to that of an agent merely. This being so, I think the defender is bound personally to answer to the pursuer's demand for implement of the obligation given by him.

The Court adhered.

Counsel for the Pursuer (Respondent)—J. A. Christie. Agents — Nicol Bruce & Clark, W.S.

Counsel for the Defender (Appellant)—Christie, K.C.—Ingram. Agent—Malcolm Graham-Yool, S.S.C.

Thursday, November 28.

FIRST DIVISION.

OSWALD *v.* MAGISTRATES OF KIRKCALDY.

Revenue—Income Tax—Deduction of Tax—Obligation to Make Up Annual Deficiency in Sewer Rate—Condictio Indebiti—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *secs.* 102 *and* 103.

A landed proprietor, in consideration of a burgh constructing a sewer from his property—which he was developing for building—to the sea, bound himself and his heirs, executors, and representatives that until the assessable rental of the district should yield in respect of the sewer rate a return equal to 5 per cent. on the cost of the sewer he would make up in each year the amount of the deficiency, and that so long as loans contracted by the burgh for the expense of the sewer were outstanding. For a number of years the deficiency was made up without making any deduction in respect of income tax. A successor of the proprietor claimed that he was entitled to deduct income tax from the annual payment due by him to the burgh, and sought to recover the income tax which had not been deducted from former payments. *Held* that income tax could not be deducted from the payments made to the burgh, in respect that the obligation was to make up completely the annual deficiency in the sewer rate, and that accordingly the Income Tax Acts did not apply.

Opinions, per the Lord President, that the payments might also be regarded as instalments of the price of the sewer, and, *per* Lord Cullen, as capital payments, and that the Income Tax Acts did not apply to them.

Opinion per the Lord President that in any event the claimant would not have been entitled to recover income tax omitted to be deducted from past payments made under error in law.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 102, enacts—"Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable . . . either . . . or as a personal debtor obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence, without deduction . . . provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment and the person so liable to make such annual payment . . . shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof; and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money and under the penalty hereinafter contained; and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

Section 103 enacts penalties for refusing to allow deductions, and provides that "all contracts, covenants, and agreements made or entered into . . . for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void."

The Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 40, enacts—"Every person who shall be liable to the payment of any rent or any yearly interest of money or any annuity or other annual payment, either . . . or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment."

Colonel St Clair Oswald of Dunnikier, *first party*, and the Provost, Magistrates, and Councillors of the Burgh of Kirkcaldy, *second parties*, brought a Special Case to determine questions relating to the deduction of income tax from payments made to the second parties by the first party under an obligation of 27th July 1904 in supplement of sewer rate.

The *obligation* granted by the late John Oswald of Dunnikier — author of the first party—in favour of the second parties was in the following terms:—"I, John Oswald, Esquire, of Dunnikier, considering that I applied to the Provost, Magistrates, and Councillors of the Burgh of Kirkcaldy, hereinafter called the 'Town Council,' to make provision for the drainage of the district

delineated and coloured pink on the plan annexed and signed as relative hereto: And considering that the Town Council were advised and decided that the most suitable method for making provision for the drainage of said district was by the construction of a main sewer from at or near the house called 'Denend,' down the course of the East Burn to the sea: And whereas the Town Council agreed to construct said sewer on condition that I should give an undertaking that until the assessable rental of the said district should yield a return in respect of the sewer rate equal to 5 per cent. on the cost of the said sewer I should make up the deficiency: Therefore I hereby bind myself and my heirs, executors, and representatives whomsoever to pay to the Town Council at Whitsunday in each year the amount of the said deficiency as the same shall be certified by the Town Chamberlain, and that so long as the loans to be contracted by the Town Council for paying the expense of the said sewer shall be outstanding."

The Case set forth—"1. The first party is proprietor of the estate of Dunnikier, which lies partly within but mostly without the burgh of Kirkcaldy. 2. In connection with the development for building of part of his said estate within the burgh the late John Oswald, then proprietor of Dunnikier, about the year 1904 desired that a main sewer should be constructed leading down therefrom to the sea, and requested the second parties to have such a sewer constructed. The second parties agreed to comply with said request on condition of the said John Oswald granting in their favour an undertaking that until the assessable rental of the portion of his estate to be served by said sewer should yield in sewer rate a sum equal to five per cent. on the cost of said sewer, he should make up the deficiency, and that so long as the loans to be contracted by the second parties for paying the expense of the said sewer should be outstanding. The said John Oswald accordingly granted the obligation, dated 27th July 1904. 3. The sewer was constructed by the second parties, and they, commencing with the term of Whitsunday 1907, rendered annually to the said John Oswald accounts showing the sums payable by him in terms of said obligation in order to make up the difference between five per cent. on the cost of the sewer and the sum yielded by the sewer rate on the said portion of his estate. The said John Oswald from time to time paid the sums brought out in the accounts rendered by the second party. The last account paid by the said John Oswald [was] rendered on 11th March 1916 and paid on 15th May 1916. In the said accounts no deduction or allowance was made in respect of income tax and the sums brought out in said accounts were paid by the said John Oswald in full without deduction of income tax. 4. On 20th March 1917 the said John Oswald's agents wrote to the Town Chamberlain raising for the first time a claim that income tax should be deducted. 5. The said John Oswald died on 1st May 1917, and the first party is his successor in the estate of Dunnikier, to which he acquired right under the *mortis causa* disposition and settlement of the said John Oswald. He is infeft in said estate. He is also heir-at-law of the said John Oswald. The first party is liable personally to pay all sums that are due or may legally become due to the second parties under the said obligation, and has undertaken in respect of a payment made to him to relieve the said John Oswald's personal representatives of all liability for said payments. The said personal representatives have assigned to the first party the benefit of any abatements, deductions, or counter-claims competent to the said John Oswald in respect of the sums paid by him under said obligation as aforesaid. 6. On 6th March 1917 the second parties rendered to the said John Oswald an account made up in the same form as those rendered in previous years, and bringing out as the amount due under the foresaid obligation, for the year ending 15th May 1917, the sum of £200, 0s. 8d. The first party has declined to pay this account."

The *questions of law* were—"1. Is the first party entitled to deduct income tax from the amount payable by him at 15th May 1917 under the said obligation, and from the further payments due or to become due under the said obligation? 2. In the event of the foregoing question being answered in the affirmative — (*a*) Is the first party entitled also to deduct the amount of income tax omitted to be deducted from past payments made under the said obligation? or (*b*) is he entitled to be repaid such amount otherwise by the second parties?"

Argued for the first party—The annual payments under the obligation being payable as a personal debt or obligation by virtue of a contract, fell under the Income Tax Act 1842 (5 and 6 Vict. cap. 35), secs. 102 and 103, and the Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 40. The first party was therefore entitled to deduct income tax—*North British Railway Company* v. *Duke of Abercorn*, 1880, 7 R. 419, *per* Lord President Inglis at p. 422, 17 S.L.R. 270; *Paisley Cemetery Company* v. *Inland Revenue*, 1898, 25 R. 1080, 35 S.L.R. 947; *Dalrymple* v. *Dalrymple*, 1902, 4 F. 545, 39 S.L.R. 348; *Lees' Trustees* v. *Inland Revenue*, 1916 S.C. 188, 53 S.L.R. 156 (*s.v. Schulze* v. *Inland Revenue*). The payments were not instalments of a price—*Foley* v. *Fletcher*, 1858, 3 H. & N. 769, *per* Baron Bramwell, p. 783. Nor were they interest on such instalments—*Gateshead Corporation* v. *Lumsden*, [1914], 2 K.B. 883, *per* Lord Sumner at p. 887, but were payable out of annual gains or profits already brought into charge — *Harris* v. *Corporation of Irvine*, 1900, 2 F. 1080, 37 S.L.R. 799; *Glasgow Water Commissioners* v. *Miller*, 1886, 13 R. 489, 23 S.L.R. 285; *Brooke* v. *Price*, [1917], A.C. 115, 54 S.L.R. 632—was not in point, and was to be contrasted with *Blount* v. *Blount*, [1916] 1 K.B. 230. *Bell* v. *Thompson*, 1867, 6 Macph. 64, 5 S.L.R. 68, turned on a specialty. The first party was entitled to recover the income tax not deducted

from previous annual payments by his predecessor in the obligation by way of *condictio indebiti* — *Dalmellington Iron Company, Limited* v. *Glasgow and South-Western Railway Company*, 1889, 16 R. 523, 26 S.L.R. 373; *Agnew* v. *Ferguson*, 1903, 5 F. 879, *per* Lord Justice-Clerk at p. 882, 40 S.L.R. 636; *Galashiels Provident Building Society* v. *Newlands*, 1893, 20 R. 821, 30 S.L.R. 730, was distinguishable.

Argued for the second parties—The sums payable under the obligation were not of the nature of yearly interest, in the sense of the sections of the Income Tax Acts. The payments were really payments of rates, and rates were not taxable—*Glasgow Corporation Water Commissioners* v. *Inland Revenue*, 1875, 2 R. 708, 12 S.L.R. 466. The agreement meant that if the second parties constructed the drain they were to be in the same position as if they levied a sewer rate. The first party had guaranteed that the rates should equal 5 per cent. on the cost. The arrangement between the parties determined whether the stipulated sum was in the nature of interest. If income tax was deducted the obligation would never be fulfilled, as the sum paid would always fall short of the cost by the amount of the deduction. The payment to be made was of a capital sum in instalments rather than yearly interest. It was not sufficient to say that it was an annual payment—it must be a payment *ejusdem generis* with the payments referred to in the Income Tax Acts—*Foley* v. *Fletcher* (*cit.*), *per* Bramwell, B., at p. 780, and Watson, B., at p. 784; *Gateshead Corporation* v. *Lumsden*, [1914] 2 K.B. 883. The second parties had no taxable interest in the payments, and had not as a matter of fact been taxed on them. It was not an investment by them. The following cases were also cited—*In re Cooper*, [1911] 2 K.B. 550, *per* Cozens-Hardy, M.R., at p. 554, and *Glamorgan Quarter Sessions* v. *Wilson*, [1910] 1 K.B. 725; *London County Council* v. *Attorney-General*, [1901] A.C. 26. In any event, income tax not deducted at the time could not be afterwards recovered. The right to deduction was purely statutory, and could only be made in terms of the Acts—*Galashiels Provident Building Society* v. *Newlands* (*cit.*); *Inland Revenue Commissioners* v. *Anglesey* (*Marquess*), [1913] 3 K.B. 48, at p. 58; *Currie* v. *Goold*, 1817, 2 Mad. 163. *Agnew* v. *Ferguson* (*cit.*) was special. Further, recovery of part payments would be inequitable to the present ratepayers of the burgh, who had not been *lucrati* by those payments—*Bell* v. *Thomson* (*cit.*). Payments made under error of law were not recoverable.

Lord President—The reasoning in the case of *Brooke* v. *Price*, [1917] A.C. 115, 54 S.L.R. 632, and in the case of *Foley*, 1858, 3 H. & N. 769, seems to me to be very helpful in this case although none of the decisions which have been quoted to us from either side of the bar is precisely in point.

It appears that in the year 1904 Mr Oswald of Dunnikier was minded to have a certain district drained—a district which, I gather, was partly if not entirely within his property—and the method was by conducting the main drain down to the sea. He approached the Magistrates of Kirkcaldy and invited them to make the drain, but as it was apparent to both parties at that time that it was not an undertaking that could be characterised as business-like, having regard to the condition of the area at the time, they made a bargain that the drain should be constructed, that the Magistrates should pay for it, and that Mr Oswald should help them to pay the expense. The method of payment was this—the Magistrates were to borrow money to repay the outlay at the rate of 5 per cent. per annum, and the area was to be assessed for that purpose. It being well known that the yield of the assessable rental would not be adequate to meet the 5 per cent. upon the outlay, Mr Oswald undertook to make up the deficiency in each year upon a statement being presented to him certified by the town chamberlain. In other words he agreed to assist the Magistrates in paying for the drain, or it may be put thus—he agreed to supplement the deficiency in the drainage rate. And he undertook to continue to do so until the loans were paid off, that is to say, until the drain was paid for.

For a period of ten or twelve years he did fill up the gap between the yield of the assessable rental and 5 per cent. upon the outlay for the drain. And I for my part regard that as a very important fact in the case, because it shows quite clearly that both parties understood their bargain to be exactly what I think it was—a bargain to fill up the deficiency between the two sums, the yield of the assessable rental and the cost of the drain to the Magistrates. At the end of that period it suddenly occurred to Mr Oswald that the bargain was contrary to section 103 of the Income Tax Act of 1842 (5 and 6 Vict. cap. 35), and that not only should the income tax be deducted for the year in question but that he should get back all the income tax which he might and ought, he says, to have deducted during that long succession of years.

Sections 102 and 103 of this Income Tax Act have in my opinion no application to this case, for the payment made was a payment by instalments of the price of the drain, so to put it, otherwise it was a supplement of a drainage rate. But in neither case does the payment fall within the purview of the Income Tax Act. For these reasons I am of opinion that we should answer the first question put to us in the negative. If we do, it will be unnecessary to answer the other questions, although I do not regard them as in any degree doubtful. Even if I had been of opinion that we should answer the first question in the affirmative, I should have been very clear against the view that the first party would be entitled to recover these payments which have been made during a succession of years, at the very highest, under a mistake in point of law.

Lord Mackenzie—I am of the same opinion. The obligation imposed upon Mr

Oswald in the document which is printed in the appendix to the case is that he should make up the deficiency. The question is—deficiency in what? It appears to me that that can only mean deficiency in the sewer rate. If the argument advanced by him were given effect to it would result, not in his making up a deficiency, because, by the amount of the income tax deducted, there would be a minus quantity.

I think the true construction of the obligation is this, that if there was a deduction from the periodical payment amounting to the sum of income tax, that would not be a discharge by Mr Oswald's successor of his obligation under this agreement. He would still be liable to make up the minus quantity and to pay over to the Town Council a sum equal to the income tax that had been deducted. The result of that is that I think the question of law put to us may be answered by finding that he is not entitled to deduct income tax. Another and perhaps a preferable way of reaching the same result would be to find that he was entitled to deduct the income tax, but that he was bound to make payment to the Town Council of a sum equal in amount thereto.

LORD SKERRINGTON—The decision of this case depends upon two quite separate considerations, and in the first place upon the true meaning of this agreement. Having ascertained that, we then turn to the Income Tax Acts, especially sections 102 and 103 of the Act of 1842, and inquire whether the agreement, so construed, contravenes in any way the provisions of the statutes.

As to the meaning of the bargain I do not think that there is room for doubt. The obligation is to make up a deficiency, and of course that is not done unless the deficiency is completely made up. Accordingly Mr Oswald does not fulfil his obligation if he deducts income tax from his payments to the Town Council of Kirkcaldy. That is the plain meaning of the agreement. But of course it is open to him to say that this agreement is illegal and that it is "utterly void," to use the language of section 103 of the Act of 1842. It is remarkable that no trace of such a contention is to be found in the special case. No precedent was cited where an agreement at all like the one before us was held to be in violation of the Act of 1842, and I think that it is not open to objection.

LORD CULLEN—I come to the same conclusion. I rather incline to take the view that the payments which Mr Oswald undertook to make under this deed were of the nature of capital expenditure made for the benefit of his landed estate with the view of enhancing its value for building purposes, and on that ground do not fall within the description of annual payments intended to be included within the scope of section 102 of the Act of 1842 or section 40 of the Act of 1853. But however that may be, I think that on the true construction of the obligation as to its amount, Mr Oswald undertook to pay to the second parties in each year as much money as would put them in the same position pecuniarily as if they had received sewer rates at the rate of 5 per cent. on the cost of the pipe. If they had received such an amount of sewer rates they would have received it free of income tax, and the obligant must put them in the same position.

Accordingly if the annual payments fall under section 102 of the Act of 1842 or section 40 of the Act of 1853, the obligant, while formally in right to deduct the tax, must, if he exercises the right, pay so much the more until he has made up for the deduction.

The Court answered the first question of law in the negative.

Counsel for First Party—Wilson, K.C.—Gentles. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for Second Parties—Chree, K.C.—R. C. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 30.

FIRST DIVISION.

(BILL CHAMBER.)

HATTON & ANOTHER *v.* AKTIESELSKABET DURBAN HANSEN

Expenses — Shipping Law — Arrestment — Salvage — Expenses of Arresting Salved Ship to Initiate Proceedings in rem for Recovery of Salvage.

Salvors of a ship arrested her as an initiatory step in an action *in rem* to recover the salvage due. *Held* that they were entitled to recover the expenses of arresting the ship from her owners.

Observations per the Lord President, concurred in by Lord Mackenzie, Lord Skerrington, and Lord Cullen, that the first and most proper remedy for the recovery of salvage is *in rem*.

Thomas Hatton, Royal Naval Reserve, commanding officer of the Admiralty tug "Stoic," and Lieutenant J. Dutton, Royal Naval Reserve, commanding officer of the armed trawler "Carisfort," *petitioners*, presented a petition in the Bill Chamber for warrant to arrest the barque "Carmel" and her cargo. The owners of the barque "Carmel," Aktieselskabet Durban Hansen, of Christiania, were called as *respondents*.

The petitioners *averred*—"That the said tug 'Stoic' and trawler 'Carisfort' left Longhope at midnight on 10th June 1917 with instructions to search for a derelict barque, the 'Carmel,' of Christiania. . . . That the petitioners, after a prolonged search, found and boarded the said barque 'Carmel' on the 12th June 1917. She was then in a seriously damaged condition, and in particular her hull was badly damaged, and nearly all her sails were shot away, having apparently been attacked by enemy craft and subjected to heavy gun-fire. She was derelict and water-logged, with one dead man aboard, whose head had been