

being lost *a non utendo*, but rather a right of the public of Kirkcaldy, vested in the corporation for them.

The only remaining question is, Whether this ground is truly part of the commonity termed the Volunteers' Green? I think that has been clearly established, and consequently that the neglect shown as regards this angle of ground will not place it in a different position from the rest. Power is given to sell the other greens, but not thus to deal with the Volunteers' Green. Although the corporation cannot divert this ground from the public use, they maintain that it is within their power to sell to themselves as police commissioners. I do not see how this can be, for I am not satisfied that the clauses of the Police Act give to the magistrates as police commissioners any broader right to take lands than they would have had as magistrates.

The Court adhered, superseding extract till 20th October.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—Kinnear—M'Kechnie. Agents—Cunrro & Cowper, S.S.C.

Counsel for Defenders (Reclaimers)—Guthrie Smith—A. Gibson—Pearson. Agents—H. & H. Tod, W.S.

Saturday, June 28.

FIRST DIVISION.

[Exchequer Cause.]

ROGERS v. INLAND REVENUE.

Revenue—Income-Tax Act (5 and 6 Vict. cap. 35), Schedule (D) and sec. 39—Liability of Ship-Captain for Income-Tax—Where Absent from Great Britain during Whole Year.

The captain of a British ship was absent in charge of his vessel during the entire year to which an income-tax assessment applied, but his wife and family lived at home in his house in this country. *Held* that he was liable in the assessment.

In this case David Rogers, master mariner, appealed to the Income-Tax Commissioners for the Kirkcaldy district of Fifeshire, against an assessment under Schedule (D) of the Income-Tax Acts for the year ending April 5, 1879, on the sum of £240. It appeared that he had been absent from Great Britain in command of his ship during the whole year of assessment, but that he possessed in his own name a house at Innerleven, in Fifeshire, where his wife and family had resided during the year in question, that he had no dwelling-house in any other country, and that he would return to Great Britain when ordered by his employers, as he had no present intention of residing out of it.

By 5 and 6 Vict. cap. 35 (Property Tax Act), sec. 39, it was enacted "that any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed

from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by the Act as a person actually residing in Great Britain, and shall be assessed and charged accordingly (in manner hereinafter directed) upon the whole amount of his profits or gains, whether the same shall arise from property in Great Britain or elsewhere, or from any allowance, annuity, or stipend (except as herein is excepted), or from any profession, employment, trade, or vocation in Great Britain or elsewhere."

The Commissioners confirmed the assessment.

The appellant having obtained a Case for the opinion of the Court of Exchequer, argued—This case was not within *Young v. Inland Revenue*, July 10, 1875, 2 R. 925, inasmuch as here the appellant had been absent from Great Britain during the entire year of assessment. [The Lord President referred to *Brown v. M'Callum*, Feb. 14, 1845, 7 D. 423.]

The respondent was not called on.

At advising—

LORD PRESIDENT—I have no doubt about this case at all. It is ruled by the case of *Young*. Every sailor has a residence on land, as Lord Mackenzie very well puts it in the case of *Brown v. M'Callum*, and the question is, Where is this man's residence? The answer undoubtedly is, that his residence is in Great Britain. He has no other residence, and a man must have a residence somewhere. The circumstance that Captain Rogers has been absent from the country during the whole year to which the assessment applies does not seem to me to be a specialty of the least consequence, That is a mere accident. He is not a bit the less a resident in Great Britain because the exigencies of his business have happened to carry him away for a somewhat longer time than usual during this particular voyage.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for Appellant—Dean of Faculty (Fraser)—Scott. Agents—J. & J. Galletly, S.S.C.

Counsel for Inland Revenue—Solicitor General (Macdonald)—Rutherford. Agent—Solicitor of Inland Revenue.

Saturday, June 28.

SECOND DIVISION.

M'ELROY & SONS v. THARSIS SULPHUR
AND COPPER COMPANY.

(*Ante*, vol. xv. pp. 115 and 727.)

Expenses—Modification.

Where the Court had given the pursuers in an action decree for expenses subject to modification, and remitted to the Auditor to tax and report, the Auditor disallowed all expenses incurred by the pursuers in branches of the case in which they were unsuccessful. The pursuers objected, urging that the modification to be made by the Court referred to the part of the case in which they had been unsuccessful; the Court affirmed the Auditor's report.

The facts in this case have been already reported, *ante*, vol. xv. pp. 115 and 727, 5 R. 161, and in terms of the interlocutor of the Second Division of 17th November 1877 the Auditor reported. The pursuers lodged objections to the report, and the Court on 18th March 1879 pronounced the following interlocutor—"The Lords having heard counsel on the objections to the Auditor's report, before further answer remit to the Auditor to report generally on the principle on which his taxation has proceeded, how far it is affected by the fact that the pursuer has partially failed in the litigation, and the effect, if any, attributed by him to the finding of the Court in regard to modification."

The Auditor in consequence lodged the following special report:—"Having considered the note of objections for the pursuers to his report of 8th March 1879 on the account of expenses to which they are entitled under the interlocutor of the Lord Ordinary (CUBBERELL), of 29th May 1877, and the interlocutors of the Court of 17th November 1877 and 28th February 1879, with the account itself, the proceedings in the case, and the interlocutor of the Court of 18th March 1879 (under which this report is made), the Auditor now reports,—

"*First*, That in taxing the account in question he has proceeded in the same manner as if the finding of expenses had been in general terms without mention of modification;

"*Second*, That the taxation has been affected by the fact that the pursuers have partially failed in the litigation only in this respect, that he has disallowed all expenses clearly distinguishable as connected with the portions of the case in which the pursuers have not been successful; and

"*Third*, That in the audit he has not attributed any effect to the finding of the Court in regard to modification.

"The grounds on which the Auditor has proceeded in thus dealing with the account may be briefly stated. Under a general finding of expenses, without any qualification whatever, it is the duty of the Auditor to disallow all expenses of unsuccessful litigation. The Act of Sederunt of 15th July 1876 (repeating a provision of the previous Acts) provides (General Regulation 5) 'that notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the

account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.' The Auditor cannot see any reason for disregarding the instruction where expenses are found due subject to modification. It cannot be doubted that where this qualification is attached to the finding it is intended by the Court to give the party entitled to expenses less than under a general finding. The duty of the Auditor (subject to the correction of the Court) is to ascertain and report the amount of expenses properly incurred, exclusive of those connected with unsuccessful litigation. It is for the Court alone to deal with the question of modification, and it is evident that they cannot satisfactorily modify without previous knowledge of the amount of the expenses properly incurred. If such amount be not ascertained in the ordinary way by the Auditor's report, it is difficult to see how it can be arrived at by the Court so as to form a proper basis for modification. It has always been held by the Auditor (and he believes by his predecessors also) that modification is intended, not to interfere with the ordinary rules of taxation, but in some measure to compensate the party found liable in expenses for the costs incurred in resisting the claims in regard to which his opponent has failed. Modification, in a word, as understood by the Auditor, is to some extent a substitute for a cross finding of expenses. This view as to modification is not understood by some agents, and whether for confirmation or correction, an authoritative disposal of it by the Court is not unnecessary."

The pursuers objected to this report that the modification allowed by the Court referred to the part of the case on which they had been unsuccessful, and that the Auditor was wrong in disallowing the expenses connected with this part of the case, which fell to be dealt with by the Court in allowing a modification.

At advising—

LORD JUSTICE-CLERK—We will modify to £300. The Auditor says it is important that there should be some recognition of the principle which he lays down that modification was not intended to interfere with the ordinary rules of taxation, but in some measure to compensate the party found liable in expenses for the costs incurred in resisting the claims in regard to which his opponent has failed. We may take the result of this case as a recognition of this principle in so far as it affirms entirely the Auditor's report.

LORD ORMDALE and LORD GIFFORD concurred.

Counsel for Pursuers—Dean of Faculty (Fraser)
—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defenders—Trayner—Darling.
Agents—Webster, Will, & Ritchie, S.S.C.