knight Crawford, 1 Bligh's App. 163. This was the law under the old election system, and it has been given effect to by the Reform Act. Cay's Analysis, p. 175, and cases there cited.

GUTHRIE, for the respondents, was not called upon.

Lord ORMIDALE—The nature of the objection here is that the claimant has no beneficial interest in the property. The position of the claimant has been quite clearly established. It is plain that his right is controlled as to the disposal of the property; but there is nothing to show that he is not to have at present the full beneficial enjoyment of it. But it is alleged that he has not a right to vote. The only evidence as to that point is the solitary witness, the claimant himself; but it lies on the objector to establish that the claimant is in the position of an individual who is to exercise his vote not as he likes, but according to the will of his author. This is not to be assumed against a man. It must be clearly made out. But here you have a statement by the witness—"I have no understanding with my father as to how I am to vote for a Member of Parliament." It is quite clear from all the authorities quoted to us, that whatever grounds of suspicion there may be—and the cases cited are stronger than the present—we are not to give effect to mere suspicion, and that objections of this kind must be clearly established and founded on reasonable and satisfactory evidence.

Lord KINLOCH—The Sheriff puts the question of law in a way which would be irregular but for the previous explanations. He says—"The question of law is—whether the claimant is entitled to have his name entered on the register as proprietor under the 7th sec. of the statute 2 and 3 William IV., c. 65?" That would be too vague a way of stating the question of law if he had not previously said, "The objection was that the claimant has no beneficial interest in the property, and has not the right to exercise his vote as he thinks proper." I read the question of law as stated—whether, in the face of this objection, the claimant is entitled to have his name entered on the register. I agree with your Lordship in holding that the deposition by the claimant does not make out either of these two propositions—(1) that he has no beneficial interest; and (2) that he has not the right to exercise his vote as he thinks proper.

The judgment of the Sheriff was accordingly affirmed.

EXPENSES.

In respect that neither party moved the Court for expenses, both having been successful in a like number of appeals, the Court found none due.

Agents for Appellant—J. & F. Anderson, W.S.
Agent for Respondent—D. J. Macbrair, S.S.C.

## WIGTOWNSHIRE.

### M'CHLERY *v.* COWAN.

*Voter—Register.* A party whose name had been expunged from the register, restored of consent of parties, by minute and without discussion.

This was an appeal against a judgment of the Sheriff of Wigtownshire, expunging the name of the appellant from the register of voters for the county.

R. V. CAMPBELL, for the appellant, stated that parties had agreed that the name of the appellant should be restored to the roll; and a minute to that effect, signed by the counsel and agents for the parties, was given in.

The Court allowed the minute to be received, and of consent and without discussion ordered the judgment of the Sheriff to be reversed.

Counsel for Appellant—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Stair A. Agnew. Agent—James Renton, Junior, S.S.C.

*Friday, Nov.* 30.

## FIRST DIVISION.

### LORD ADVOCATE AND BARBOUR *v.* LANG.

*Crown—Prerogative—Tax—Repair of Pavement.* Held (diss. Lord Curriehill) that the Crown, as proprietor of heritages, was not bound to implement the obligations imposed on proprietors in regard to foot pavements by the Glasgow Police Act, these being of the nature of a tax or assessment.

The question raised in this case is, whether, under the Glasgow Police Act, 1862, the Crown is bound to maintain and keep in repair the foot pavement of the Gallowgate of Glasgow, adjoining the Glasgow Infantry Barracks, which belonged to the Crown, and are occupied by it through its servants for the public service.

The Glasgow Infantry Barracks, which are situate in the Gallowgate of Glasgow, are enclosed within a high wall, which forms the boundary of the Crown's property. The foot pavement in question is beyond the Crown's property. This is admitted.

At the time of the proceedings after mentioned, the barracks were occupied by the suspender, Major R. D. Barbour, as Barrack-Master, acting under the instructions of the Secretary-at-War. It is not alleged that he had any beneficial occupation of the barracks.

In the year 1863, the foot pavement in Gallowgate, adjoining the barracks, fell into disrepair. The Superintendent of Streets, or, as he is called in the Act, the Master of Works, in terms of sections 322 and 326, called upon Major Barbour, as occupant of the barracks, to repair the pavement. On his failing to do so, the respondent, John Lang, as Procurator-Fiscal of the Dean of Guild Court of Glasgow, presented a petition to the Dean of Guild setting forth the condition of the pavement, and the refusal of Major Barbour to repair the same, though called upon by the Master of Works to do so. The Procurator-Fiscal's petition concluded with an application to the Dean of Guild for a warrant to execute the necessary repairs; and the Dean of Guild was asked thereafter to ascertain and fix the cost of the repairs, and decern against Major Barbour for the same, and also to award the expenses of the petition against Major Barbour.

This application was made in terms of the 330th section of the Act, which runs as follows:—"If all the proprietors to whom notice has been given, and who have not relieved themselves from liability in manner hereinbefore provided, fail to comply as aforesaid with the requisition contained in such notice, it shall be lawful for the Procurator-Fiscal to enforce the same at any time by applying to the Dean of Guild for a warrant to execute the work therein specified; and the Dean of Guild shall, upon a certificate by the Master of Works that a notice had been duly given, and upon a certificate by the clerk that no objections

had been lodged thereto, or upon a certificate by the assessor or by the clerk of court that any objections thereto had been duly disposed of, grant a warrant to execute such work, and shall thereafter ascertain and fix the cost thereof, and decern against the said proprietor or proprietors to whom notice was given, or such of them as have not relieved themselves from liability in manner hereinbefore provided, for the proportions of such cost due by them, and may award expenses to or against any of the parties to such application; but no such application shall operate as a relief to any proprietor or proprietors from liability for any penalties which had been incurred by him or them previous to the date thereof." The Dean of Guild, on consideration of the petition, granted warrant as craved to the respondent to execute the repairs; and after their completion awarded the expenses of the repairs and of the petition against Major Barbour, who, with the concurrence of the Lord Advocate, acting on behalf of her Majesty and the War Department, now brings a suspension of a charge following on the decree of the Dean of Guild.

The case is a good deal simplified by admissions on both sides. On the one hand, the suspenders admit that had the Crown not been called in question, the proceedings of the respondent would have been fully justified by the powers conferred upon him by the Act. On the other hand, the respondent expresses himself willing to waive all distinction for the purposes of this case between Major Barbour and the Crown itself. The question, therefore, is, whether or no the Crown is subject to the provisions of the Glasgow Police Act, which relate to the repair and maintenance of foot pavements.

The Lord Ordinary (Ormidale) sustained the reasons of suspension.

The respondent reclaimed.

After an oral hearing last winter session, the Court ordered written argument.

In his revised case,

A. B. SHAND (with him A. R. CLARK), for the respondent, argued—It is conceded that the Crown is not liable in payment of any tax or impost, whether imposed by a general or local Act. But the obligation to repair pavement is not a tax, but a police regulation which the Crown is bound to observe as much as any other proprietor situated within the operation of the Glasgow Police Act. Further, the Crown is by the Act made liable for the burden by such necessary implication as is equivalent to an express declaration that the Crown shall be bound by the Act. Crown property is liable to limitations by means of servitudes, and if this obligation is not exactly of the nature of a servitude, the same law is applicable to it. It is a burden on property arising from neighbourhood, and there is no principle under which the Crown can claim exemption from it. There are other obligations under the Act in which the Crown is liable, such as the maintenance of sewers and chimneys in an efficient state of repair, and this burden is of the same nature. Chitty on Prerogative of the Crown; King *v.* Archbishop of Armagh, 15th Nov. 1721, Leach's Mod. Rep., vol. viii., p. 6; Crown *v.* Magistrates of Inverness, Jan. 29, 1856, 18 D. 366, 371; Bell's Prin., secs. 979, 964, 973, Ersk. Inst., ii. 9. 2; Glasgow Police Act, 1862.

In the revised case for the Crown,

LORD ADVOCATE MONCREIFF and H. J. MONCREIFF answered—By reason of its royal prerogative, the Crown enjoys immunity from all taxation, and is bound by no Act of Parliament, whether of a general or local nature, by which it has not expressly consented to be bound. No such consent has been given in regard to the Glasgow Police Act, and therefore the Crown is not liable in the obligation sought to be enforced, because it is practically of the nature of a tax. The mode in which the obligation is imposed under the Act does not in any way affect its character. The analogy which the respondent draws from other sections of the Act is not in point, because these regulations are directed to obligations, the breach of which would amount to *quasi delicta*, which it is not contended the Crown could commit with impunity. Bacon's Abridgment *voce* Prerogative, vol. vi., 462, No. 5; Chitty, 383; Advocate-General *v.* the Commissioners of Police of Edinburgh, 22d Jan. 1850, 12 D. 456; 11 and 12 Vict., cap. 113; Rex *v.* Cook, 3 Term. 522; Attorney-General *v.* Hill, 2 Meeson and Welsby, 170; Master of Trinity House *v.* Clark, 4 M. and Sel., 291; Advocate-General v. Garioch, 12 D. 447; Mayor of Weymouth *v.* Nugent, 25th Jan. 1865, 11 Jur. N. S. 466; 6 Geo. IV., cap. 116, Bell's Prin. secs. 964, 965, 966, 967; Netherton *v.* Wavel, 3 B. and Ald. 21; 23 Henry VIII., c. 5; Glas. Police Act, 1862.

At advising,

Lord PRESIDENT—This case raises the question of the liability of the Crown to defray the expense of repairing the foot pavement opposite to the barracks in the Gallowgate of Glasgow. The Police Act in Glasgow (25 and 26 Vict., cap. 204), provides by section 322 that the foot pavements of streets shall be made and repaired by the adjoining proprietors. That is an obligation imposed by statute. Failing that, the pavement is repaired at the instance of a public officer, who recovers payment from the party failing. Although the Act is a recent one, the mode of repairing is of a primitive kind, and is scarcely in accordance with the modern notion of doing these things. If this had been an act providing for an assessment for repairing the pavement, it is very clear, according to the principle which was laid down in the Edinburgh case, that the Crown would not be liable. The Crown is bound by no tax imposed by Act of Parliament, whether general or local, by which it is not made expressly liable, or to which it gives its consent. But in the present case there is no direct assessment, and there is practically no difference between one mode of imposing the obligation and the other. In the one case each party is liable to make and repair the foot pavement opposite to his property; in the case of a general assessment, each portion is paid out of a general fund. There is a difference in fact, but is there any difference in law? The obligation in this case is not deducible from the titles of the Crown, it is an obligation imposed by Act of Parliament on proprietors, which makes no mention of the Crown. Now, I do not see any sufficient ground for distinguishing the case of an Act of Parliament which directs each individual to repair his pavement opposite his property, and an Act which imposes a money obligation for the purpose of repairs generally. And on that ground, as this Act imposes no obligation on the Crown, I think the Crown is not liable. There may be inconveniences arising out of this view, for the statute provides no other means of effecting the repairs otherwise; but that must be regarded simply as an omission in the Act. It cannot disturb the general principle that no impost can be imposed on the Crown by Act of Parliament when it is not a consenting party.

Lord CURRIEHILL—This a process of suspension of a decree of the Dean of Guild Court of Glasgow for payment of a sum of £37, 10s. 6d., expended by the charger, the Procurator-Fiscal of that Court, in repairing a piece of foot pavement in front of the Barracks of Glasgow. That decree was obtained in virtue of the Glasgow Police Act (25 and 26 Vict., c. 204, sec. 322). That Act requires every "proprietor of a land or heritage" adjoining any public street in Glasgow to form in a suitable manner, and from time to time to alter, repair, or renew, to the entire satisfaction of the Master of Works, a foot-pavement in the road or street opposite to such land or heritage. The party who is to perform that obligation under the denomination of the proprietor of the adjoining land and heritage, is pointed out by the interpretation clause (being sec. 4) of the Act, whereby it is enacted that "the expression land or heritage" shall mean a land or heritage "separately valued, or entered *in the valuation roll* as separately occupied;" and that "the expression *valuation roll* shall mean the valuation roll made up in pursuance of the Acts for the valuation of lands and heritages in Scotland for the time being." And the party who is so entered in that roll as the proprietor of the land and heritage of which the barracks consists, is, as I understand, the Crown, or the barrack-master as representing the Crown.

It appears from the record that the Crown, as the owner of the land and heritage, had formed a foot pavement opposite the same; that, having allowed it to fall into disrepair, the Master of Works, in conformity with the 322d section of the Act, sent a notice, dated 4th December 1864, addressed to the Barrack-Master, as representing the Crown, requiring the requisite repairs to be made; that that requisition not having been complied with, the Procurator-Fiscal of the Dean of Guild Court presented a petition to that Court for warrant to execute the work, to fix the cost thereof, and to decern against the Barrack-Master for the same; that no objection having been made to that petition, the warrant prayed for was granted; that the Procurator-Fiscal accordingly got the operations performed by a tradesman, and advanced payment of the expense, amounting to £37, 10s. 6d.; and that the Dean of Guild accordingly pronounced the decree in question, ordaining that advance to be reimbursed to him. That is the decree which is now sought to be suspended.

The ground of suspension which is pleaded is that her Majesty, and the suspender as representing her, is not liable to repay that expense, in respect that the Crown has an immunity from the payment of taxes in cases where it is not expressly named in the statute imposing them. There is no doubt that such an immunity from the payment of taxes is a prerogative of the Crown, and the question is, whether the obligation to perform such an operation, and to reimburse the expense which may be laid out on competent authority in performing it, on behalf of the Crown, falls under the operation of that immunity? To enable me to solve this question, I have endeavoured to ascertain upon what this immunity of the Crown rests in the law of Scotland. So far as I have been able to discover, it is not upon any statute. Nor does it appear to have been part of the common law of Scotland before the union of the kingdoms. For example, the land tax payable under the Supply Acts was then an important part of the public revenue; but the Crown had not an immunity from payment of the quota of such taxes corresponding to the lands and heritages which belonged to it, as appears from the enactments in the statute 42 Geo. III., c. 116, s. 131, which contains special regulations for allowing that quota to be redeemed. So far as I can ascertain, this immunity from the payment of taxes which the Crown has unquestionably now acquired, has been derived from usage. The question is, does the obligation in question fall under that immunity?

In the consideration of this question, two characteristics of this obligation must be kept in view. One of these is that it is not an obligation to pay money imposed as a tax. It is an obligation *ad factum praestandum* to make or repair a stripe of a foot pavement. The statute provides that if the obligant fail to perform that obligation, the performance of it may be enforced by the Procurator-Fiscal of the Dean of Guild Court, obtaining from that Court first a warrant to perform the work, and thereafter a decree for the cost thereof. The suspender denominates that remedy a commutation of a tax. But that is not its character. Even if that remedy could be denominated a commutation, what would be commuted would be an obligation to perform a piece of work, not to pay a tax. But it is a mode of enforcing *specific performance of the obligation by having the prescribed work actually executed* at the expense of the obligant—not a commutation of that obligation into something else. It is similar to the remedy which our law provides for enforcing performance of the statutory obligation, which is incumbent on the heritors of a parish to rebuild or repair a parish church, and which consists in the Presbytery granting first, authority to tradesmen to perform the work, and next a warrant to levy from the heritors the expense of the work. In neither case is the expense payable by the obligants a commutation tax or anything else than the expense of performing their legal obligation.

Another characteristic of this obligation is that it is *exclusively* incumbent upon the party who is proprietor of that land or heritage to which the stripe of foot pavement to be made or repaired immediately adjoins. On the one hand, the obligation is limited to the operation of making or repairing that specific portion of the foot pavement. On the other hand, no other party whatever is bound to make or repair that portion of the foot pavement—in so much that, if the operation be not performed by him, that portion of the foot pavement must be left for ever unmade, or in its state of disrepair; and this regulation of the Police Act must to that extent be inoperative.

I do not think that an obligation to perform such a specific obligation *ad factum praestandum* falls under the denomination of a tax, or that, as such, it falls under the Crown's immunity from the payment of taxes. And, accordingly, so far as I know, there is no precedent or authority for extending that immunity to such an obligation. All the cases quoted in the pleadings, referred only to the payment of money taxes. Nor is it alleged that, according to the *usage* which appears to be the only foundation for this royal immunity, it has ever been extended to such an obligation. On the contrary, it is admitted in the record and in the pleadings that the usage has been the very reverse; that the Crown has hitherto always been in use to perform such obligations, and indeed that, in conformity with that usage, this very stripe of foot pavement was made by the Crown.

The respondent says that if the Legislature had enacted that the foot pavements in Glasgow should be made and repaired by means of a money assessment imposed upon the owners of all the lands

and heritages in the city, the Crown would have been exempted from paying any portion of such assessment; and that it makes no difference although the same object is appointed to be effected in a different form. But supposing that in that case the Crown would have had such immunity (and probably it would) this would have arisen only because the object would have been effected by the Legislature having thought proper to effect its object not by imposing on each proprietor of the lands and heritages a separate obligation to perform a specific piece of work on ground adjoining his own property, but by imposing a money tax on the community indiscriminately. And in the next place, these two modes of effecting the object would have led to essentially different results if in both cases such an immunity should operate; because, on that supposition, in the one case the foot pavement would be actually made or repaired, although the expense would be borne by the owners of other lands and heritages in the city, whereas, in the other case, that pavement would be left for ever unmade, or in disrepair.

The respondent farther maintains that the Crown is not bound to perform this obligation because it is not named in the statute as being the obligant. The rule that the Crown requires to be so named in a statute in order to render a burden thereby imposed upon it effectual is liberally interpreted. To use the words of Dwarris in his treatise on statutes (p. 525)—"Though it is said that the King shall not be bound by a statute (whether affirmative or negative) which does not expressly name him, yet, if there be equivalent words, or if the prerogative be included by necessary implication, it would seem to admit of a different construction." In my opinion, there are equivalent words in this statute in as much as it expressly requires the stripe of foot pavement adjoining the barracks to be made and repaired by the party who is named in the statutory Valuation Roll as being the owner of that land and heritage; and the Crown is the party who is named as being its owner in the document so expressly referred to by the statute. This express reference in the statute itself to the entry in that valuation roll for the name of the obligant upon whom this obligation is imposed, is fully equivalent to a nomination of that party in the statute. And it is necessarily implied that that party is to perform the obligation; because otherwise it would never be performed by any party, and the enactment *quoad* the subject in question would be a nullity.

I therefore think that the reasons of suspension ought to be repelled.

Lord DEAS—I agree with your Lordship in the chair. I am not prepared to say that all that belonged to the Crown in England belongs to the Crown in Scotland; for the Union was one between two equal and independent states, and there would be just the same ground for saying that all that belonged to the Crown in Scotland before the Union should now belong to the Crown in England. But, however that may be, since the Union the exemption of the Crown from taxation has been recognised in Scotland by a series of authorities both here and in England. The exemption of the Crown from all general taxation has long been recognised, and in the case of the Magistrates of Edinburgh (1850) it was decided that the same exemption applies to local taxes. That leaves only the question whether there is any difference in principle between the obligation said to be incumbent on all the proprietors, and the obligation calling upon them to do the same thing in the way of a local taxation. I don't see any sufficient difference. I think if the Crown is liable in one case, it is liable in the other. The pavement may be provided for by assessment, or in the way it is done here, but the burden laid on the Crown appears to me the same in both cases. It may be that if the Crown is not liable to repair the pavement there is no other provision for that purpose in the statute. But if that be so, that is only an omission in the Act. It may be that it has not been specially decided that the same rule applies in both. But is there any distinction? Suppose the case of statute labour. I don't know that the Crown is liable in statute labour. It consisted originally of a service by occupiers, and money was paid in lieu of it, which was just a conversion of this service. I don't see that the barrack-master would be liable in such service any more than he is liable to repair the pavement opposite the barracks.

Lord ARDMILLAN—If this case had turned on the direct right to levy a tax or assessment from the Crown, there is abundance of clear authority to support a decision in its favour. It is vain to raise that question now, for the cases have clearly settled it, and they clearly exclude the notion that in this year 1866, and in this United Kingdom, there is any different law in any part of the kingdom as to the obligation of the Crown. Since the Union the law must be the same in England as in Scotland. Further, I think that the right of the Crown to immunity from taxation, unless it is named in an Act of Parliament, or has consented to take on itself the obligation, is a very important part of the Royal prerogative, and eminently in accordance with sound constitutional principle, because it is the true counterpart of the right of the subject to be free from taxation imposed by the Crown without the assent of the subject, given by the representative body. It is most important to preserve this counterpart in our nicely-balanced constitution. And so I find it laid down in all the authorities, in England, from the time of Lord Kenyon and Lord Abinger down to the judgment of Lord Chief-Justice Cockburn in 1865; and in Scotland I find such distinguished Judges as Lord Fullerton, Lord Jeffrey, and Lord Ivory, concurring in 1850 in the same view. And, therefore, I think that there is no doubt that the immunity of the Crown rests upon established principle; and the second question is not attended with much difficulty. Is the mode of levying the tax in Glasgow to put the Crown in a different position there from what it is in Edinburgh or any other place? If the Crown is not liable for direct taxation, can a defeat of its constitutional prerogative be effected merely by a change in the mode of levying the assessment? That would be a very transparent artifice. It is just an indirect mode of doing indirectly what could not be done directly. Therefore, I think that this impost on the Crown is not lawfully laid.

Agent for the Crown—William Waddell, W.S.
Agents for the Respondent—Campbell & Smith, S.S.C.

### BIRRELL *v.* M'CULLOCH, *et e contra.*

*Arbitration—Ultra Fines Submissi.* Circumstances in which held that an arbiter had not exceeded his powers.

These were conjoined actions for payment of a sum found due under a decree-arbitral, and for reduction of the decree. The parties were George