the tenant as the landlord's agent. It seems to me therefore that the *Hamilton* case is decisive of the present question, and although I can quite understand, and even sympathise with, the tenant's expectation that the insurance money would be used for its natural purpose of reinstatement, I cannot hold that the landlord was bound by contract so to use it. The result must be absolvitor."

The pursuer reclaimed, and argued—In the present case the tenant stipulated with the landlord that the mill should be insured. There was therefore an obligation on the landlord to insure, and an implied contract that if the buildings and machinery were burnt down he should reinstate. In this respect the case was distinguished from that of *Duke of Hamilton's Trustees* v. *Fleming*, December 23, 1870, 9 Macph. 329, 8 S.L.R. 266, in which case there was no stipulation. The clause contained two correlative parts, one in favour of the tenant to the effect that the landlord should insure the buildings, and the other in favour of the landlord that the tenant should insure the stock. The agreement in the lease that the tenant was to take the threshing-mill at a valuation from the outgoing tenant, and when the lease was over hand it on at a valuation to the landlord or ingoing tenant, also showed that the insurance was in favour of the tenant as well as the landlord. The Court should sustain the first plea-in-law for the pursuer and remit the case to the Lord Ordinary for further procedure.

Argued for the defender and respondent —The stipulation in the lease was in the landlord's interest, and it was for him to judge whether or not it was for his interest to restore the subjects. If the stipulation had been in the interest of the tenant a sum would have been fixed at which the mill was to be insured. No such sum was mentioned; the matter was left wholly in the discretion of the landlord. The case was the converse of that of *Duke of Hamilton* v. *Fleming*, *supra*, and was ruled by it.

LORD JUSTICE-CLERK—I think that the judgment of the Lord Ordinary is right. The clause in the lease is no doubt in peculiar terms, but to spell out of that clause an obligation on the part of the landlord to reinstate in the event of a fire and a right on the part of the tenant to require such reinstatement is in my opinion impossible. The case presented by the tenant is that in terms of this clause the landlord was taken bound to insure the mill in order to provide against loss by fire on the part both of himself and of the tenant. I do not think that is the meaning of the clause. I think the terms of the clause are only a converse mode of stating the provisions in the lease, which formed the subject of the action in the *Duke of Hamilton's Trustees* v. *Fleming*. The insurance in my opinion was solely for the benefit of the landlord, the stipulation being that he should be entitled to insure the buildings for his own interest, and that if he did so the tenant was to pay one half of the insurance premium.

LORD YOUNG—I am of the same opinion. I think Mr Pitman's contention as to the true import and meaning of the clause in the lease upon which the question in dispute depends is the sound one, that it was a stipulation that the tenant should pay half the premium of any insurance which the landlord should make of the mill for such sum as he thought necessary, and that accordingly the tenant is not the creditor therein but the debtor. The words upon which Mr Millar's argument was founded were "the landlord shall insure." The construction put by Mr Millar upon these words was that the landlord became bound to insure for such sum as he considered necessary, and that the obligation of the tenant was to pay half of the premium. The contention on the other side which I prefer to that is, that there was no obligation put upon the landlord by the use of the word "shall," but that the meaning of the clause was to stipulate that if the landlord saw fit to insure, and did it for what sum he considered necessary, the tenant should pay half the premium. Now, that brings the case within the rule of the common law, which was well illustrated—for it was a mere illustration of the rule of common law—in the case of the *Duke of Hamilton*.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer —M'Lennan —J. H. Millar. Agents — Adam & Sang, W.S.

Counsel for the Defender and Respondent —Campbell, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Thursday, December 18.

FIRST DIVISION.

[Sheriff-Substitute at Edinburgh.

COLVINE *v.* ANDERSON & GIBB.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37) *sec.* 7, *sub-secs.* 1 *and* 2—*Factory—Warehouse—Distinction between Warehouse and Shop.*

The Workmen's Compensation Act 1897 enacts (section 7 (1))—"This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . 'factory.' . . ." (2) "'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."

A workman employed as a lorryman under a firm of drysalters was injured while removing certain casks from

their premises to his lorry. In a claim under the Workmen's Compensation Act 1897 it was proved that from 85 to 90 per cent. of the drysalters' business was retail, and that no notice under the Factory Acts had ever been served upon them. *Held* that the premises were not a "warehouse," but a shop, and therefore did not fall under the provisions of the Act.

Question (*per* Lord M'Laren) whether the word "warehouse," as used in section 7, sub-section 2, was limited to warehouses used as adjuncts to a dock, wharf, or quay; and *opinion* that it is limited to warehouses *ejusdem generis* with those usually found in connection with a dock or other landing-place for goods.

This was a case stated for appeal by the Sheriff-Substitute of the Lothians at Edinburgh (MACONOCHIE) in an arbitration under the Workmen's Compensation Act 1897, between William Colvine, lorryman, 46 Albert Street, the claimant and appellant, and Anderson & Gibb, drysalters, Blackfriars Street, Edinburgh, respondents.

The following facts were admitted or proved:—"(1) That appellant was a lorryman in the employment of Messrs Cowan & Company, contractors, North Bridge, Edinburgh, and the respondents describe themselves in their trade documents as drysalters, oil, paint, varnish, and chemical merchants and manufacturers, and as paint and varnish manufacturers and wholesale drysalters.

"(2) To enable them to carry on their business at Nos. 19 and 21 Blackfriars Street, the respondents contracted with Messrs Cowan & Company for the hire of a lorry and man.

"(3) That for a considerable time previous to 18th March 1902 Messrs Cowan & Company had, in fulfilment of said contract, sent the appellant to the respondents' premises every morning, and that while there he was under the direction of the respondents and their foreman.

"(4) That the appellant's average weekly wage for the twelve months prior to 18th March 1902 was 22s. 8d.

"(5) That on said 18th March the appellant was in the ordinary course of his duty removing casks of white lead, weighing about 2 cwt. each, from the respondents' premises to his lorry, which was standing in the street opposite Nos. 19 and 21, when one of the casks slipped and so crushed his left hand that the first and middle fingers had to be amputated.

"(6) That as the result of the accident the pursuer was at the time when the evidence was heard totally incapacitated for his work as a carter.

"(7) That the respondents have two sets of premises in Blackfriars Street, viz., Nos. 19 and 21 on the one side of the street, and on the opposite side, 20 to 30 yards further down the street, a yard in which large barrels of oil and heavy chemicals were stored. On the yard door was painted 'office and warehouse at Nos. 19 and 21 opposite.'

"(8) That the premises at Nos. 19 and 21 Blackfriars Street consisted of two large rooms on the ground floor and two cellars in the basement.

"(9) That in the northmost room on the ground floor there was a counter, over which the goods were sold to customers, and that in the southmost room (which is connected with the north room by a door not used by the public) there was also a counter, which was used only for office purposes, and for making up small quantities of paint, spirit varnishes, and roller composition from materials bought elsewhere.

"(10) That almost the entire business of the respondents (viz., between 85 and 90 per cent.) consisted of sales to customers of goods for their own use, and not to be sold by them again.

"(11) That there were goods kept in all the rooms at Nos. 19 and 21, the heavier casks being kept mainly in the basement. The goods consisted mainly of casks of oil, all of which were open and ready for the delivery of small quantities; casks of white lead, of which there were generally ten or twelve in the premises, four, one of each quality, being open for retail sales; small parcels of saltpetre, soda, and varnish; paints, none of which were sold in large quantities from the premises, and starch, which was sold in 56 lb. cases.

"(12) That though a considerable amount of goods were sold and delivered over the counter the greater part of them were delivered by lorry or by rail to the buyers.

"(13) That one of the firm and a traveller go round the country for orders, and that respondents' staff in Blackfriars Street consisted of two clerks, a foreman, three porters, a boy, and the lorryman from Messrs Cowan & Company.

"(14) That on one occasion since the respondents were carrying on business in the same way as at present the inspector of factories called to make inquiries as to whether the premises fell within any of the provisions of the Factory and Workshop Acts, and after examination said to the respondents' foreman, 'I have nothing to do with the premises;' and that the respondents have never been notified by the said inspector that their premises fell within the provisions of these Acts, and that they have never been required to do any of the things required of employers whose premises fall within the provisions of those Acts."

On these facts the Sheriff held "that the respondents' premises were not a warehouse to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895 within the meaning of section 7 of the Workmen's Compensation Act 1897, and dismissed the petition."

The following was the question of law:—"'Whether upon the facts stated the accident to the appellant took place on, in, or about a factory within the meaning of section 7 of the Workmen's Compensation Act 1897.'"

Argued for the appellant—The accident happened in a warehouse within the mean-

ing of the Act. The meaning of warehouse was a place where goods were stored, and the fact that a retail trade was carried on in the same place did not make it any the less a warehouse. The word "warehouse" was not limited to premises used in conjunction with a landing-place for goods—*Wilmott* v. *Paton* (1902), 1 K.B. 237. Secondly, if this was a warehouse it was a factory within the meaning of the Act. Every warehouse to which any of the provisions of the Factory Acts were or might be applied was a factory, just as every dock was a factory—*Hall* v. *Snowden, Hubbard, & Company* (1899), 2 Q.B. 136; *Strain* v. *Sloan & Company*, March 13, 1901, 3 F. 663, 38 S.L.R. 475; *Raine* v. *Jobson & Company*, (1901), A.C. 404. Section 23 of the Factory and Workshop Act 1895 applied to all docks and all warehouses.

Argued for the respondents—This was a shop, not a warehouse. A warehouse meant a building primarily used for storage of goods, not for retail trade. It should be the kind of building found at a landing-place for goods, whether it must necessarily be physically in connection with a dock or not. Even if this was a warehouse it was not a factory, because no provisions of the Factory Acts had ever been applied to it—*Jackson* v. *Rodger & Company*, January 30, 1900, 2 F. 533, 37 S.L.R. 390; *Bruce* v. *Henry & Company*, March 8, 1900, 2 F. 717, 37 S.L.R. 511; *Low* v. *Abernethy & Company*, March 8, 1900, 2 F. 722, 37 S.L.R. 506; *Healy* v. *Macgregor*, February 20, 1900, 2 F. 634, 37 S.L.R. 454. The Act was not intended to apply to every warehouse; if it did, the definition in section 7, sub-section 2 (quoted in rubric) was meaningless—*Raine* v. *Jobson & Company*, *cit. supra*, was not a decision to the effect that every dock was a factory, though that was stated in the head-note. It was clear from the opinion of the Lord Chancellor that the judgment proceeded on an admission, and did not decide the point.

At advising—

LORD PRESIDENT—The first question is whether the premises of the respondents in Blackfriars Street, Edinburgh, or any part of these premises, are a "warehouse" within the meaning of the Workmen's Compensation Act 1897.

The respondents have two sets of premises in Blackfriars Street, Nos. 19 and 21 on one side of the street, and on the opposite side of the street, twenty or thirty yards further down, a yard in which large barrels of oil and heavy chemicals are stored.

The premises 19 and 21 Blackfriars Street consist of two large rooms on the ground floor and two cellars on the basement. In the northmost room in the ground floor there is a counter over which goods are sold to customers, and in the southmost room there is also a counter, but it is used only for office purposes and for making up small quantities of paint, spirit varnishes, and roller composition, from materials bought elsewhere. Between eighty-five and ninety per cent. of the respondents' business consists of sales to customers of goods for their own use, and not to be sold by them again—in other words, eighty-five to ninety per cent. of it is a retail business. Goods are kept in all the rooms in Nos. 19 and 21, the heavier casks being kept mainly in the basement. The goods consist principally of casks of oil, all of which are kept open and ready for delivery of small quantities, casks of white lead, also open for retail sales, small parcels of saltpetre, soda, varnish, and paints, none of which are sold in large quantities, and starch, which is sold in 56 lb. cases.

Although a considerable proportion of the goods is sold and delivered over the counter the greater part of them is delivered to the purchasers by lorry or by rail.

A principal of the firm and a traveller go round the country for the purpose of obtaining orders, and the staff at Blackfriars Street consists of two clerks, a foreman, three porters, a boy, and a lorryman from Messrs Cowan & Company.

Since the respondents have carried on business in the same way as they now do, the Inspector of Factories called and made inquiries with the view of ascertaining whether the premises fell within any of the provisions of the Factory and Workshops Acts, and after examination and inquiry he said to the respondents that he had nothing to do with their premises. The respondents have never received notification from the inspector that their premises fall within the provisions of these Acts, and they have never been required to do any of the things demanded of employers whose premises fall within these provisions.

Upon these facts, I am of opinion that the respondents' premises are not a "warehouse" within the meaning of the Workmen's Compensation Act 1897. There is no definition of "warehouse" in the Act of 1897, and we know that the term is used in a variety of senses, but I think that, as used in that Act, it does not include a retail shop, which the respondents' premises practically are, otherwise every such shop would come under the provisions of the Factory Acts which have not hitherto, so far as I am aware, been held applicable to them. While it may be difficult to define "warehouse," I am of opinion that as used in the Act of 1897 it involves the idea of a place, normally of considerable size, mainly used for the storage of goods in bulk, or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise.

If I be right in thinking that the premises in question are not a "warehouse" in the sense of the Act of 1897, it is unnecessary to consider the questions, some of them difficult, which would arise if these premises were a "warehouse" within the meaning of that Act.

LORD ADAM concurred.

LORD M'LAREN—This case raises an important question as to the application o

the Workmen's Compensation Act and the Factory Acts to warehouses. As to the meaning of the word "warehouse," I desire to reserve my opinion on the larger question, whether the Workmen's Compensation Act applies only to such warehouses as are part of or related to a dock or place for the loading and unloading of sea-going ships.

It may be that the association of "warehouse" with "dock, wharf, or quay" does not limit the application of the Act of Parliament to warehouses which are in actual proximity to a landing-place for goods, and yet the association or collocation of these words may legitimately be considered as explanatory of the sense in which this ambiguous word "warehouse" is used. For the purposes of the present case it is sufficient to say that in my opinion a "warehouse" under the Workmen's Compensation Act must be a warehouse *ejusdem generis* with such warehouses as are usually found in connection with a dock or other landing-place.

In other words, if there may be an inland warehouse in the sense of the Act, it must be a warehouse for the storage of goods such as might form part of the equipment of a dock, and not any building which in a loose sense of the word might be called a warehouse. I therefore concur in the judgment proposed.

LORD KINNEAR concurred.

The Court answered the question in the case in the negative.

Counsel for the Appellant—A. S. D. Thomson—M'Robert. Agent—T. Stuart Macdonald, Solicitor.

Counsel for the Respondent—Graham Stewart—W. L. Mackenzie. Agents—Clark & Macdonald, S.S.C.

Thursday, December 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THE BOWHILL COAL COMPANY, FIFE, LIMITED *v.* TOBIAS.

Sale—Contract to Deliver Coal for Export f.o.b.—Export-Duty Imposed after Contract Made—Seller or Purchaser Liable to Pay Duty—Finance Act 1901 (1 *Edward VII. c.* 7), *sec.* 3 (1).

In the beginning of April 1901 a firm of coalowners in Fife sold 6000 tons of coal to a coal importer in Germany. Under the contract delivery was to be f.o.b. at certain specified ports in Scotland, the shipments to extend over twelve months beginning 1st April 1901 in as nearly as possible equal quantities per month. It was also a condition of the contract that the coal sold was to be for *bona fide* exportation only. On 19th April, when the contract had just begun to be executed, the Finance Act 1901 came into operation. By section 3 (1) of this Act a duty of 1s. per ton was imposed "on coal exported from Great Britain and Ireland."

Held (*aff.* judgment of Lord Ordinary Kyllachy, *diss.* Lord Young) that under the contract the sellers and not the purchaser were liable for the export duty.

In October 1901 the Bowhill Coal Company, Fife, Limited, raised an action against A. Tobias, Oldenburg, Germany, (1) for a balance still due and resting owing of the price of coals sold and delivered to the defender; and (2) for damages for breach of contract.

The facts of the case were as follows—By contract dated 3rd and 6th April 1901 the Bowhill Coal Company agreed to purchase from the Tobias 6000 tons of treble nut coal, to be shipped from 1st April 1901 to 1st April 1902 in as nearly as possible equal portions per month, delivery f.o.b. at Burntisland, Methil, and Charlestown, at 10s. per ton. The contract expressly provided that "the quantity of coal herein named is for *bona fide* exportation by the purchaser, and not for sale by other export merchants or any other person in Great Britain, unless specially permitted by us (the sellers) in writing."

On 19th April, when the contract had just begun to be executed, the export-duty on coal imposed by the Finance Act 1901 came into operation.

By section 3 (1) of this Act it is enacted:—"There shall, as from the 19th day of April 1901, be charged, levied, and paid on coal exported from Great Britain or Ireland a duty of 1s. per ton, but a rebate of the duty shall be allowed on any coal the value of which free on board is proved to the satisfaction of the Commissioners of Customs not to exceed 6s. per ton."

The sellers and the purchaser differed as to who should pay this duty. The sellers claimed that it should be paid by the purchaser as being the exporter. The purchaser contended that as delivery was to be f.o.b., and the duty had to be paid before shipment, the burden fell on the sellers. The purchaser had chartered certain vessels to proceed to the port of loading for the purpose of loading the coal which the sellers were to supply, but the sellers refused to load any of these vessels unless the purchaser paid the tax. As the Customs authorities insisted on payment as a condition of shipment the purchaser, in order to get the vessels loaded, and to prevent loss from demurrage and other claims, paid the tax under protest and reservation of his rights. Thereafter, on 18th September 1901, as the sellers persisted in their refusal to pay the tax, the purchaser intimated to them that he cancelled the contract, reserving his claim for damages. When the contract was cancelled, 2157 tons 5 cwts. out of the 3000 tons to be taken during the months of April, May, June, July, August, and September had been supplied, for which a balance of £578, 7s. 7d. was still owing by the purchaser to the sellers. Of this