LORD ADAM—This is an action of maills and duties brought by a heritable creditor, infeft in certain subjects, against James Heddle, the principal debtor, and against the tenants in these subjects.

The defender is the only tenant who appears to defend, and the decree which is sought against him is for the sum of £7, 10s., being the rent of the premises occupied by him, due and payable at the term of Whitsunday 1892 for the current half-year, and the like sum half-yearly thereafter.

The defender does not dispute his liability for the rent, but he claims deduction therefrom of the sum of £5, 17s. 10d., being the amount of goods sold and delivered by him to James Heddle, the principal debtor. There is no evidence that James Heddle owes this sum, but I understand the fact to be admitted—at anyrate the case was argued on that footing.

It will be observed, accordingly, that the whole amount at stake in this litigation is the sum of £5, 17s. 10d.

The Lord Ordinary has found that the defender is not entitled to deduction of this sum, and I think he is right.

It appears to me that the raising of an action of maills and duties by an heritable creditor, and the service of it on the tenant, is legal intimation to him of the assignation of rents contained in the heritable security, and is sufficient to interpel him from paying any further rent to the landlord.

The rent becoming due and payable after the intimation, as it does in this case, is due and payable to the heritable creditor, and not to the landlord, and therefore I think the Lord Ordinary is right in holding that the tenant cannot set off against the rent a debt alleged to be due by the landlord to him.

In the case of *Clark's Creditors*, referred to by the Lord Ordinary, Clark's adjudging creditors, who were infeft in the subject, raised an action of maills and duties against Keith the tenant. Keith alleged that Clark was due a debt to him, and pleaded compensation. The Court repelled the plea.

It appears to me that a heritable creditor, infeft and in possession under an action of maills and duties, is in the same position as an adjudging creditor, and that therefore this is a case directly in point. I am accordingly of opinion that the defender cannot plead compensation.

But it was further maintained that the principal debtor was in this case sequestrated, and that therefore the defender was entitled to retain the debt against the rent.

That might be so if the pursuer required to appear and claim payment of the rent in the sequestration. But he does not require to do so. He is entitled to proceed directly against the tenant, and the rules of ranking in a sequestration have no application.

On the whole matter I think the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered.

Counsel for the Pursuer — Greenlees. Agents—Watt & Anderson, S.S.C.

Counsel for the Defender—Dewar. Agent —Daniel Turner, S.L.

Thursday, January 19.

FIRST DIVISION.

[Court of Exchequer.

WEBBER *v.* CORPORATION OF GLASGOW.

Revenue—Income-Tax — Common Good of Royal Burgh — Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *Schedule D.*

Determination by the Income-Tax Commissioners for the city of Glasgow, on appeal by the Corporation of Glasgow against assessments imposed under Schedule D on certain items of their revenue which formed part of the "common good" of the city, deciding "that if assessable at all, the 'common good' should be held as one concern for income-tax purposes, and that the Corporation should deduct all expenditure disbursed in their corporate capacity," *reversed.*

Adam v. *Maughan*, November 15, 1889, 2 Tax Cases, 541 (27 S.L.R. 64; 17 R. 73), *followed.*

At a meeting of the Commissioners for General Purposes of the Property and Income-Tax Acts for the City of Glasgow, held at Glasgow on the 20th day of June 1892, the Corporation of Glasgow appealed against assessments made upon them under Schedule D of the Income-Tax Acts for the year ending 5th April 1892, in respect of (1) Burgess and Freedom Fines, £216; (2) Sand Lordship, £140; (3) Petty Customs, £1500. 1. The "Burgess and Freedom Fines" are the payments made by individuals on becoming burgesses and freemen of the city. The amount assessed, £216, is the sum received, less portions paid to the Trades' House and Merchants' House of Glasgow, and is the average nett receipts during the three years preceding the year of assessment. 2. The "Sand Lordship" is paid by the Lord Provost, Magistrates, and Town Council of Glasgow, acting as Police Commissioners, for sand removed from the river margin of Glasgow Green. The sum assessed, £140, is the amount paid during the year preceding the year of assessment. 3. The "Petty Customs" is a statutory annual sum paid by the said Glasgow Police Commissioners as commutation of the dues exigible on articles brought into the city for sale, in respect of the abolition of said dues by 9 and 10 Vict. cap. 289. Section 36 provided—"And whereas it is expedient to provide a sum sufficient to defray the additional expense of the municipal establishment of the said city of Glasgow as extended by this Act, and the expense attending the elections and other expenses to which the

Corporation is and will be subject under the said recited Act of 3 and 4 Will. IV. and this Act, and also to compensate the funds of the Corporation of the city for the loss consequent upon the abolition by this Act of the right to levy the said Petty Customs: Be it enacted, That the said Police and Statute Labour Committee hereby constituted shall be entitled, and they are hereby authorised and required, out of the funds levied for police purposes under the foresaid first of the Acts passed in the sixth and seventh years of the reign of Her present Majesty before recited and this Act, to pay annually to the Magistrates and Council of the said city, or to their treasurer or clerk, such a sum as may be necessary for that purpose: Provided always, that such sum shall not exceed in any one year the sum of £1500."

The assessments were appealed against by the Corporation on the following grounds—(1) That the items of revenue assessed formed part of the income of one corporate estate, namely, the "common good" of the city and royal burgh of Glasgow, which is appropriated by common law and by immemorial custom to the maintenance of the burgh and of its municipal staff, to the support of the city clergy, and to other purely burghal purposes; and that so exclusively is it applicable to these objects that in so far as it is required therefor it cannot be alienated or attached for burghal debt. The "common good" of royal burghs being so applicable to public purposes, it is contended that it does not form a subject for Imperial taxation. Besides, in Glasgow the "common good" did not in the year in question yield any clear surplus after payment of the whole expenditure necessarily and legitimately defrayed out of the "common good." (2) Under reservation of the contention that the "common good" of royal burghs does not form the subject of special taxation in respect of income, objection was stated to the splitting up of the various items of the "common good" revenue, and the charging of income-tax on three items of that revenue separately and distinctly from the other items of revenue therein contained. (3) It was contended that as the items thus assessed separately and distinctly formed part of the income of one corporate estate, the Inland Revenue authorities were not entitled to split up for the purposes of assessment under the Income-Tax Acts the general items of that income in the manner done, but were bound, if entitled to assess the "common good" for income-tax at all, to deal with the whole revenue of the "common good," from whatever source derived, as a *unum quid*, and to allow as deductions from that revenue before assessing it under Schedule D of the Income-Tax Acts the whole expenditure necessarily and legitimately incurred in connection with the "common good." (4) It was further contended on behalf of the Corporation that as the return lodged with the Surveyor with respect to the assessment of the "common good" for the year 1891-92—and which return had been made up in the same manner as it had been made up and accepted by the Inland Revenue authorities for many years past—showed that in the aggregate there was no surplus of revenue over expenditure for the year in question, no assessment was payable by the Corporation under Schedule D of the Income-Tax Acts. If the revenue derived from the "common good" as a whole, after deducting the entire expenditure necessarily and legitimately incurred in connection with the "common good" showed a clear surplus, then it would be necessary to have it determined whether the "common good" of royal burghs formed a legitimate subject of taxation under the Income-Tax Acts; but in the year in question no such surplus appears on the face of the "common good" account, and no assessment under Schedule D is claimable or falls to be made as regards any particular items of revenue in that account. (5) The assessment of item No. 3 (Petty Customs) was appealed against also on the special ground that it was a payment out of a public rate, and it was contended on behalf of the Corporation, under reservation as aforesaid, that as the £1500 received by the Corporation from the Police Commissioners of the city of Glasgow as a statutory commutation for these Petty Customs was a payment out of a public rate, this item was not in any case liable to be assessed, even assuming it was competent for the Inland Revenue authorities to disintegrate the various items of the "common good" revenue in the manner now for the first time done. (6) It was also contended that the decision in the case of the *Attorney-General* v. *Scott*, founded on by the Surveyor, could not be held as governing the question raised in the present appeal, as the law and practice in relation to not only the Corporation of the city of London, which is altogether exceptional, but also as regards municipal corporations in England generally, was essentially different from the law and practice in relation to municipal corporations in Scotland, and, moreover, the circumstances connected with the case referred to were not identical with those under which that appeal had been made.

Mr W. Stacey Webber, the Surveyor of Taxes, on behalf of the Crown, stated that the three items of income against the assessment of which this appeal was made, had not been specially selected for assessment, but that all the other sources of income had been separately taxed, either by direct assessment under the several schedules of the Income-Tax Acts or by deduction on payment of the dividends or interest, and that owing to the several sources of income being so chargeable they could not be dealt with in one assessment. He further contended that the Corporation were liable to be assessed for the individual items of income, less only the legitimate expenses of acquiring the same, and without allowance of any portion of the general expenditure of the Corporation.

He referred to the statement lodged on behalf of the Corporation as the Corporation's return for the assessment of the

year 1891-92, and argued that the principle on which such statement had been prepared was erroneous and unworkable, The Corporation claimed exemption upon the ground, among others, that after taking credit for the portions of the revenue that were charged under Schedule A or were received *minus* income-tax, and after deduction of the general expenditure of the Corporation, there was a debit balance; but it was neither legal nor possible to so deal with revenue which accrued from a variety of sources and was assessable unde different schedules and rules of the Income-Tax Act. Many items of the revenue were chargeable under and according to the rules of Schedule A, many others were receivable *minus* income-tax, whilst the remainder, including the three items under appeal, were chargeable under and according to various rules of Schedule D. The Surveyor referred the Commissioners to the case of the *Attorney-General* v. *Scott*, January 16, 1873, Court of Exchequer, 28 L.T. (N.S.) 302. This case decided that the profits of the Corporation of the city of London derived from market-tolls, corn and fruit metages, brokers' rents, &c., were liable to income-tax under Schedule D, without reference to the purposes to which they were applied, and that the proper principle on which the assessment should be made was to take each item or head of income separately and assess the income-tax upon the produce of such item after deducting from the gross receipts only the expenses incurred in earning and collecting the same, and not the general expenditure of the Corporation. The Surveyor contended that the circumstances of the case quoted were so identical with the circumstances of the case of the Glasgow Corporation as to make the ruling wholly applicable. With reference to the assessment on item No. 3 (Petty Customs, £1500), the Surveyor contended that the nature of the source from which the "Petty Customs" annual payment of £1500 arose did not affect the liability of the Corporation to assessment for it.

The Commissioners decided in favour of the appellants, their determination being that if assessable at all, the "common good" should be held as one concern for income-tax purposes, and that the Corporation should deduct all expenditure disbursed in their corporate capacity.

The Commissioners did not consider any special judgment relative to the assessment on item No. 3 (Petty Customs) necessary.

The Surveyor of Taxes, on behalf of the Crown, being dissatisfied with the determination, as being erroneous in point of law, the present case was stated for the opinion of the Court of Exchequer.

Argued for Surveyor of Taxes—The "Petty Customs" was really an annuity payable to the Corporation as a commutation for certain dues abolished by 9 and 10 Vict. cap. 289, sec. 15, and as such it should pay income-tax under 16 and 17 Vict. cap. 34. No doubt in origin it came out of the rates, but it was not the Corporation but the Police Commissioners who were the rating authority. The case of *Adam* v. *Maughan*, November 15, 1889, 27 S.L.R. 64, 17 R. 73, and 2 Tax Cases, 541, was on all fours with *Scott* (quoted *supra*), and they were conclusive of the questions here raised.

Counsel for the appellants stated that the judgment under appeal was directly in face of the case of *Adam*, and that he could not ask the Court to sustain it.

At advising—

LORD PRESIDENT—The counsel for the respondent under this appeal have informed us that they are unable to distinguish the present case from a decision given by this Court in the case of *Adam* in 1889. There is unfortunately no record of the grounds of judgment there stated, and accordingly we were prepared to have heard any argument which could be offered for the respondent in support of the determination of the Commissioners, as if the matter were entirely fresh. But the learned and very able counsel for the respondent has stated that, taking the matter upon that footing, and assuming the Court not to be bound by authority, no argument occurs to him which he can state in support of the judgment under appeal. That being so, it appears to me that our course is clear, and that is to give effect to this appeal.

LORD ADAM concurred.

LORD M'LAREN—I concur that in consequence of the course which the argument has taken the determination of the Commissioners must be reversed, but I wish to say that I have not applied my mind at all to the consideration of the question raised by the case, and am not to be understood as expressing any view whatever upon it. My concurrence in the judgment proceeds simply upon the ground that no argument has been offered to us in support of the determination, and that it is admitted by counsel that the determination must be reversed. Probably they did quite right in making that concession, but I do not wish that anything that is said in this case should prejudge any other corporation who may have arguments to offer from raising the question before us again.

LORD KINNEAR—I concur for the reason your Lordship has stated.

The Court pronounced the following interlocutor:—

> "The Lords of the First Division having considered the foregoing case for Stacey Webber, Surveyor of Taxes, on the appeal of the Corporation of Glasgow, and heard counsel for the parties, Reverse the determination of the Commissioners for General Purposes for the City of Glasgow, and remit to them to sustain the assessment in dispute," &c.

Counsel for Surveyor of Taxes—Lord Advocate, Q.C.—A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Respondents—Graham Murray, Q.C.—Ure. Agents—Millar, Robson, & Co., S.S.C.

NOTE.—The case of *Adam* v. *Maughan*, Nov. 15, 1889, 27 S.L.R. 64, 17 R. 73, 2 Tax Cas. 541, is not reported upon the points referred to in the above case. The point was raised in a case stated for the opinion of the Judges, from which it appeared that at a meeting of Income-Tax Commissioners the City Chamberlain appealed against the two following assessments made against the Lord Provost, Magistrates, and Council of the City of Edinburgh under Schedule D of the said Acts:—The profits assessed were revenue from markets and revenue from slaughter-houses, the assessed amount of the former being £10,211, 10s., and of the latter £1683, 10s. The nett amounts of these assessments was arrived at by taking the gross revenue as detailed in the city accounts, and deducting therefrom (1) rents included therein but already assessed under Schedule A, and (2) the amount of the expenditure for management, repairs, &c., as detailed in the city accounts.

The appellants claimed exemption from assessment on the revenue from the markets and slaughter-houses, inasmuch as, after deducting interest on borrowed money and annuity, there was no profit arising therefrom assessable under Schedule D. They also contended that the revenue therefrom formed part of the common good of the burgh, which was vested in the magistrates and council by charter for behoof of the town, and for maintenance of the administration of the affairs of the city, both civil and judicial. In earning the common good certain outlays were inevitable. The salaries of the market officers were direct charges on the market revenue, and these have been admitted to deduction. But the expenses of maintaining the municipal offices, and all the expenses connected with the civil government and judicial administration of the town fell as dued charges upon the common good, and the municipal officers of the city were as much required for the control of the markets and slaughter-houses, and all other sources of the common good, as were the officers who immediately superintended them. In the annual apportionment of expenses in the city accounts the municipal expenses of the town had all along been charged against the common good.

They also contended that the municipal expenses of the city ought to be proportionally charged against the revenue of the markets and slaughterhouses as a part of the common good, and such deductions had been previously allowed.

The surveyor contended that the income derived by the city from the markets and slaughterhouses was profit assessable under No. III., Rule 3, of Schedule A of the Act 5 and 6 Vict. c. 35; that there was no exemption on the ground that these revenues formed part of the common good of the town; that the expenses actually incurred in earning these revenues had been allowed in assessing the profits, and no further deduction was allowable. He referred to section 40 of the said Act, which imposes the tax on "all bodies politic, corporate, or collegiate, &c.," the same as on individuals, and to the case of *Attorney-General* v. *Scott*, 28 L.T. (N.S.) 302.

The Commissioners refused the appeal on the ground that the Corporation was assessable for profits the same as an individual, and that the proper deductions had been allowed from the revenues of the assessments appealed against.

At advising—

LORD PRESIDENT—As regards the remaining questions, viz., the revenue derived from the markets and slaughterhouses, it appears to me that though possibly the appellant may have some case for claiming a deduction from the profits of the markets and slaughterhouses in respect of a portion of the salaries of some of the general municipal officers of the town, they have not made any case here which can enable us to give them any relief. The statements made in the case are of the most general and vague description, and not only do not offer any figures, but do not offer any general principle or rule that we could adopt for the guidance of the Commissioners. I am therefore of opinion that we should affirm the determination of the Commissioners in so far as regards the markets and slaughterhouses.

LORD SHAND—In regard to the other question [revenue from markets and slaughterhouses] I think it possible that there may be a case made for a deduction of some salary or proportion of salary if it were made perfectly clear that these are clearly upon the strictest view a proper charge against markets and against the slaughterhouses before reaching the profits or final results of the income, but we have nothing in the case which enables us to say that there are materials for that, or that the point is properly raised, and I am clear on the case as stated that we should adhere to the Commissioners' deliverance on that branch of it.

LORDS ADAM and M'LAREN concurred.

The Court accordingly affirmed the determination of the Commissioners in so far as regards the markets and slaughterhouses.
