2, 2s. of modified expenses.

Counsel for the respondents moved for full expenses, and stated that, after an interview between the parties' agents on 27th May at which the reclaimers' agents had rejected a proposal for a joint print, and at which no indication had been given of any prospect of the reclaiming-note being withdrawn, the respondents had printed certain documents. He argued that the previous communication with the other side distinguished the case from *Gilchrist & Co.* v. *Smith*, Jan. 9, 1901, 38 S.L.R. 238, and brought it within the rule of *Little Orme's Head Limestone Company* v. *Hendry & Company*, November 25, 1897, 25 R. 124.

LORD PRESIDENT—We think that the circumstances here are such as to lead to somewhat more liberal treatment than in the ordinary case, because it cannot be said here, as it has been said in some other cases, that the respondent has been premature in printing. The respondent communicated with the other side and they offered no discouragement to printing. We therefore think that the expense of printing the documents referred to should be allowed, but we consider that instead of making a remit to the Auditor, an award of £6, 6s., instead of the customary £2, 2s., will meet the justice of the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court found the reclaimers liable in £6, 6s. of modified expenses.

Counsel for the Reclaimers — Macphail. Agents—Gadell & Wilson, W.S.

Counsel for the Respondents — Berry. Agents—Hagart & Burn Murdoch, W.S.

Tuesday, June 4.

FIRST DIVISION.

[Dean of Guild Court, Musselburgh.

DOWNIE *v.* FRASER.

Process—Civil or Criminal Jurisdiction—Dean of Guild Court Proceedings—Penalty—Appeal—Summary Procedure Act 1884 (*27 and 28 Vict. cap.* 53), *sec.* 28 *—Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 487.

Proceedings in the Dean of Guild Court, even when their purpose is the recovery of a penalty, are of a civil character, and may be appealed, when an appeal is competent, to the Court of Session.

Robert Fraser, Burgh Prosecutor of the Burgh of Musselburgh, presented a petition in the Dean of Guild Court Musselburgh against John Downie, contractor, Musselburgh, in which he prayed the Court to find the respondent liable in a penalty not exceeding £5 sterling, and additional penalties for each day that the contravention complained of continued.

In the petition it was averred that Downie was the owner of a new tenement in Musselburgh, and that he had failed to give notice to the clerk of the commissioners that the tenement in question was ready for inspection before permitting it to be occupied, contrary to section 180 of the Burgh Police (Scotland) Act 1892.

That section is in the following terms:—"Within one month after any new house or building, or any alteration on the structure of any existing house or building, has been completed, or before such house or building or any portion thereof has been occupied, the owner or the builder shall give notice to the clerk of the commissioners that the house or building, or any part thereof, is ready for inspection before being occupied; . . . and every owner or builder who shall fail to give such notice aforesaid, or shall permit such house or