whether there is repugnancy in the admission of the general meaning of the word "tolls" under the 90th section.

I do not intend to go through these sections. I quite concur in the remarks your Lordship has made, but I wish to make this observation:—A party who sends his goods to be carried by the railway company has employed that railway company as a public carrier, but a party who runs his own waggons upon the railway belonging to the company, whether with or without goods in them, is hiring the railway for toll, and I humbly think that the lien given by sec. 90 is incident rather to the contract of hiring than to the contract of carriage. If a railway company running waggons on another line were to undertake to carry my goods along that other line—where you have at once two companies, the one the carrying company and the other the company whose line is hired by the carrying company—it does not appear to me that the company which carries my goods would have any benefit from this extended lien. The company in the meaning of the 90th section is the company who hold the line, and the relation between that company and those who run waggons upon their line is the relation between the hired and the hirer, but the company which carries my goods on that other line is to me the public carrier, and I do not think that it would be entitled to plead the benefit of this section. This, I think, goes deeply into the meaning of the 90th section.

Upon the authorities, I have nothing to add. I think there has been a misunderstanding upon the part of Lord Shand in regard to the authority of the case of *Wallis*. In the Law Journal, where the pleadings and opinions are given at greater length, it appears very clearly that the case was fully argued, that this particular point was raised, and that it was carefully considered and authoritatively decided. Lord Shand has undoubtedly expressed an opinion different from that given by your Lordship, and I cannot concur in his opinion, though it is very ably and fully expressed. I think there is an indication by Lord Young in the case of *Peebles* in the same direction, but the judgment in that case turned on another point; and on the whole matter, I feel, as your Lordship does, considerable satisfaction in finding that the judgment in these reports upon the 97th section of the English Act is in entire conformity with the view which, apart from any authority, I would be disposed to take without much hesitation on the construction of sec. 90 of the Scotch Act.

Lord Mure—I have come to the same conclusion. I shall simply add that it appears to me that, looking at the matter in a general point of view, the principle which seems to run through those sections in relation to railway companies acting as common carriers is to place them substantially in the same position as that in which common carriers stood at that time. Looking at sec. 90, the question is, whether by that section it was intended, as is here contended by the company, to give railway companies advantages in the matter of a general lien far beyond any which common carriers enjoyed then or enjoy now. That is what we are asked to hold as the meaning of the section in the circumstances of this case. Now, putting aside the words used, I think the presumptions are very strong against there being any such intention on the part of the Legislature. I think, therefore, it would require some more express and unequivocal declaration to that effect to warrant us in coming to such a conclusion, and I can find no such warrant in the 90th section.

But, on the other hand, looking to the nature of the traffic to be carried by railway companies, and the use to be made of their lines, it was necessary to make provision by some new and special arrangement under this section for cases where parties were using their own carriages for the carriage of their own goods on payment of certain tolls for the use of the line belonging to the company. It was necessary to make provision for such goods, which are so completely in the power of the private party who is using the line, in the matter of removal, that they could be removed at any time without the consent or even knowledge of the railway company, and without payment of the tolls; and I think it is to the tolls of goods so removed, and tolls paid for the use of the line by a private party using his own carriages, that the words of section 90 are meant to apply.

I think the section is limited to that, and on that ground, without going into details as regards the other sections, I have come to the same conclusion with your Lordships, and I think that the judgment in the English case of *Wallis* is a sound construction of that clause.

The following interlocutor was pronounced:—

"Recall the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 12th March and 30th November 1875: Refuse the prayer of the petition, and decern: Find the respondent entitled to expenses both in the Inferior Court and in this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Petitioners (Appellants)—Dean of Faculty (Watson)—Mackintosh. Agents—H. & A. Inglis, W.S.

Counsel for the Respondent — Balfour — M'Kechnie. Agent—T. Carmichael, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

THE INLAND REVENUE *v.* THE GLASGOW CORPORATION GAS COMMISSIONERS.

Assessment—Property and Income-Tax Act, 5 and 6 Vict. cap. 35—Profits.

The Glasgow Corporation Gas Commissioners were under a local Act empowered to manufacture and sell gas to the inhabitants of Glasgow and suburbs. It was provided that the balance of revenue, after certain payments of interest on debt and of annuities, was to be carried to the credit of the corporation for their general purposes.

Held that as under this Act the corporation were traders in gas, the balance was assessable as profits under Schedule D of the Income-Tax.

Observations (*per curiam*) on the distinction to be drawn between this case and that of *The Glasgow Corporation Water Commissioners*, May 26, 1875, 2 Rettie 708.

This was a Case stated by the Commissioners for General Purposes under the Property and Income-Tax Acts for the city of Glasgow, which coming before the Lord Ordinary (SHAND) in Exchequer causes, was appointed by his Lordship to be heard before the First Division of the Court.

The case was as follows:—The Glasgow Corporation Gas Commissioners appealed against an assessment made upon them under Schedule D of the Income-Tax Acts, for the year 1875-6, on the sum of £62,083, the alleged profits of the gas-works—1st, On the plea of *res judicata*, in respect it was alleged that under an arrangement come to between the solicitors in Edinburgh acting respectively for the Inland Revenue and the Glasgow Corporation, it was agreed that the decision in the case of the water-works (*The Glasgow Corporation Water-works* v. *Inland Revenue*, Exchequer, Scotland, First Division, 26th May, 1875, 2 Rettie 708) should rule that of the gas-works; and 2d, On the merits—that under the statutes and the decision just quoted they are only assessable for their annuities, interest on mortgages, and feu-duties, from which they are entitled to retain the tax on payment. The facts are these—By "The Glasgow Corporation Gas Act 1869" the Glasgow Gas Light Company and the City and Suburban Gas Company of Glasgow, with all their privileges, obligations, and liabilities, were transferred to and vested in the Municipal Corporation of the city, the former as at 31st May 1869, and the latter as at 30th June 1869. That Act was amended by "The Glasgow Corporation Gas Act 1871," and "The Glasgow Corporation Gas Act 1873." The corporation are authorised to supply gas to the city of Glasgow and suburbs. They are also required to pay the shareholders of the original companies perpetual annuities to the extent of £34,762, 10s., and in the event of there being any deficiency of funds to pay these annuities they are authorised to assess the occupiers of all lands and heritages situated within the parliamentary and municipal boundaries of the city of Glasgow at a rate not exceeding 6d. per £ on the real rent or yearly value of such lands and heritages. The corporation are also empowered to borrow money, not exceeding one million sterling, on mortgage, for the purposes of their carrying the Act into execution. They are further required to set apart as a sinking fund a sum not less than one per centum per annum on the amount borrowed, which fund is to be applied in the redemption of the mortgages or annuities, and must never be less than £2000. They are further empowered to manufacture and sell gas, gas-pipes, and lamps, and carry on such operations and business as are for the time being usually carried on by gas companies. The price charged by the corporation must not exceed 4s. 7d. per 1000 cubic feet. The monies received under the Act (not being money borrowed) must be applied in the following manner, and not otherwise:—*First*, "In payment of the expenses of and incidental to the raising, levying, and recovering the rents, charges, and revenues, and the borrowing of monies under this Act." *Secondly*, "In payment of the expenses of managing and maintaining the gas-works of the corporation." *Thirdly*, "In payment of the Glasgow Corporation gas annuities, and annuities to holders of funded debt, and interest of money borrowed under this Act." *Fourthly*, "In carrying the several powers and provisions of this Act into execution, including any extension and improvement of the gas-works and mains, and may carry any balance thereof to the credit of the corporation for their general purposes." In support of their preliminary objection, the corporation stated—[here followed the argument upon the plea of *res judicata*, which was not insisted on before the Court of Exchequer.] . . . . The corporation admit their liability to pay tax on the annuities, interest, and feu-duties, as they did in years prior to 1872-73, and which amounts for the year 1875-76 to £59,712; but they maintain that they are not liable for income-tax on any surplus after payment of the working expenditure, nor for the sinking fund (which in the case of the Water Company were found not to be assessable), as such an assessment would be practically one on means and substance. It was submitted that the case of the gas-works is substantially the same as that of the water-works, in which it has been found by the Court of Exchequer that there can be no profits in the sense of the Income-Tax Acts. The expenses and revenue are intended to meet each other, and if there happen to be a surplus, it is simply carried forward to aid in reducing the price of gas in the succeeding year. The charge for gas in this case is cost price as nearly as can be estimated, and is simply "a district rate" imposed by the corporation upon themselves, and payable in proportion as they use the article. The object of the corporation in taking over the undertakings of the old gas companies was to save profits and give the inhabitants gas at cost price. There are no profits belonging to any one for his patrimonial interest, and no individual is enriched by the exercise of the statutory powers of the corporation, who are merely gratuitous trustees for the general community; and though the corporation have power to apply the surplus to their general purposes, they have never done so, and have refused to do it—any surplus being always carried forward to next year's account. Reference was also made to the opinion of the Judges who took part in the decision of the water case, and to the cases and *dicta* of the English Judges there referred to. [Here came the answer of the Crown to the plea of *res judicata*.] . . . . In reply to the second plea, it was argued that in the water-works the whole point was whether the monies collected by means of a compulsory general district rate, under the authority of an Act of Parliment, could be regarded as profit; and the Court held that they could not be so regarded, because the rate must be, and was, adjusted so as to cover the expense incident to the supply of water, and leave no surplus. In the case of the gas-works there is no obligation upon any householder in Glasgow to have pipes laid down to his house or to burn gas; and the amounts paid by those to whom gas is supplied are in no respect general

or compulsory rates, but are payments made according to the quantity consumed, and in conformity with contracts between the consumer and corporation. It was further submitted that it is a commercial undertaking. The Corporation purchased the works of two companies who carried on their works as commercial undertakings, and by section 54 of "The Glasgow Corporation Gas Act 1869" they are "empowered to manufacture, purchase, supply, sell, let, lay down, place and maintain gas-fittings, meters, pillars, pipes, lamp-posts, lamps, burners, and other articles and things connected with gas-works or with the supply of gas for public or private consumption, in such manner as the corporation think proper, and generally may carry on such operations and business as are for the time being usually carried on by gas companies." Again, they compete beyond the municipal boundaries with other gas companies, which are purely commercial undertakings and sell their gas at the same price as the corporation do. Further, by the last part of section 86 of the said Act the corporation are empowered to carry any balance or surplus to the credit of the corporation for their general purposes, clearly showing that it is anticipated that profits will be realised; and these profits, when so realised, may be applied as part of the common good. No such powers and privileges as those conferred on the corporation by sections 54 and 86 of the Gas-Works Acts are contained in the Water-Works Acts, so that the two cases are not the same in principle, nor are they analogous. It was therefore maintained that the assessment was correct, and should be affirmed. The Commissioners having considered the case, were of opinion that there was no difference in principle between the two cases; and as the trust existed for the benefit of the community, they sustained the appeal, and restricted the assessment to the amount of the annuities, interest, and feu-duties, say £59,712. A case was then craved on behalf of the Crown for the opinion of the Court of Exchequer.

At advising—

Lord President—In this case the Income-Tax Commissioners say that they have not found any difference in principle between it and the case which we decided in regard to the Water-works assessments in Glasgow. If I could agree in that opinion I should be very glad to confirm the decision of the Commissioners; but the distinction between the two cases is, I think, very palpable, and essential for the purposes of this question. The Glasgow Corporation Gas Act of 1869 empowered the magistrates and town council —the Corporation of Glasgow—to purchase the undertakings of the two companies which had been previously authorised by Act of Parliament to supply Glasgow with gas, and the 4th section of the statute transferred the whole property of these two companies to the municipal corporation.

The way in which the corporation were authorised to pay the price for this subject which they so acquired, is provided by the 11th section of the statute, and it was by way of annuity to the shareholders in the former gas companies, corresponding to the value of the interest which they held in those companies. The corporation were then empowered to manufacture and sell gas to the inhabitants of Glasgow and suburbs, and the 83d section, among other things, provided that there should be a sinking fund to pay off the debt, which, of course, the corporation were obliged to incur, in the first instance for the purpose of erecting works and setting the concern on foot. Now, as regards the other clauses of the Act, with respect to the conduct of this undertaking by the corporation, it is only necessary to add that they have no power to compel anybody to take their gas. On the contrary, it is quite optional for any of the inhabitants to buy their gas from the corporation or not, as they think fit, and the corporation are put under a restriction as to the price which they are to charge for the gas by the maximum price of 4s. 7d. being allowed. Then, finally, the 86th section of the statute provides for the application of all moneys that are to go into the gas corporation in the way of revenue. The revenue of the corporation is applied in terms of this section;—in the first place, in payment of the interest of mortgage debt, and in payment of the annuities; and there can be no doubt that income-tax is charged on that part of the revenue—not on this corporation, but on their creditors, the creditors on the mortgage debts and the holders of annuities—because the income-tax which is levied on the corporation in the first instance, forms a deduction from the payment of these interests and annuities.

But then, the question has arisen, and it comes to this very narrow point, whether, if there be anything beyond that—if there be any revenue beyond what is applied in this way, or in maintaining the work, and which goes into the sinking fund in terms of the 83d section, or goes into the coffers of the corporation for their general purposes under the 83d section—that is or is not liable for income-tax. Now, I answer that question in the affirmative. It seems to me that the corporation of the city of Glasgow is by virtue of this statute empowered to enter into a speculation as traders in gas. No doubt it may have been for the benefit of the community,—that is perfectly true—but they have all the character and attributes of a trading company. They acquired the works for the purpose of manufacturing gas; they manufacture gas, and sell it to those who are willing to become buyers; but they cannot sell it to every one—that is to say, they cannot compel anybody to take it who is not willing to do so and willing to do so at their price. They are empowered and authorised—nay, bound—to make provision for the paying off of the mortgage debt which they had incurred at the commencement of the concern; and after they have done that, whatever surplus there is belongs to the corporation for its general purpose—that is to say, goes simply into the common good of the corporation, which is, in other words, saying that the surplus belongs to this company—to this trading company—for its own uses and purposes.

The distinction between this and the case which is argued by the Income-Tax Commissioners is very clear. There never could be any surplus or balance of profit under the Water Trust Act, for this simple reason, that the statute made it imperative to use every shilling of revenue that was levied under that statute, so far as it was not otherwise employed, in reducing the rates paid by the ratepayers; and in that way there never

could be any balance at all. There was no trading in the sense that, after paying the expenses and interest, a balance could arise which which was not otherwise appropriated. Further, by the Water Trust Act, Commissioners thereby appointed were authorised to levy assessment within a certain district, at a certain rate, according to the rental of the property within that district; and all the moneys raised by means of that assessment were to be devoted exclusively to the public purpose defined by the statute itself. In this case there is no authority to levy a rate at all, and therefore the case belongs to a different category, because that rate which is authorised to be levied by the 42d section of the statute is really nothing more than the creation of a security or guarantee for the annuitants, the shareholders of the companies, in the event of the concern not turning out profitable enough to enable the corporation to continue to pay the annuity. That, however, is not to come into operation under ordinary circumstances, and forms no proper part of the scheme under which the corporation are to conduct the business of manufacturing and selling gas. I think the distinction in this way between the cases is so clear that it is needless to waste more words upon it. The portion of the revenue which goes into the sinking fund is just a part of the income of this trading corporation, which is used by them for paying off their debt, and the portion of it beyond that, which goes into the funds of the corporation for their general purposes, is just also something which they had gained in the way of profit or surplus revenue for public benefit; and it does not require that profits shall be for the benefit of individuals only in order to make them profits within the meaning of Schedule D of the Income-Tax. If they are for corporate benefit, they are just as much profit within the meaning of the statute; and I have no hesitation in setting aside the decision of the Commissioners and sustaining the assessment.

Lord Deas concurred.

Lord Ardmillan—I also am of the same opinion, and have little to add to what has already been said. I think there are two grounds on which the distinction of this case from the case of the Water Company rests. In the first place, in the mode of operation by which the funds come in. In the case of the Water Company the funds came in by an assessment upon all the parties liable in a public assessment, and every person had to pay that assessment whether he consumed the water or not. But in the case of the supply of gas every person is not bound to take it in. Customers take it just as much as any other article sold to them. The relation between the corporation and the ratepayers in regard to gas is the relation between a company or corporation selling and individuals purchasing. In regard to the mere use of the article, the water supplied by the Water Company was in the same position as the gas. If a person chose not to use the water so supplied, having a supply in the back-green or elsewhere, he was not bound to use it, but he was still bound to pay; but if he uses oil lamps in preference to the gas supplied by the corporation, he may do so, and be relieved from paying for the gas which the corporation manufacture. Therefore, the distinction in the mode of operation as to the manner in which the funds are gathered is very obvious; but the other distinction is just as obvious. What is the ultimate result in administering the funds? In the case of the water-rate, the ultimate result led, by force of the statute, to a diminution in the water-rate. There is no such result in the case of the gas. The statute, after setting forth what may be done with the funds, ends by saying that the balance shall be carried to the credit of the corporation for their general purposes. I have no doubt these purposes are wise and beneficent purposes, but they are purposes within their own control, so far as this statute goes. I cannot see any ground for dealing with this company as other than a company choosing to sell to those who buy, and the profits they make after complying with certain statutory regulations about the payment of debt is property at their own disposal. The case of the Corporation under the Water Act is quite different, for a statute law came in and gave them statutory powers, and imperative statutory directions for the ultimate application of the fund for the benefit of all assessed.

Lord Mure concurred.

The decision of the Commissioners was reversed, and the assessment sustained to its full amount.

Counsel for the Inland Revenue—Solicitor-General (Watson)—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Glasgow Corporation Gas Commissioners—Maclaren—Balfour. Agents—Campbell & Smith, S.S.C.

Wednesday, June 21.

FIRST DIVISION.

[Lord Rutherfurd Clark.

NAISMITH *v.* CAIRNDUFF.

Superior and Vassal—Feu-Contract—Condition.

In the feu-contract of a portion of ground it was declared that the buildings to be erected on the feu "shall consist of cottages with suitable offices, which cottages shall not exceed four in number, and shall be built on the sites shewn on the plan" which was endorsed upon the deed. The superior further served the minerals. The vassal proceeded to put up a building to which the superior objected—firstly, that it was not a cottage; and secondly, that it was erected on a site different from any of those shewn upon the plan.—*Held*, after a proof, that as the building consisted of two square stories it was not a cottage, and the feu-contract had therefore been violated.

Cottage.

A cottage is a single-storey building, but that does not exclude the addition of apartments in the roof with windows.

Opinion (*per* the Lord President, and Lord Rutherfurd Clark, Ordinary) that under the circumstances, as the dimensions of the building areas were not inserted in the contract, it was not intended to restrict the vassal absolutely within the area specified upon the plan,