It was said, that either Archibald Smith or Margaret Heugh might have insisted upon the estate being sold. In my view of the case, it is not at all necessary to controvert that. Supposing they had insisted upon its being sold, they might have altered the character of the property. But, inasmuch as they did not insist upon its being sold, and it was not sold, it is impossible to hold, that their representatives after their death could insist upon its being sold; because that would be just to enable one person to say—it shall belong to me; whereas, in another view of the case, it would belong to another person.

On the whole, therefore, it seems to me, that the course suggested by my noble and learned friend is perfectly correct. The judgment of the Court upon that part of the summons which relates to the reduction does not come before us, and appears to be substantially right. Therefore it is only the other part of the judgment which ought to be reversed, with the declaration that my noble and learned friend has suggested.

LORD KINGSDOWN.—My Lords, I quite agree with your Lordships as to the conclusion at which you have arrived, and the grounds upon which you have placed it. And as we are not desirous of encouraging the repetition of arguments at the bar, I think, that perhaps I should set a good example to learned counsel by avoiding a repetition in my judgment.

LORD CHANCELLOR.—I think the form of your Lordships' order had better be, to reverse the interlocutor of the Lord Ordinary, which is at page 25 of the case, and to reverse the interlocutor of the Inner House, and to find in the terms of the reclaiming note of the appellant, by which the appellant prays "to recall the said interlocutor, to repel the defences in so far as applicable to the declaratory conclusions of the summons, and in particular, the third and fourth pleas in law for the defenders, and to decern in terms of the said declaratory conclusions, with expenses." I apprehend that that does not relate to the reduction, but relates only to the point of the construction of the trust settlement.

Mr. Anderson.—I think we all agree upon that. The claim for expenses only relates to the declaratory conclusion, so far as regards the discussion on the *jus crediti*. We have been found liable to the expenses of the reduction, and now we are to be declared entitled to the expenses of the declarator.

Lord Advocate.—That is quite true, with this observation: the other side have not been found liable to the expenses of reduction, as far as the record is concerned, which expenses are reserved by the interlocutor. There is a reservation of all other questions of expenses under the finding of 27th November 1858. So that we are in all respects at variance on that subject.

LORD CHANCELLOR.—Their Lordships do not mean to touch anything that has been found in respect of so much of this action as relates to the question of reduction.

Interlocutors reversed, and cause remitted with a declaration.

For Appellant, Holmes, Anton, Turnbull, and Sharkey, Solicitors, Westminster.—*For Respondents*, Grahame, Weems, Grahame, and Wardlaw, Solicitors, Westminster.

JULY 18, 1862.

HER MAJESTY'S ADVOCATE, *Appellant*, *v.* THE COMMISSIONERS OF SUPPLY FOR THE COUNTY OF EDINBURGH, *Respondents*.

Statute—Clause—Construction—Land Tax—Commissioners of Supply—Statutes, 23rd January 1667—38 Geo. III. c. 60—5 and 6 Will. IV. c. 64, §§ 10, 13—*In an application at the instance of the Crown against the Commissioners of Supply for the county of Edinburgh:*

HELD (affirming judgment), *That the latter were not bound to furnish the collector of land tax for the county with an annual assessment roll, specifying the names of the subjects liable to be assessed, the sums of land tax payable therefor, and the names of the persons liable in payment. The Commissioners must inform the Treasury of any alterations made by them in the assessments, but are not bound to do more.*[1]

The Crown appealed, arguing in their *printed case* that the judgment of the Court of Session should be reversed, for the following reasons:—"1. By the Statutes founded on, the respondents are bound to furnish to the Crown collector a cess or tax roll, as it is necessary for the purpose of levying the tax, in respect the Commissioners are appointed for the purpose of raising and levying the tax, and are authorized to do everything necessary for that purpose. 2. Because,

[1] See previous reports 23 D. 933: 33 Sc. Jur. 484. S. C. 4 Macq. Ap. 387: 34 Sc. Jur. 657.

apart from special and express authority, a tax roll, containing the names of the parties and the sums payable, is essential to the levying of the tax; and the power and the duty to make it are implied in the imposition of the tax, and the nomination of Commissioners for the purpose of raising it. 3. Because each shire and burgh is, by the Statutes, bound to make good to the Crown, free of expense, its quota of land tax, excepting any deficiency arising from the defalcations of the collector; and the Commissioners of Supply are bound to take all measures necessary to the payment of the debt, and, among others, to furnish a roll to the collector of the persons within the shire who are liable in payment; and failing their doing so, they must as a body constituted by Statute, fulfil the obligation to pay the quota of the county as a debt to Her Majesty, and that free of expense. 4. Because the Commissioners of Supply have, since the Statute of 1667, regularly made up tax rolls for the use of the collector; and where they failed to do so, they were compelled at the suit of the Crown, by writ of mandamus issuing from the Scottish Court of Exchequer, to furnish such rolls; and such having been the law and practice anterior to the year 1856, when the Statute 19 and 20 Vict. cap. 56, was passed, the Court of Session ought, in terms of § 15 of that Act, at once to have granted the order prayed for in the petition presented to them by the appellant." Craig de Feudis, i. 16; *Graham*, M. 10,164; Bell's Prin. §§ 1125, 1127, 1130; Thomson's Scots Acts, vol. iii. p. 431; Skene's Acts, vol. i. p. 520; Robertson's History of Scotland, 11th ed. vol. viii.; Acts 1621, cap. 2; 1633, c. 1 and 2; 1621, c. 3; 1597, c. 281; 1633, c. 2; Act of Convention of 1667; 1690, cap. 6; 1706, c. 2; Treaty of Union; 38 Geo. III. c. 5; Wight on Election Law, p. 114; Hutchison's Justice of Peace, vol. iii. p. 18; 19 and 20 Vict. cap. 56.

The respondents in their *printed case*, supported the judgment on the following grounds:—"1. The duty of preparing and furnishing to the Crown collector of the land tax a roll of the nature demanded by the appellant does not attach to the respondents at common law, and has not been imposed upon them by any Statute. 2. None of the Statutes relating to the land tax provide any powers or machinery by which the respondents could prepare such a roll, even if it could be held, that the preparation of such a roll had been contemplated by the Legislature. 3. The preparation of a collection roll is properly incidental to the collection of the tax, and the roll should therefore be prepared by the present statutory collector as a proper part of the duties of his office. 4. The privilege and patronage of the collection of the tax being now taken away from the respondents, and transferred to Government Commissioners, the latter ought to bear the burden and responsibility of preparing a collection roll, if such shall now be found necessary, as they do in the case of the assessed taxes. 5. The tax has from its institution been collected without any such roll having been found necessary, and no reason for the preparation of such a roll now exists which did not previously exist, at least none has been alleged by the appellant; and, 6. There is no source of information open to the respondents which is not equally open to the Crown collector, and no difficulty in the way of preparing a roll by that officer which would not equally prevent the due preparation of the roll by the respondents. Erskine's Inst. ii. 5, 31; Act of Convention, Jan. 23, 1667; Jamieson's Dictionary, vol. ii. *voce* "*stent;*" Acts 1667; 1690, c. 6; 1597, c. 281; 1621, c. 2; 4th August 1649; 1656; 1707, c. 7; 3 and 4 Will. IV. c. 13; 5 and 6 Will. IV. c. 64; and 17 and 18 Vict. c. 91.

Lord Advocate (Moncreiff), and *Agnew*, for the appellant.

Sir H. Cairns, Q.C., and *Mure*, for the respondents.

The arguments turned entirely on the construction of the several Statutes.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, this appeal is presented by the law officers of the Crown in Scotland, and it raises questions upon a petition presented by them to the Court below in the nature of a writ of mandamus. The prayer of that petition was, "to ordain and appoint the respondents, the Commissioners of Supply for the County of Edinburgh, to furnish, within one month from the date of service hereof, to Donald Ross, the collector of land tax for the said county, and to his successors in office, a correct and proper assessment roll of the cess or land tax for the county of Edinburgh, specifying the names of the various lands and heritable subjects within the said county, and liable to be assessed, with the sums of land tax payable for such lands and heritable subjects, together with the names of the persons or parties liable in payment of the said sums respectively for the year's land tax, which is payable to Her Majesty by the county on the 25th March 1860." This is a requisition of great particularity, enforcing on the Commissioners of Supply a very serious obligation. It was incumbent, therefore, upon the appellant to shew, first, that it is the bounden legal duty of the Commissioners to do what is here required, and, secondly, that they have the means in law of performing that duty, and obeying this requisition. Now the land tax to which the petition relates was imposed in Scotland several centuries ago. Originally it was imposed in mass upon the whole kingdom. It was afterwards apportioned among the different counties, each county being made liable for a certain part. The proportionate part of each county was again sub-distributed and divided according to the valued rent of the subjects liable, that is, the lands and tenements as they were held at

the time of such valuation. These things were done by virtue of Statutes passed in the year 1660 and 1667 in the Parliament of Scotland. The rating and assessment were made according to the then value of the property. There was no power to make successive or future valuations.

As to the state of things consequent upon that Statute, I take a description from one of the judgments below :—"The tax was imposed according to the valued rent, and the valued rent was ascertained at a distant period; and no power exists now of revising, or correcting, or altering that valuation. The tax is thus imposed according to a rental and a state of possession unsuitable to the present condition of matters. It was imposed according to the value of the subjects at the time, and with reference to the possession by the parties at the time. The value is changed, the parties are changed, and the division of property is altered. To ascertain even the names of all the parties who are now proprietors of the several subjects as they previously existed and were valued, may be difficult and troublesome, and still more so to ascertain the proportions in which they hold the subjects. The subjects remain, though differently arranged or distributed, and they have proprietors though the proprietors are changed, but the relative values as at the time of the original valuation of the several lots into which the proprietors are now distributed cannot be ascertained with absolute certainty—that is now impossible."

This account of the present position of the matter with reference to the statutory power, which I have selected from one of the judgments in the Court below, tallies altogether with the statement made by the appellants themselves. For in the third statement of the revised condescendence this is stated :—"By these two Statutes (those were the Acts of 1660 and 1667) power was conferred on the Commissioners of Supply to rectify the original valuation, and to subdivide the assessment in cases where it is unequal. The power to rectify the original valuation has not been exercised for upwards of a century. It could not be exercised now if it should still be held as existing, owing to the changes in the value of property."

It is in this state of things that the requisition is made by the Crown. For assessing and levying this tax in the counties of Scotland certain officers, called Commissioners of Supply, were appointed by the Act of 1667. Their powers under that Statute are divisible into two classes. First, certain judicial powers, which appear to be directed to two purposes only, namely, first, the rectifying of any assessment; and, secondly, the subdividing or re-distributing any existing *cumulo* assessment. I think those powers, like all judicial powers, were to be exercised on the applicati n of parties interested. Beyond those powers I am unable to collect any further judicial authority.

The other class of duties of the Commissioners prescribed by the Statute related to the management of the collection of the tax. They had the duty of collecting it, and the receiver or collector for that purpose was their agent or servant. The mode of proceeding by the Commissioners in the discharge of this duty, whilst it was exercised by them, is correctly described by a minute which is in process. It describes the form of procedure by the Commissioners anterior to the year 1798, from the year 1798 down to the year 1855, when the duty of managing the collecting of the tax was taken away from the Commissioners, and given directly to the officers of the Crown.

It would appear from the statement there made, that, anterior to the year 1798 and substantially down to the year 1855, the collection roll or collection book was prepared by and at the expense of the person employed by the Commissioners to collect; that he was occasionally directed by the Commissioners of Supply to specify in the receipts each heritor's portion, and the quantum upon each £100 of valued rent; but there was no list, or roll, or document prepared by or at the instance of the Commissioners of Supply, shewing the names of the several parties on whom the assessments were made, with the sums paid by each, and the lands in respect of which the parties were assessed.

It is stated, and I have no doubt correctly so, that the necessary information to enable the servant of the Commissioners to collect the tax, whilst the collection was their duty, was obtained by the collector himself. He was no doubt paid for the performance of that duty, and took care to have that duty properly performed. In this state of things, the Act 5 and 6 Will. IV. was passed, which, as I have already observed, transferred the management of the collection of the tax from the Commissioners to the Crown. The Commissioners were no longer to be responsible for the collector. The collector was a person appointed directly by the Crown, and became the agent of the Crown. Now, before I refer to the language of the Act, this, I think, is obvious, viz., that if there be any obligation on the Commissioners to deliver a roll to the Crown collector, such obligation must be found in the Act which took away from them the duty of collecting. Because it is plain that, whilst the Commissioners themselves had the duty of collecting, and the collector was their agent or servant, it would be absurd to suppose, that they were under any obligation to make up and deliver a roll to such servant, or that the servant could maintain against them any demand for that purpose. When, therefore, the duty was transferred, if the obligation asserted in this petition existed, we must expect to find it in the Act which transferred that obligation. The language of the Statute which transferred the obligation is found to be substantially this: "That the land tax in Scotland shall be recovered, levied, collected, and paid

under the same rules, regulations, provisions, and penalties, as the assessed taxes now are or may hereafter be recovered, collected, and paid, anything in the said last recited Act or any other Act or Acts contained to the contrary thereof in anywise notwithstanding.

I have looked in vain for any enactment creating an obligation or a relative duty between the Commissioners of Supply and the Crown collector *ultra* the obligation and duties which previously existed, and were performed by the Commissioners.

The argument on the part of the Crown has been rested upon this, that this is a duty which is necessarily required to be done in order to the adequate collection of the tax, and that therefore, if it be so, it must necessarily follow in law that that duty can be performed by the Commissioners. But I am not satisfied either with the argument itself, or with the application of it to the present case. I think it abundantly sufficient to answer that argument by observing, that no such duty could have existed as between the Commissioners and the collector anterior to the Statute of transfer; and that, from the time of the Statute of transfer, nothing of the kind can be collected, is not only evidenced by the observations which I have already made, but by the fact, that, ever since that Statute was passed, the tax has been collected, and no requisition of this kind has been enforced against the Commissioners.

It would be incumbent upon this House to see, that the Commissioners have plainly and indisputably the power of fulfilling the obligation, before it should proceed to throw that obligation upon them. I must say, that, after an earnest desire to arrive at a conclusion which would terminate this unseemly controversy, and prescribe a rule by which the public service and the duty of collecting this tax might be conveniently performed, I find it impossible to arrive, upon these Statutes, at anything like a proper and judicial declaration, that that authority has been conferred upon them; nor do I see anything laid down here as to a line of conduct for the purpose of complying with the requisition of the Crown, that might be plainly and safely adopted on the part of the Commissioners. If there were on the one side and on the other a disposition to approach this subject with a view to arrive at a practical and convenient mode of procedure, I dare say it would be found that the tax might be collected in the county of Edinburgh, as it appears to have been collected in other counties. But we have the parties keeping each other at arm's length—the Crown insisting that the Commissioners are bound by law to do that which is required in the prayer of the petition, and that the law is clear enough and plain enough to impose upon them that obligation, and has given them the means of performing that duty. From that conclusion I altogether dissent; and I feel that I am bound to confirm the opinions that have been delivered in the Court below; and I therefore would recommend your Lordships to dismiss this appeal.

LORD CRANWORTH.—I concur in the opinion, that the interlocutors appealed against should be affirmed. I can discover nothing in any of the Acts which imposed on the Commissioners, the duty of making any roll whatever. By the Act of 1667, they had the power *proprio motu* of amending the valuation of 1660, but, subject to that power, the valuation of 1660 was to be their guide in assessing and levying the tax. In none of the subsequent Acts was there expressly or (as I think) impliedly any power to alter the assessment, except on the application of parties thinking themselves aggrieved, or desiring to have a *cumulo* assessment divided, where an estate has been split among different owners. When the duty of collecting the tax was taken away from the Commissioners, a roll or book was given by them to the Treasury shewing the then state of the assessment, *i.e.* the assessment of 1667, modified by the subsequent corrections made on occasion of divisions of property, or otherwise.

The Commissioners, in my opinion, still retain the power and duty of deciding on any complaints made to them of unequal assessment, and on any applications for dividing assessments where property assessed is divided. And, on general principles, I think they must be bound to inform the Treasury or collector of any alterations so made. This will, I should think, enable the collector to discharge his duty. But if this is not the case, application must be made to the Legislature, for I cannot discover any obligation binding the Commissioners to do more. I do not go into the question more in detail, but content myself with expressing my entire concurrence with the LORD CHANCELLOR in the view which he has taken of the case.

Sir H. Cairns.—Will your Lordships permit me to mention that, by a special Statute for Scotland, the Crown stands upon the same footing as to costs as any other suitor? We have ourselves no funds to meet the costs of this appeal; and we trust, therefore, that your Lordships will dismiss it with costs.

LORD CHANCELLOR.—I hope your Lordships will not listen to this suggestion. I think both parties would have done well to have considered the question of expense before they entered upon this contest.

Interlocutors affirmed.

Agent for Appellant, J. Timm, Solicitor of Inland Revenue.—*Agents for Respondents*, Connell and Hope, Solicitors, Westminster.