The verdict was applied, and the pursuer found entitled to expenses.

After taxation the pursuer lodged a note of objections to the report of the Auditor upon his account of expenses, which had been taxed at £193, 12s. 5d. The main items of the objections were the 4th and 5th of his note, dealing with fees of counsel and charges incident thereto for their attendance at the trial, involving a sum of £16, 18s. 2d. taxed off by the Auditor.

Salvesen, for the pursuer, submitted that the Auditor was wrong in allowing fees to counsel for the trial only at the rate to senior of 15 guineas for the first day instead of 20 guineas, and 12 guineas for the second day instead of 15 guineas, and to junior at the rate of 10 guineas instead of 15 guineas for the first day, and 8 guineas instead of 10 guineas for the second day. The scale he contended for was usual in jury trials. Here points of law as to liability between the defenders and certain feuars in a question with the pursuer, a tenant of the property of the latter, had been raised at the trial, as well as points in regard to contributory negligence. In regard to this latter point the defenders excepted to the charge of the Court to the jury, but did not proceed with their bill of exceptions.

The defenders supported the Auditor's taxation. The fixing of the scale of fees was one entirely within his discretion. The trial was of a simple description. No injustice could be done to the pursuer by the adherence of the Court to the report, in respect that in the present case the fees of his counsel were not sent at the time.

Pursuer's Authorities—*Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149; *Black* v. *Mason*, March 1881, 8 R. 666; *Young* v. *Johnston & Wright*, May 19, 1880, 7 R. 760.

Defenders' Authority—*Wilson* v. *North British Railway Company*, December 13, 1873, 1 R. 305.

Lord Kincairney—In this case I have consulted with the Auditor. In regard to the main items objected to I have had some difficulty. These relate to the fees of counsel for the first and second day of the trial. The case was an ordinary one of its class, but it was keenly contested, and lasted two full days. I do not think it was unduly prolonged in any way. The Auditor has explained to me that in taxing these fees he had in view an allowance by him to the pursuer of consultation fees of 5 guineas, and 3 guineas to senior and junior counsel respectively prior to the trial. But I think that upon the principle of *Campbell* v. *Ord & Maddison* the objection of the pursuer in this matter is well founded. Pleas of contributory negligence as in that case were pressed at the trial of this case, as well as other points of law. I observe from the report of *Campbell's* case that the same consultation fees were also sent in that case as the Auditor has allowed here. Accordingly, following that case, I sustain the objection in regard to these fees, increasing the fees to senior by 8 guineas, and to junior by 7 guineas, and as incident thereto, the agent's and counsels' clerks' charges of £1, 3s. 2d. must also be allowed. These items in all amount to £16, 18s. 2d. But as the pursuer did not press certain objections, and as I do not intend to interfere with the Auditor upon the remaining objections, I find no expenses due in regard to the discussion upon the objections.

Counsel for Pursuers—Comrie Thomson—Wilton. Agent—W. M. Morris, S.S.C.

Counsel for Defenders—Guthrie—Cook. Agents—Traquair, Dickson, & M'Laren, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BROWN *v.* VERTUE.

Compensation — Action of Maills and Duties—Right of Tenant to Set-off Debt Due Him by Landlord Against Claim of Heritable Creditor of Landlord for Rent —Bankruptcy—Retention.

In an action of maills and duties brought by a heritable creditor infeft under a bond and disposition in security, a tenant maintained in defence that he was entitled to set-off an account for goods supplied by him to his landlord, the principal debtor, against the creditor's claim for rent.

The Court *repelled* the defence, *holding* (1) that as the tenant was bound after the raising of the action of maills and duties to pay his rent to the heritable creditor, there was no *concursus debiti et crediti* entitling him to set-off the debt due him by his landlord against the rent; and (2) that the fact that the landlord had been sequestrated before the action of maills and duties was raised did not give the tenant a right of retention for the debt due by his landlord, in respect the heritable creditor did not require to claim in the sequestration in order to obtain payment of the rent.

By bond and disposition in security dated 10th and recorded 13th September 1883, James Heddle bound and obliged himself to repay to Robert Chambers and others, as trustees of the deceased Robert Chambers, LL.D., the sum of £2300, which he had borrowed from them, and in security of repayment he disponed to the said trustees certain tenements in Water Street, Leith.

The estates of James Heddle were sequestrated on 1st March 1892.

On 5th March Richard Brown, C.A., who had been appointed judicial factor on the trust-estate of the said deceased Robert Chambers, and was in right of the foresaid bond and disposition in security, conform to assignation dated 21st January and re-

corded 29th March 1886, raised an action of maills and duties and poinding of the ground against James Heddle, as principal debtor, and against the tenants in occupation of the security-subjects, in order to have the tenants ordained to make payment to him of the rents due by them at the next term of Whitsunday, and the like sums half-yearly or quarterly thereafter, according to the terms of their respective tenancies.

One of the tenants, George Vertue, whose rent was £15, and who was due a half-year's rent at Whitsunday 1892, lodged defences, averring that the rent due by him was subject to the deduction of £5, 17s. 10d., being the amount of an account due to the defender for goods sold and delivered to the principal debtor.

The defender pleaded, *inter alia*, that the pursuer could have no higher claim than his author, and that the sum condescended on formed a valid set-off against the claims of the pursuer.

On 28th June 1892 the Lord Ordinary (WELLWOOD) repelled the defences stated for Vertue, and decerned against him in terms of the conclusions of the summons.

"*Opinion.*—This is an action of maills and duties and poinding of the ground at the instance of a heritable creditor in virtue of a bond and disposition in security to which he acquired right. All the tenants or occupants, who are called as defenders, have allowed decree in absence to pass against them with the exception of the defender George Vertue, whose yearly rent is £15. The summons was signeted on 5th March 1892, while the term Martinmas to Whitsunday was current. The defence, which is confined to the rent due at Whitsunday 1892, is grounded on the averment that at the date of the summons the principal debtor James Heddle was due Vertue £5, 17s. 10d., principally for goods sold, and to a small extent in respect of the landlord's share of rates and taxes paid by Vertue. The pursuer does not dispute that on evidence being produced of payment of the landlord's share of rates and taxes a deduction will be allowed from the rent, and therefore the only question is, whether the account for groceries can be set-off against the pursuer's claim for rent? I am of opinion that it cannot, on this simple ground, that the pursuer is not the defender's debtor in that account. To admit the plea of compensation there must be *concursus debiti et crediti*. If a landlord who is in debt to his tenant assigns the rents to a third party, there is no *concursus quoad* future rents, because nothing is due and payable by the tenant to the landlord at the date of the assignation. The tenant is simply an unsecured creditor, and the rents when due must be paid to the assignee—*Clark's Creditors* v. *Dewar*, M. 2656; Bell's Comm. ii. (M'Laren's ed.) 132; Bell's Prin., sec. 1468.

"It is otherwise as to rents which are due and in arrear at the date of the assignation, because as they are payable to the cedent, concourse has taken place and compensation is pleadable—*Elmslie* v. *Grant*, 9 Sh. 200.

"The defender erlied on the maxim *assignatus utiter jure auctoris*, but I do not think that that maxim has any application to such a case as the present. It may apply where the debt or obligation founded on as a counter-claim forms one of the outstanding cardinal conditions or obligations of the contract between the parties—landlord and tenant or superior and vassal. I take it that this was the ground on which the case of *Arnott's Trustees* v. *Forbes*, 9 R. 89, relied on by the defender, was decided. Here, however, the defender's counter-claim is wholly unconnected with the contract of lease, and falls under the general rule to which I have adverted, viz., that compensation cannot be pleaded unless before the landlord is effectually divested there has been a proper *concursus debiti et crediti*.

"As to intimation, the rents sued for have not been paid away; but further, the demand made in the summons is quite suffieient intimation. The case relied on by the defender, *Royal Bank* v. *Dickson*, 6 Macph. 995, is not in point, because in that case what was relied on as intimation was simply a summons of poinding of the ground, which was held not to be equivalent to an intimation of assignation to the rents, the summons not containing any such claim or assertion. This clearly appears from Lord Barcaple's note, p. 997. In the present summons there is an express assertion of right to the rents under the bond and disposition in security, and that is equivalent to an intimation."

The defender reclaimed, and argued—The Lord Ordinary had omitted to advert to the fact that the principal debtor was sequestrated prior to the raising of the present action; that was prior to the date at which the creditor's right to the rents was intimated to the tenants. But that fact took the case out of the ordinary rule that there must be a *concursus debiti et crediti*, and the question became one of retention or the balancing of accounts in bankruptcy; and in the case of mutual debts in bankruptcy the right to retain existed, though the claim of the person asserting such right was contingent, future, or illiquid—Bell's Comm. (7th ed.), ii. 118; Bell's Prin. sec. 1410; *Arnott's Trustees* v. *Forbes*, November 3, 1881. The defender had therefore a valid right of retention in respect of the debt due to him by the principal debtor.

Argued for the pursuer—The infeftment of a heritable creditor completed his right to the rents, and was a sufficient intimation to the tenants that the rights were assigned to him—Bell's Comm. (7th ed.) 1, 793; *Paul* v. *Boyd's Trustees*, May 22, 1835, 13 S. 818; *Edmond* v. *Magistrates of Aberdeen*, November 16, 1855, 18 D. 47. The pursuer's right to the rents being therefore completed and intimated prior to bankruptcy, the defender's contention that he had a right to retain owing to the sequestration of the principal debtor fell to the ground.

At advising—

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