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—

Lord President—The summons in this case is founded on the allegation that the deceased was killed "through the gross carelessness and culpable neglect of duty of the defenders, or others for whom they are responsible, in having failed or neglected to make, or caused to be made, secure the roof and sides of a travelling road and working-place in a coal-pit situated at or near Bellshill aforesaid, commonly called No. 1 Orbiston pit, belonging to the defenders, or of which they are lessees, and which was being wrought by them at the date after mentioned." Now, that ground of action has been sustained by the interlocutor of the Sheriff-Substitute, who 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 coal-pit 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." The direct personal fault of the defenders is not alleged, and no attempt was made to prove it; but the summons and interlocutor of the Sheriff-Substitute leave it unascertained and vague by whose fault this accident took place; and that is all the more remarkable, because until we know by whose fault this took place it is impossible to say where the liability for it is to fall. But I cannot find from the Sheriff-Substitute's note that he has made up his mind whose the fault was. All he finds is that it was through the fault of the defenders or of those for whom they are responsible. Now, that is a very unsatisfactory ground of judgment; the indirect liability of the defenders for the fault of some one else is not easily presumed where the party injured is one of their workmen. It is true that the Sheriff and Sheriff-Substitute may have been misled by the manner in which the defence is stated. It ought to have been distinctly stated that the defenders were not liable for the fault of any one employed in the pit; and had that been so stated the case would probably have been considered and disposed of in a very different way. When the case had been opened here it was plain that the main question was one of law, assuming—for I must call it an assumption—that the accident was caused by the fault of some one employed in the pit.—Were the defenders liable for that fault? Now, had this action originated in this Court we should have required additional pleas in law to be stated in the record; but in an appeal we are directed by the 72d section of the Court of Session Act of 1868 to "give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record." Following out that direction, we must look into the evidence here to ascertain upon whom the fault, if fault there was, lay, and then consider if the defenders can be held liable for it.

There is a little delicacy in affirming positively that there was any fault in this case at all. We may be of opinion that there was or that there was not; but if there was, it plainly lies among three persons—Munro, the colliery manager, Gillies the oversman, and Downie the roadsman. The special fault alleged is that the roof was not properly supported. These three persons had all that duty laid on them. Of course the duty of supporting the roof will vary with the substance of which the roof is composed. In this case it seems to have been a dangerous one; but there is some delicacy in positively affirming that there was fault in Munro, Gillies, or Downie, for it is quite possible that an action may be raised by the pursuer Sneddon against these three parties, and it would be embarrassing to have to consider on other evidence their liability if we had pronounced them, upon the evidence before us now, to have been in fault. Of course the evidence in this case would not be *res judicata* against them, but still it would be embarrassing to have pronounced our opinion on the matter of fact. But as I am quite clear that if there was fault, it was fault in not supporting the roof, and that the persons charged with that duty were Munro, Gillies, and Downie, or one or other of them, it is not necessary to determine the question. Take it that the fault was with one or other or all of these parties, the question we have to decide is—Are the defenders liable for that fault? It is not alleged that any of these persons were unfit for their posts. On the contrary, there is evidence to show that they were persons of skill and experience, and that being so it is impossible to distinguish this case from that of *Wilson* v. *Merry & Cunninghame*. I am not referring to any expressions or *dicta* that fell from the noble and learned Lords in deciding that case. I am simply referring to the principle of our own judgment, viz., that where persons, like the partners in this company, not themselves engaged in the work, employ competent persons to do that work, they are not liable for the fault of these persons, even where death results from that fault.

Lord Deas—I agree with your Lordship that it is not necessary to determine whether there was fault in this case, or upon which of these three parties—Munro, Gillies, or Downie—the fault lay. If there was fault, it must have been the fault of one or other of these three; but it is unnecessary to say more than that. One thing struck me as unsatisfactory in the course of the discussion—that is, no part of the roof seems to have fallen except that large stone that unfortunately killed the individual whose death led to this action. If any more fell, it does not appear, and I should like to have known whether a stone of that size was to have been expected to have been found in that kind of roof. That would have been of importance in determining if the weight of such a stone had been taken into account in the supports provided for securing the roof, and for ascertaining whether there was fault or not in any of these persons. We must take the case on the assumption of fault in one or all of these parties in order to get at the question if the master would be liable.

The Mossend Iron Company having only two partners, and carrying on a variety of works, these works were not under the personal superintendence of the partners, but of skilled persons, of such skill and experience as a master is entitled to trust to. It is not very easy to see what more these partners could have done; they

could not be expected to superintend or give directions to the workmen personally, and they would probably not do that so well as the persons employed by them could. It is not alleged, either, that these men would have had any difficulty in getting whatever materials they liked to ask for to support the roof. The master is said to be liable to furnish materials adequate to the work—that means the expense of the materials. Now, in that state of matters I have great difficulty in distinguishing this case from a variety of decided cases, and especially from that of *Wilson* v. *Merry & Cunninghame*. It may perhaps be hard on the pursuer to come to this conclusion, but I am not able to see that in point of law the liability contended for exists. This plea on the part of the master does not seem to have been stated to the Sheriff or the Sheriff-Substitute, and therefore we have not the authority of these learned gentlemen for repelling a plea of that kind on the part of the master. Since this difficulty does not seem to have been stated to them, that may affect the question of expenses, but we cannot avoid, as your Lordship has pointed out, taking it into consideration here.

Lord Ardmillan—In this action of damages at the instance of Robert Sneddon, miner, near Bellshill, against the Mossend Iron Company, both Sheriffs have decided in favour of the pursuer. Differing only in regard to the amount of damages, the Sheriffs concur entirely in their view of the evidence and in their application of the law.

The pursuer is the father of the late John Sneddon, miner, a young man of about twenty-three, who was unfortunately killed by a fall of a portion of the roof of the place where he was working in the defenders' coal-pit, and while in their employment. The father claims damages in respect that the death of his son was caused, as he alleges, by fault on the part of the defenders, or those for whom they are responsible. The accident happened on the 11th of August 1873, and this action was raised on the 4th of September 1874.

It does not appear necessary, in the view which we are taking of this case, to pronounce decidedly on the question of fact whether there was fault or not causing the accident in which the pursuer's son met his death. We must assume the fact of fault, because fault is alleged, and we are dealing with the relevancy.

Now, it appears on these averments that the defenders, partners of the Mossend Iron Company, though the employers of the man killed, were not present on the occasion; that they are not alleged to take personal charge of the pit-workings, or even of the furnishing of apparatus, or the direction of the system of working; and it is not alleged that the persons whom they appointed as manager, oversman, and roadsman, were persons unfit or incompetent to discharge the duties committed to them. Such incompetency or unfitness has not been alleged. Under these circumstances, the question which arises in point of law is—Whether, on the alleged facts, the defenders are liable in damages to the pursuer in respect that the death of his son was caused by the fault of one or more of the defenders' servants, including the manager, the oversman, and the roadsman employed by them?

It is of great importance, especially to the operative classes, that the true state of the law on this subject should be known. If the absence of redress in the form of damages tends to make them more cautious, it may be of some service. The protection which the law affords to workmen in a coal-pit, in such a case as this, ought not to be matter of doubt, and ought to be seen clearly to be according to justice.

The law on the subject has in recent years been frequently considered, and the change in the law has been favourable to the employers. The redress afforded to workmen has been restricted and limited. The protection against responsibility on the part of the employers has been extended and strengthened.

In the case of an injury inflicted on a stranger, the master or employer has frequently been held responsible for the fault of his servant. The maxim *qui facit per alium facit per se* applies, and the master cannot in that case escape from responsibility because the act was not done by his own hand but by the hand of his servant. This has been repeatedly recognised as law. It is so stated by our institutional writers; it has been repeatedly so decided; and it is so laid down authoritatively by Lord Cranworth in the *Bartonshill Coal Company* v. *Reid*, and by the Lord Chancellor (Lord Cairns) in the case of *Wilson* v. *Merry & Cunninghame;* and Lord Colonsay in the same case says—"I hold it to be quite clear that the liability of a master for injury done by the fault or negligence of his servant falls to be dealt with on different principles where the sufferer is a stranger and where the sufferer is a fellow-servant engaged in the same common employment."

This distinction must now be considered as quite settled. There is a series of decisions, some of which have been already alluded to, which leave no doubt on the subject. In the case of injury to a workman by the fault of a fellow-workman, even though that fellow-workman occupy the position of an oversman or manager, we must now hold it as settled that the maxim *respondeat superior* and the maxim *qui facit per alium facit per se* does not apply, and that the ruling maxim is *culpa tenet auctorem*. Unless the employer has personally interfered and done the wrong, or has failed in duty by appointing an unfit or incompetent servant—his fault in that case consisting in his careless or injudicious appointment—he is under no responsibility for accidents caused by the fault of any of his servants. I think that in the decision in the case of *Wilson* v. *Merry & Cunninghame* in this Court, on 31st May 1867, effect was given to the law established by the course of English decisions, and the judgment of this Court in favour of the employers was affirmed in the House of Lords. I see no reason to alter the opinion which I expressed in that case, with this qualification, that I then attempted, as I had done on previous occasions, to make a distinction and exception in regard to the position of a superior manager with general superintendence, whom I was disposed to regard as the representative of the master rather than as a fellow-workman of the man injured. This distinction was not accepted. The House of Lords in affirming the judgment placed the case on the broader ground, that in a question of damages for injury inflicted by the

fault of one servant on another, down through the whole gradation of servants, the employer is not responsible, unless personal fault on his part is instructed. The opinion of Lord Chancellor Cairns leaves no doubt on this matter. The observations of his Lordship, which have been already referred to, are in every respect of the greatest weight and highest authority. To a certain extent it is true, as has been remarked, that these observations were not absolutely necessary to the decision of the case immediately before the house. But they were the natural supplement and corollary of the views which he had previously expressed; and it is vain to contend against the conviction that the law is now as Lord Cairns has declared it.

It is not for me to venture on any speculation in regard to the reasonableness or the expediency of the course and progress of the law on this matter. But, with great respect and diffidence, I must say that I do not feel able to appreciate fully the logical ground for recognising to the extent now enforced the distinction between an employer's liability for a servant who injures a stranger, and his liability for a servant who injures a fellow-servant. So long as the distinction was limited to the case of the fault of one of several workmen engaged in the same employment, at the same time and at the same place, in the same work, I could understand the distinction, as in that matter the one servant might be held to confide in the other, and to run the risk of injury in the common work—such as two men engaged in felling one tree, or working at one wheel, or digging together in one pit. But when the rule releasing employers from liability is extended to the case of a manager who has charge of the work, and has authority given him over the men, and who represents the master in the exercise of that authority, I find great difficulty in understanding the distinction. If an employer keeps away from the works, appointing a manager of ordinary competence, and leaving all to him, then he, the master, is not responsible at all for any injury done to workmen in his employment, even though by the fault of his manager; and yet he would still be responsible for the act of that manager, or indeed of one of his inferior servants, if an injury were inflicted on a stranger. The case of injury to a stranger was considered by the House of Lords, and specially by Lord Cairns, in deciding this same case of *Wilson* v. *Merry & Cunninghame*, and this distinction was recognised. Therefore, in now applying the law we must apply it as involving to the full extent that distinction. It does not commend itself to my mind. But that must be my own fault. Either the recognition of the manager as the employer's representative, for whom the employer should be responsible, or the enforcement of the rule *culpa tenet auctorem* in all cases, whether the case of a stranger or the case of a workman, would in my view be more consonant to sound reason than the present state of the law turning upon this distinction.

However, I concur in holding that the law has been settled as Lord Cairns explains it, and I cannot do otherwise than concur in applying it in this case.

Lord Mure—I am of the same opinion. The matter complained of in this case is "gross carelessness and culpable neglect of duty of the defenders, or others for whom they are responsible, in having failed or neglected to make, or caused to be made, secure the roof and sides of a travelling road in a coal-pit" where this accident happened. Whether the accident arose from the material of the roof, or from some deficiency in the posts supporting it, does not appear. The duty of maintaining the roads and supports appears to me to fall either on Munro or the roadsman or the oversman. The special rules quoted to us lay the duty on these men, and if it is clear that the owners appointed competent men, they are free from liability if they furnish them with the means of keeping these roads and supports in good order; and in this case these men seem to have had all the materials that were necessary supplied to them. In addition to the cases quoted by your Lordships, I am disposed to think that the opinion of your Lordship in the chair in the case of *Wright* v. *Roxburgh & Morris*, (reported in 2 Macpherson p. 754) lays down substantially the same rule as was afterwards more fully laid down in the case of *Merry* v. *Cunninghame*, and that rule is, I think, applicable in this case.

Pearson, for the appellant, having moved for expenses, both in the Inferior Court and in this Court,—

The Lord President said—The Court are of opinion that the appellant should be found entitled to expenses in this Court; but I cannot allow this case to disappear without saying that there has been considerable miscarriage in the Sheriff Court. There is a particular duty laid on the Sheriff-Substitute by the 3d section of the Sheriff Court Act of 1853, which has not been discharged here at all, viz. "The Sheriff shall hear the parties in explanation of the grounds of action, and the nature of the defence to be stated thereto, and if satisfied that no further written pleadings are necessary he shall cause a minute, in the form of the Schedule D annexed to this Act, to be written on the summons, setting forth concisely the ground of defence, which minute shall be subscribed by the parties or their procurators, and the Sheriff shall thereupon close the record." Now, the short form of defence is undoubtedly of great importance if the provisions of the statute are attended to, but if the Sheriff, without hearing parties, is, as a matter of course, to close the record, great injury may follow. Accordingly, in this case it was said that there was "culpable neglect of duty on the part of the defenders, or others for whom they are responsible." What is meant by others? I know of no others for whom they are responsible. The defence is not very intelligible either. What is meant by their "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?" Do they mean that there were others for whom they may be responsible? If the Sheriff had heard parties in explanation it would have turned out, without the expense of a proof, that the fault lay with the manager, and then the question might have been decided on relevancy; and it is much to be regretted that this course was not taken; the expense would then have been trifling.

The following interlocutor was pronounced:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 4th August and 31st December 1875: Find, in point of fact, (1) that on or about the 11th August 1873, while the pursuer's (respondent's) son, the deceased John Sneddon, miner, was engaged in the employment of the defenders (appellants) as a miner in their coal-pit 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. (2) that the death of the said John Sneddon was caused by the support of the roof having proved insufficient; (3) that the defenders took no personal superintendence of the mining operations in the said pit, but devolved these entirely on James Munro as colliery manager, and his subordinates; (4) that the duty of providing for the support of the roof lay on the said manager, and John Gillies as oversman, and William Downie as roadsman; and (5) that these parties were experienced and skilful persons, quite competent to the discharge of the duties committed to them, and were furnished by the defenders with all the requisite materials to enable them to discharge their duties: Find in law, that if the roof fell through the fault of the said James Munro, John Gillies, and William Downie, or any one or more of them, the defenders are not answerable for such fault: Therefore assoilzie the defenders from the conclusions of the summons, and decern: Find no expenses due to or by either party in the Inferior Court, but find the appellants entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Fraser—J. C. Lorimer. Agent—P. H. Cameron, S.S.C.

Counsel for Defenders — Dean of Faculty (Watson)—Pearson. Agent—John Gill, Solicitor.

Saturday, June 24.

SECOND DIVISION.

[Lord Shand, Ordinary.

RIDDELL *v.* POLWARTH.

Entail Amendment Act 1848, *sec.* 3—*Date of Deed of Entail*—Mortis causa *Settlement.*

An entail was constituted by *mortis causa* deeds executed prior to 1st August 1848, and the granter died in 1849.—*Held* that the date of the *mortis causa* deed was, with reference to the question of entail, the date of the execution of the deed, and not the date when the deed came into operation.

This was an action at the instance of George William Hutton Riddell, Esq. of Muselie, against the Right Hon. Lord Polwarth, to have it declared that the defender in October 1874 became purchaser of the lands of Dryburgh for the sum of £21,000, and of the lands of Prieston for the sum of £11,000, in virtue of holograph offers and acceptances therefor, and to enforce implement of the contract of purchase and sale thereby constituted. The said lands formed part of the estate of Muselie, which was entailed by two *mortis causa* deeds granted by Charles Riddell, Esq. of Muselie, the first being a disposition and deed of taillie, executed on 25th February 1836, and the second a deed of destination and alteration, executed on 1st July 1848. The said Charles Riddell died on 11th December 1849, without leaving heirs of his body, and on 12th April 1852, on the death of his mother, who had under the second deed a liferent of the estate, the pursuer entered into possession of the lands as institute of entail. The pursuer being desirous to acquire the lands in fee-simple, obtained the necessary consents from the three nearest heirs who were for the time entitled to succeed to the estates, and executed an instrument of disentail on 11th April 1873. On 21st April he presented a petition to the Court for warrant to record the said instrument in the Register of Taillies. The petition was reported by Lord Shand to the First Division of the Court, the question having been raised whether, under the third section of the Act 11 and 12 Vict. cap. 36, the date of the deeds should be held to be that which they bore or the date of the death of the granter. The Court decided that the date of the entail must be held to be that which the deed bore, and that being dated prior to 1st August 1848 the petitioner was entitled to disentail.

The report of the petition, which contains a full statement of the case, is referred to (11 Scot. Law Rep. 243).

The defence stated to the present action was that the pursuer could not grant a valid disposition of the subjects, in respect that he held them under deeds of strict entail; that these deeds being *mortis causa* deeds, constituted a valid entail only when they came into operation by the death of the granter, which occurred subsequent to 1st August 1848, and that therefore the disentail proceedings were invalid; that the proceedings in the petition were entirely *ex parte*, and not *res judicata* as against any of the substitute heirs of entail; and that for these reasons the validity of the title offered by the pursuer being open to serious doubt, the defender was not bound to accept it.

The Lord Ordinary issued an interlocutor, dated 1st February 1876, in which he repelled the defences, and decerned against the defender Lord Polwarth in terms of the conclusions of the original action, finding no expenses due to or by either party.

The following note was appended:—"The answer to the defence stated in the first three pleas in law for the defender is that the point raised has been decided—Petition, *Riddell*, 6th February 1874, 1 Rettie 462. That decision is not *res judicata* in a question with the defender, but it is a direct authority against the contention that the pursuer was not in a position to disentail the estates, and that the estates have not been validly disentailed. Even if the sound-