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,

and that it was not incorporated to that effect with the feu-contract.

By feu-contract, dated June 10, 1868, the pursuer James Naismith, portioner in Bothwell, sold to the defender James Wilson Cairnduff a plot of ground containing 1 acre 1 rood and 30 poles, part of the lands of South Whitelaw Park, lying in the parish of Bothwell. The consideration was a yearly feu-duty of £14, 7s. 6d. and there was the following declaration in the deed:—"Declaring that the said James Wilson Cairnduff and his foresaids shall be bound and obliged within two years to erect and finish in the plot or area of ground hereby disponed one cottage, to be occupied as a dwelling-house, yielding a yearly rent to the amount of double the feu-duty after stipulated at least, and to maintain and uphold the said cottage, and to rebuild the same, and to maintain the same when so rebuilt, so that it shall yield the like rent in all time coming: And declaring that the buildings to be erected on the foresaid plot or area of ground 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 said plan or sketch, and shall front the north, and shall each of them be, in point of size and accommodation as well as architectural character, at least equal to either of the two cottages which have been already erected on the ground to the southward thereof, lately feued to the said William Henderson; and the outer walls of the said cottages, and also of any outhouses, coach-houses, stables, and offices, to be erected on the ground hereby disponed, shall be built of stone and lime; and the said cottages and other buildings shall be covered with slates, and shall be erected at the distance of not less than 15 feet at all points from the west side of the said Parish Road; and the front and gable walls of the said cottages shall be of polished ashlar or neatly-dressed square rubble work; and the said James Wilson Cairnduff and his foresaids shall not be at liberty at any time to erect any building upon the said plot or area of ground other than the said four cottages to be occupied as dwelling-houses, with suitable outbuildings or office-houses to be used and occupied in connection therewith."

The minerals were reserved to the pursuer in the following terms:—"Reserving always to the said James Naismith and his heirs and successors the whole coal, ironstone, shale, metals, and minerals within the said lands and others before disponed, with full power and liberty to him and his foresaids, or others authorised by them, to search for, work, win, and carry away the same, provided this be done without breaking or entering upon the surface of the said lands, and subject always to the condition that he and his foresaids, or their tacksman of the said coal, ironstone, shale, metals, and minerals, shall be bound to pay to the said James Wilson Cairnduff and his foresaids all damage that may be done to the foresaid plot or area of ground and buildings erected or to be erected thereon by searching for, working, winning, and away-carrying of the said coal, ironstone, shale, metals, and minerals."

The pursuer brought this action of declarator, interdict, and removing, on the ground, as he averred, that the defender "is in course of erecting on his feu a building which is not a cottage, but a double villa of two square stories in height, and he is erecting the same on the site marked A B C D on the plan or sketch herewith produced, being a different site from any of those shewn on the plan or sketch which was endorsed on the said feu-contract and subscribed as relative thereto." He further averred that the erection of such buildings seriously affected his rights of property, as they were more likely to be injuriously affected by mining operations than "cottages." He explained that the cottages referred to in the feu-contract as having been erected on the ground feued by Henderson were single cottages of one square storey in height with attics.

The defender admitted that the building he had erected consisted of two stories, containing two separate dwellings, and averred that it was placed on the site indicated by the plan referred to. Henderson's building was a "double villa of two stories in height at the back," and he had extended in the several cases in which he had built beyond the limits of the sites marked off on the plan endorsed on his feu-contract.

The pursuer pleaded, *inter alia*—"(1) The pursuer, in virtue of the titles libelled, is superior of the subjects in question, and is in virtue thereof, and of the feu-contract between him and the defender libelled, entitled to decree of declarator as concluded for. (2) The dwelling-house which the defender is in course of erecting not being a cottage, and being in various other respects a violation of the contract of parties as embodied in the feu-contract and relative sketch or plan, the pursuer is entitled to interdict, and to have the same removed and taken down, as and to the extent concluded for."

Both parties were allowed a proof of their averments. It was proved that the buildings erected by the defender had two square stories. Mr Peddie, architect, described it as a double villa. He further deponed—"It is perhaps not possible to define the distinction between a cottage and a double villa: but a cottage is a very small residence, and, when applied to a residence for people of the middle class, it is in my experience applied to a house of one storey; or, if there is a second storey, that storey is almost wholly in the roof. When it goes beyond that it ceases to be called a cottage. *Cross.*—You can have a house which would fall within the proper appellation of a cottage although it extended to a full storey and another storey that was only partially upon the roof. It is quite possible to spend upon a cottage in ornamentation a great deal more than would be necessary to build a double villa." The buildings erected by Henderson were proved to have only one storey and attics. Mining engineers were brought to give evidence as to the existence of minerals in the district and the liability to damage where there are buildings of weight upon the surface.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 12*th January* 1876.—The Lord Ordinary having considered the cause, Finds that the defender has violated the conditions of the feu-contract libelled by erecting a house which is not a cottage: to that extent Finds, declares, and decerns in terms of the conclusions for declarator and interdict; decerns and ordains the defender to take down the house erected or in the course of being erected by him in so far as

it exceeds in height one square storey and attics, and that at the sight of Mr John Baird, architect in Glasgow: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and report.

"*Note.*—The buildings of the defender are objected to, 1st, because they are not cottages; and 2d, because they are not erected on the sites specified in the plan referred to in the feu-contract.

"The defender did not maintain that the house which he was erecting was a 'cottage,' but he contended that there was no restriction on the character of the buildings, provided that they were used as dwelling-houses, and that even if there were, the pursuer had no interest to enforce it.

"The Lord Ordinary does not think that this answer is well founded. The feu-contract declares that the buildings to be erected on the feu 'shall be cottages;' and again, that the defender shall not be entitled to erect any buildings 'other than the said four cottages.' These provisions are so express that, in the opinion of the Lord Ordinary, they cannot be extended by construction in the manner which the defender proposes.

"The Lord Ordinary is also of opinion that the pursuer has sufficient interest to insist on the fulfilment of this condition, as the contravention of it might diminish the value of the minerals which are reserved to him.

"With respect to the sites, the case is more difficult; for though the defender is not entitled to erect any houses other than cottages, he is not prohibited from building larger cottages than those referred to in the feu-contract. His obligation is to build cottages as good as those already erected on Henderson's feu; and this implies that he may erect cottages which are larger and better. But this could not be done without occupying a larger area than that shewn on the plan as the site for building. Further, it is not easy to reconcile the restriction for which the pursuer contends with the provision that the cottages and other buildings shall be erected at a distance of not less than fifteen feet from the west side of the parish road.

"Considering that the restrictions on the use of property must, in order to be effectual, be expressed in the clearest manner; and besides that the pursuer has no apparent interest to object to the position on which the defender's house has been erected, the Lord Ordinary has not given effect to the objection stated by the pursuer with respect to the site."

The defender reclaimed, and argued—The clause in the charter obliged the defender to erect buildings of at least the size of cottages. A cottage was only the minimum. The object was to secure the feu-duty, and the pursuer had no interest to require that a cottage only should be erected. The word cottage was not confined to a house of one storey.

Authority—*Campbell* v. *The Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943.

At advising—

Lord President—There are two questions distinctly raised in this record, and both have to be considered. The first is whether the defender in building on the ground feued under the conditions of the feu-contract of 10th June 1868 is entitled to deviate from the extent of the area shewn upon the plan as applicable to each of the four cottages. The provision of the feu-contract is that "the buildings to be erected on the foresaid plot or area of ground 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 said plan or sketch, and shall front the north, and shall each of them be in point of size and accommodation, as well as architectural character, at least equal to either of the two cottages which have been already erected on the ground to the southward thereof, lately feued to the said William Henderson." Taking this clause as a whole, I am satisfied, with the Lord Ordinary, that it is not intended to restrict the feuar to confine himself absolutely within the area specified upon the plan. I think that is too strict a construction to put upon the clause. The kind of building is another affair, but keeping that out of view, I do not think that any deviation will make a violation of the feu-contract, except in so far as that building is to be one of small size. If it had been intended that the cottages were not to exceed the proportions they bear in the plan, as measured according to the scale, it would have been reasonable to insert the dimensions, which could be ascertained by a pair of compasses, and if it was the meaning of parties that the feuar was to be restricted to an area of 40 by 30 feet, it should have been so stipulated. I cannot read the words as incorporating the plan with its strict measurement, but merely as shewing the general way in which the cottages were to be built. So far I agree with the Lord Ordinary in refusing to sustain that ground of action.

But it is equally clear that there has been a violation of the feu-contract in another part of its provisions—I mean in regard to the style and size of the cottages so far as their height is concerned. What it was intended should be erected was four cottages in the ordinary and usual acceptation of the word, *i.e.*, single storey houses. That is the common and popular meaning of the term, and does not exclude the building of apartments in the roof with windows. That is very common; and one might almost say there are as many cottages with windows in the roof as without them. Whether these are labourers' cottages or of a more ornate character is of no matter, because I am not disposed to exclude anything of the nature of houses with windows in the roof. There is a very good example of that kind of cottage to be found on the ground feued by Mr Henderson in 1867, adjoining the defender's feu, where there are two houses with windows in the roof.

But then the building which the defender has erected is not a cottage, but a totally different kind of building of two square stories in height. If you look at the back the windows are all under the roof, both upper and lower, and when you come to the front, where it is said that the windows run up into the roof, I think this observation may be made, that those which are not ornamental do not run up, and that the reason why the others do is for the purpose of ornamentation. That building is, in my opinion, no longer a cottage merely, where two out of the

four windows are so constituted that the roof runs out above them.

Is the superior accordingly entitled to have the house pulled down, in so far as it exceeds the limits of a cottage? I have not the least doubt that in inserting the clauses contained in the feu-charter the superior had several objects in view. One was to have as much building as would secure his feu-duty, and that is an object provided for in all feu-contracts. Another was to provide that the buildings should be of the same general character as those in the neighbourhood, and that was for the benefit of the adjoining feus. But surely it is not out of the question to say that there is an additional reason to be found, and that is suggested by the fact that there are minerals in the district of a valuable kind. They are reserved to the superior, and he contemplates working or letting them. He undertakes to be responsible for any damage thereby caused, and has therefore a most material interest in preventing what buildings shall or shall not be erected on the ground. Surely the superior would have an obvious interest on the face of the feu-contract to prevent the erection of buildings or manufactories of a ponderous character, and to make that a real burden upon the feu. But is it not equally natural that a superior, in such a position, should desire to secure himself against the erection of buildings even of the nature of dwelling-houses. It would be awkward if these were converted into a street with buildings of three or four stories high. Therefore it is that he limits the feuar with regard to these. One is to be of a certain value to secure the feu-duty, and then there are to be three more, at least equally good as those erected by Henderson. But he has a separate clause of prohibition, which is in these terms—"And the said James Wilson Cairnduff and his foresaids shall not be at liberty at any time to erect any buildings upon the said plot or area of ground other than the said four cottages, to be occupied as dwelling-houses, with suitable out-buildings or office-houses, to be used and occupied in connection therewith." It is said there is no restriction as to the size of the out-houses or offices. I think there is. They are to be suitable, and it would be a dangerous proceeding for this vassal to erect a coach-house of two stories. But that is a matter on the construction of the deed, and is not before us.

I think the defender is only entitled to build a house of one storey, and therefore have no hesitation in agreeing with the Lord Ordinary.

Lord Deas—The first question for consideration here is what kind of building is prohibited by this feu-contract. It prohibits, in so many words, every kind of building except "cottages." Without going into the inquiry what is a cottage, which may be doubtful and difficult, I can have no doubt that "cottage" in this deed means a building of one storey. The only cottage mentioned is that belonging to Henderson, and the plan shews us that in speaking of "cottages" his is referred to. The next question is, why was the prohibition inserted? As your Lordship has pointed out, there are two reasons for the stipulations made in the feu-contract as to the kind of building. One is that there shall be buildings of a certain value, to secure the payment of the feu-duty. The other, that the amenity of the district should be preserved. Plainly both were in the mind of the superior, and his desire was that the cottages, so long as they stood, should possess a certain uniformity, and be of an agreeable description. But it does not follow that there may not have been another reason, and nothing is clearer on the face of this deed than that this was that the superior might be enabled to work the minerals without being involved in ruinous damages. We are told in the evidence quite distinctly that there do exist there strata of minerals of a very valuable description. The superior reserves the minerals, and that is enough to shew that he thinks he has an interest. He comes under an express obligation to pay damages done by the mining operations. It is impossible to imagine a more direct or stronger inference that the reason why he made the stipulation that the buildings should be restricted to cottages was that they might not be brought down by, and that he should not have to pay damages for, the working of the minerals. That is clear from the deed. It is said that the superior must have an interest in order to entitle him to succeed. Let that be conceded. But here we have a clear and distinct interest, and I have therefore no hesitation in coming to the same conclusion as the Lord Ordinary.

On the other point, whether the vassal was bound to keep to the sites marked on the plan, I give no opinion in favour of or against it. It might be a troublesome and difficult question.

Lord Ardmillan—I agree with the Lord Ordinary. This house is not the sort of house contemplated by the contract of feu, and it is not a cottage in the ordinary sense. I am glad to be assured on this point by referring to Richardson's Dictionary. The word "cottage" does not indeed occur in its proper place in the alphabetical order; but under the word "cote" or "cot" the word "cottage" is given, and these words are explained as "Anything which covers, shelters, or protects the human or any other body, whether applied to a place for men to dwell or rest in, or for the shelter and protection of sheep, pigeons, or other animals,"—a very general description, but including a cottage.

Chaucer and Surry are quoted as giving illustration of the word cote. Spencer says—

> "But if to my cottage thou wilt resort,
> So as I can, I will thee comfort."

Dryden says—

> "But what plain fare her cottage did afford—
> A hearty welcome at a humble board—
> Was freely hers; and to supply the rest
> An honest meaning and an open breast."

In Latham's Dictionary, published in 1866, I find the word cottage given as a "hut, mean habitation: cot, little house," and there is a quotation from Shakespeare—

> "The self-same sun that shines upon his Court
> Hides not his face from our cottage, but
> Looks on both alike."

I cannot doubt that what is meant generally by the word cottage is a dwelling with a character of simplicity and humility. What was in this case meant was a house of one storey; and the superior had an interest to make that a condition

as larger buildings might increase his responsibility for mineral workings. The house actually erected and now complained of is not of one storey, and is not of the style and character desired, and alone permitted, by the superior. I therefore agree with your Lordships.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Dean of Faculty (Watson)—J. A. Crichton. Agents — Dewar & Deas, W.S.

Counsel for Defender (Reclaimer)—Asher—J. P. B. Robertson. Agent—A. Morrison, S.S.C.

Friday, June 23.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SNEDDON *v.* THE MOSSEND IRON COMPANY.

Master and Servant—Reparation—Culpa—*Fellow-Workmen—Manager.*

A coalmaster *held* not liable in damages for the death of a miner caused by the fault of some one or other of those appointed to superintend the mine, there being no proof that incompetent men had been appointed, or that the master had failed to supply them with necessary apparatus.

Expenses—Sheriff—Statute 16 *and* 17 *Vict. cap.* 80, *sec.* 3—31 *and* 32 *Vict. cap.* 100, *sec.* 72.

Where a case was brought by appeal from the Sheriff Court, and judgment (reversing that of the Sheriff) given on a point of law not pleaded in the record—*held* that the appellant was not entitled to expenses in the Sheriff Court.

Observations (*per* Lord President) on the duty of Sheriffs under 16 and 17 Vict. cap. 80, sec. 3.

This was an action raised by Robert Sneddon, miner, against the Mossend Iron Company, a company consisting of two partners only, Messrs William and James Neilson, in which he concluded for the sum of £500 as *solatium* for the loss, injury, and damage sustained by him in consequence of the death of his son John Sneddon, a miner working in a pit near Bellshill in Lanarkshire. The accident by which the death of John Sneddon was caused was the fall of a portion of the roof of the pit, which it was alleged by the pursuer was insufficiently supported and unsafe. The defence stated, in a minute of defence, was—"A denial that the falling of the roof or sides, whereby the pursuer's son John Sneddon was killed, was occasioned by *culpa* on the part of the defenders, or others for whom they are responsible, said fall having arisen either from some latent defect in the roof or sides or materials supporting the same, in respect of which the defenders were not responsible, or from the fault of the deceased himself or of some one or more of his fellow-workmen"; and a statement "that in any event the damages claimed are excessive."

The Sheriff-Substitute (Clark) allowed a proof, and on 4th August 1875 pronounced the following interlocutor:—

"Having heard parties' procurators and made avizandum, Finds that on or about the date libelled, the 11th August 1873, while the pursuer's son, the deceased John Sneddon, miner, was engaged in the employment of the defenders as a miner in their coalpit known as No. 1 Orbiston pit, and at or near the place known as the causeway top, and at or near a horizontal pivot-wheel at the top of an incline, the roof and sides of the place at which he was working gave way and fell upon his person, so that he was crushed to the ground and killed, by and through the fault of the defenders, or of those for whom they are responsible: Therefore, and for the reasons assigned in the subjoined note, Finds the defenders liable to the pursuer in damages, and assesses the same at the sum of Two hundred pounds sterling, and decerns against the defenders for said sum accordingly: Finds the defenders liable to the pursuers in expenses."

On appeal the Sheriff (Dickson) adhered to the judgment, but reduced the damages to £100.

The defenders appealed to the First Division, and argued—In the case of a company like this, where the partners took no personal charge of the workings, they could not be held liable for damages to any of the workmen employed by them unless it were shewn that they were in fault, either (1) in not appointing competent men to superintend the workings, or (2) in not providing proper gearing and appliances for the conduct of the workings. The former was not alleged on record, and the latter was disproved on the evidence. The failure to support the roof was the cause of the accident here, and if there was any fault in the case it lay with the persons charged with that duty, *i.e.*, the oversman, or some one of the deceased's fellow workmen. There was no personal superintendence exercised by the defenders, and therefore no liability.

Argued for the pursuer and respondent—The servant is not, of course, to be protected against the consequences of his own carelessness, but the master is, on the other hand, bound to protect him against accident by taking all reasonable precautions. Now, here there was a bad system of working and an insufficient staff of workmen, either of which is sufficient to make the master responsible if an accident occurs, as this did, in consequence. There was a special necessity here for personal superintendence on the part of the masters, for new workings had been opened up, and in these circumstances it will not do to shift liability to the fellow-workmen of the deceased, who can only be held to be responsible for the carrying out of a system of working; the master is responsible for the adoption of that system.

Authorities—*O'Byrne* v. *Burn*, 16 Dunlop 1026; *Bartonshill Company* v. *Reid*, 3 M'Queen 294 (Lord Cranworth's observations); *Wright* v. *Roxburgh*, 2 Macph. 748; *Wilson* v. *Merry and Cunninghame*, 6 Macph. 84 (especially Lord Chancellor's observations); *Leddy* v. *Gibson*, 11 Macph. 304; *Howells* v. *The Landore Siemen's Steel Company*, Law Reps., 10 Queen's Bench, 62; *Hall* v. *Johnston*, 33 Law Journal, Exchequer, 222; *Paterson* v. *Wallace*, 1 M'Queen 748; *Weems* v. *Mathieson*, 4 M'Queen 215, and cases quoted there.

At advising—