a company having power to construct a railway or navigable canal, or any branch or extension railway or navigable canal, or any deviation of a line of railway or a navigable canal already sanctioned, the works for which such subscription is to be made being unfinished, or in any additional capital to be raised for the completion of any such railway, canal, branch, extension, or deviation, the same being upon or near to, and which will improve or benefit, the lands of such landowner, and who shall be desirous that such amount, or any part thereof, may be charged upon the lands so to be improved, it shall be lawful for him to apply to the Commissioners for that purpose within the time limited by the Railway or Canal Companies Act or Acts for the construction of the works in question." "(80) If the Commissioners shall be satisfied that the railway or canal, when constructed and open for traffic, will effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, they shall execute and deliver to the landowner a provisional order under their seal and the hands of two of them, expressing their sanction of the charge proposed," in the form therein set forth. The reporter, to whom a remit was made to inquire whether the provisions of the Act had been complied with, reported that he saw no reason to doubt that the lands would be benefited, at least to the extent of the annual charge created.

The Lord Ordinary had some doubt whether the application should be granted, as it appeared that the railway would be constructed and the lands benefited whether the petitioner gave the proposed subscription or not, and reported the matter to the First Division.

At advising—

LORD PRESIDENT—I am quite satisfied that this application should be granted, and an interlocutor pronounced in the terms suggested in the Lord Ordinary's report, "authorising and requiring the Inclosure Commissioners of England and Wales to proceed upon the application to them by the petitioner in virtue of the Improvement of Land Act 1864, and to deal with the same according to the provisions of the foresaid Act, authorising them on that behalf, notwithstanding the circumstances that the petitioner is the father of a person entitled to an estate in the lands to be improved under the foresaid application to them, and that such person is a minor." There is one difficulty suggested by the Lord Ordinary to which it is necessary to advert, as our attention has been so specially directed to it. His Lordship says—"An agreement has been made by the promoters of the Kelvin Valley Railway with the North British Railway which practically amounts to a guarantee of 5¼ per cent. per annum on the stock of the Kelvin Valley Railway from the time it is opened, with an option to the North British Railway to purchase the stock at a premium of 10 per cent.; and it is the fact that the construction of the Kelvin Valley Railway is not contingent on the proposed subscription of £5000 being made to it by the petitioner. It is apparent, therefore, that the increased value of the lands by the making of the railway does not depend on the application being granted. The lands will be equally increased in value whether the application be granted or refused." Now, his Lordship does not express an opinion that it is indispensable to the success of the application that the petitioner should show that without his assistance the railway would not be made, but he suggests that that is a possible interpretation of the clause under which the application is made. Now, I do not think that that clause is susceptible of such an interpretation. The party must no doubt be interested in the construction of the railway, and there is no reason to doubt that the petitioner is in that position. This small branch line of two miles in length is of local value, intended to benefit the estates through which it passes, and it was therefore very natural that the Railway Company should try to induce the landowners in the district to interest themselves in the proposed line. If the construction of the Railway must under the Act depend on the petitioner's subscription being made, the case is not in that position at all, for the investment is plainly a very satisfactory one, and therefore there can be no difficulty in getting the money; but I have no idea that it is necessary to prove that the petitioner's subscription is indispensable to the carrying on of the undertaking. In all other respects the petition is satisfactory.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced this interlocutor:—

"Authorise and require the Inclosure Commissioners of England and Wales, acting under the Statute 27th and 28th Vict. chap. 114, commonly called the "Improvement of Land Act 1874," as regards lands in Great Britain, to proceed on the application to them by the petitioner, and to deal with the same according to the provisions of the said Act, authorising them on that behalf, notwithstanding the circumstance that the petitioner is the father of a person entitled to an estate in the lands to be improved under the foresaid application immediately after the petitioner, and that such person is a minor: And direct that the costs of the application to the Court and of the procedure following thereon, as the same shall be taxed by the Auditor of Court, shall be decerned to be part of the expenses of and incidental to the said application to the said Commissioners, and decern; and remit to the Auditor to tax the account of said costs."

Counsel for Petitioner — Balfour — Murray. Agent—J. Stormonth Darling, W.S.

Saturday, February 24.

SECOND DIVISION.

[Court of Exchequer.

COMMISSIONERS OF INLAND REVENUE *v.* BELCH.

Stamp—Contract of Ground-Annual—Discharge of a Security—Reconveyance—Statute 33 *and* 34 *Vict. c.* 97.

Where certain subjects were disponed by contract of ground-annual, with power to the purchaser at any term after the expiry of 20 years to redeem the ground-annual on 6 months' notice at 22½ years' purchase—*held* that the stamp-duty exigible upon the instrument granted under that power to the pur-

chaser by the seller was the *ad valorem* duty payable on it as a discharge of a security, and not as a reconveyance or release "upon a sale" under the Act 33 and 34 Vict. cap. 97.

By contract of ground-annual, dated 17th April 1856, between Duncan Cameron and John Belch, it was provided "that the said John Belch and his foresaids shall at any term of Martinmas or Whitsunday occurring after said term of Whitsunday 1876, but not sooner, be entitled to redeem from the said first party or his foresaids the said ground-annual, or any of the allocated portion thereof (provided the subjects burdened with the remainder shall be of the full yearly rent to the extent aforesaid), upon giving six months' previous notice in writing, and making payment of twenty-two years and six months' purchase of the said ground-annual, or of the part thereof to be so redeemed; and on payment being made of such redemption money in the terms foresaid, and all arrears, the said Duncan Cameron binds himself and his foresaids to grant and deliver, at the expense of the party redeeming, all discharges or deeds necessary for disburdening the foresaid lands, or the portion thereof liable for said ground-annual, or the allocated portion thereof; all which additional provisions and declarations before written shall also be inserted in the instrument of sasine to follow hereon, and shall be validly referred to in all the subsequent transmissions and investitures of the said several lands and others hereby disponed, or any part thereof, until redemption of the ground-annual, otherwise the same shall be void and null."

The ground-annual payable under this contract was £480, and the contract was stamped with the duty of £30, being the *ad valorem* duty on the ground-annual.

In 1876 Mr Belch redeemed the ground-annual by payment of £10,800 in terms of the contract, and the trustees of Duncan Cameron (then deceased) granted a discharge dated 5th October 1876 to Mr Belch, which formed the subject of this appeal.

The following was an abstract of the discharge:—It narrated that John Belch, in terms of the contract of ground-annual between Duncan Cameron and John Belch therein mentioned, had right to redeem on the terms after mentioned from the said trustees a ground-annual of £480 sterling, upliftable furth of subjects in Main Street, Anderston, Glasgow; therefore, and in consideration of the sum of £10,800 paid by the said John Belch, the said trustees discharged the said ground-annual upliftable furth of the foresaid subjects, in terms of contract of ground-annual between Duncan Cameron and John Belch. Further, the trustees redeemed and disburdened of said ground-annual, &c., All and Whole the subjects therein described; statement of titles by which said trustees acquired their right to said ground-annual; clause of warrandice from fact and deed; consent to registration for preservation; testing clause.

The deed was stamped with a duty of £2, 14s., being the *ad valorem* duty payable on the discharge of a security, but the Commissioners of Inland Revenue charged upon it the additional duty of £51, 6s. to make up the duty to £54, being the *ad valorem* conveyance on sale duty in respect of the sum of £10,800.

Mr Belch maintained that the instrument was only liable to the duty of £2, 14s., being the duty under the head of mortgage, bond, debenture, &c., in schedule to the Act 33 and 34 Vict. c. 97, chargeable in respect of—"(4) Reconveyance, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured, for every £100, and also for any fractional part of £100 of the total amount or value of the money at any time secured, 6d." Or otherwise, that the said instrument was only liable to a duty of 10s., either under the head of "release" in the said schedule, "in any other case than upon a sale, or by way of security;" or under the head of "deed of any kind whatsoever, not described in the schedule."

He therefore appealed, and the question stated by the Commissioners for the opinion of the Court was—"Whether the said instrument is liable to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty, in terms of the Act 33 and 34 Vict. cap. 97, or, if not, what other stamp-duty it is liable to be assessed and charged with?"

The Act 17 and 18 Vict. c. 83, schedule "Conveyance," and the second paragraph of sec. 11 of the Act 16 and 17 Vict. c. 59, were set forth in the case. Subsections 2 and 4 of the 72d section of the Act 33 and 34 Vict. cap. 97, and the schedule, title "Conveyance" of the Act 13 and 14 Vict. cap, 97, were also quoted.

Argued for Belch—An original stamp of £30 has been already paid, the ground-annual being valued when constituted. The Inland Revenue asks for a second duty, as on sale, in respect of the discharge of the ground-annual. There is a personal obligation to pay ground-annual, and the real right is merely in security. The case is the same as if part of the price had been left on the subject and then discharged. A new stamp might have been exigible on an assignation of the ground-annual; but here under the contract there was a power to redeem, and there is no new transaction—*Miller* v. *Small* and *Royal Bank* v. *Gardyne*, 1 Macq. 345, 358; Williams on Law of Real Property, p. 178.

Argued for Inland Revenue—This is clearly not the discharge of a security. The substance of the deed must be looked to—*Christie* v. *Commissioners*, L.R., 2 Ex. 50; *Leinmer Asphalte Company*, L.R., 7 Ex. 214. Under the Stamp Acts property is anything capable of assignment except moveables. This is a release or renunciation on sale. The ground-annual is a marketable subject, of fluctuating value, different from bond and disposition in security or bond of annual-rent. The option reserved to redeem is now exercised for the purchaser's interest, and does not affect the nature of the transaction.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts, and the clauses of the Stamp Acts referred to*]—The question raised here depends on whether, first, the transaction represented by the instrument proposed to be stamped is a conveyance on a sale of property, or, second, whether it is a discharge of a security by way of mortgage, or, third, whether it belongs to a class not specially enumerated.

I am of opinion that this instrument does not represent a conveyance on a sale of property. If, indeed, the granter had possessed a perpetual

and unconditional right of ground-annual, which he was entitled to retain or not as he pleased, a new bargain with the purchaser to redeem the burden would be in substance a conveyance on a sale, and the sum stated as the consideration would represent the price paid. But such is not the position or nature of the transaction represented by this instrument. The seller never had an unconditional right of ground-annual. He had only a right to his annual payment secured by infeftment as long as the purchaser elected to retain the stipulated price, being twenty-two years' purchase of the annual sum. But when the purchaser used his option and paid the price, the sum paid was the consideration for the original conveyance, and the payment of it and the discharge granted in respect of it were no new transaction, but only the completion of the original contract of sale. The discharge only becomes necessary, not for the purpose of conveying any substantial interest, but solely to clear the record.

But, in the second place, I am of opinion that this infeftment on the ground-annual right was simply security for the interest on the contract price, being £480 on a principal sum of £10,800, or something short of £5 per cent. That was its real nature, and it only subsisted at the option of the purchaser until the price was paid. I am therefore of opinion that the stamp first proposed by the second party is the correct one.

Lord Ormidale—The instrument or deed in question may in one sense be said to be a receipt or discharge for £10,800, the sum on payment of which Mr Belch was entitled to redeem the ground-annual; but the deed or instrument does more than merely acknowledge the receipt of that payment. It also declares Mr Belch's property to be redeemed and disburdened of the ground-annual and of the contract by which it was constituted. It also contains a clause of warrandice and the other clauses usual in a release or renunciation of such an heritable right. The stamp applicable to a mere receipt or discharge for money received is therefore not that with which the deed or instrument in question is chargeable, and this was not maintained.

It was contended, however, on the part of the Crown, that it was of the nature of a reconveyance, release, or renunciation of a right of property, or right or interest in property "upon a sale," and the question really comes to be, is it so or not?

If the ground-annual had not in its constitution contained, as it does, an express stipulation or provision to the effect that it was redeemable on payment of a principal sum calculated at 22½ years' purchase, or, in other words, a payment of £10,800 by Mr Belch, a great deal might have been said in support of the Crown's contention, for on that assumption Cameron's trustees could, if they pleased, have refused to consent to any redemption, and, at anyrate, they would have had it in their power to negotiate for payment of a larger sum as the consideration or price, so to speak, of their agreeing to the redemption and consequent release or renunciation of the ground-annual. But, as the matter stands, no such negotiation was necessary or indeed admissible. All Mr Belch had to do was to tender payment of the stipulated redemption money, and thereupon to insist for the necessary discharge, or, to use the words of the Act, release or renunciation. But such a transaction cannot well be said to be of the nature of a sale, which necessarily implies a seller on the one hand and a purchaser on the other, each being entitled to make the best bargain he could for himself. No room, however, for any such bargaining was left relative to the redemption of the ground-annual in question, for the consideration in respect of which its redemption could be enforced, and every other characteristic of a sale, were entirely excluded, all that having been previously arranged and fixed in 1856 by the contract of ground-annual itself, on which an *ad valorem* stamp was then paid.

I must own, therefore, my inability to see how the deed or instrument here in question can be held to be of the nature of a reconveyance, release, or renunciation of property, or of a right or interest on property "upon a sale." It is at anyrate impossible, I think, to come to any such conclusion without giving a strained and unnatural construction to the language of the statute, contrary to the well-established rule that penal and revenue Acts are to be construed strictly, and not extended to cases to which they do not clearly and unequivocally apply. In accordance with this rule it was, in *Phillips* v. *Morrison*, in 1844 (13 L.J., Exch. 212), laid down by the Court of Exchequer in England that—"The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it; he must, so to speak, hit the bird in the eye. We," said the learned Judges, "can make no intendment in favour of the liability."

For these reasons, I am of opinion, in answer to the question submitted in the case, that the Commissioners have erred, and that the deed or instrument referred to is not liable to be assessed and charged with an *ad valorem* "conveyance on sale duty" in terms of the Act 33 and 34 Vic. cap. 97, and that the stamp-duty it is chargeable with is that which it was stamped with prior to the opinion of the Commissioners being taken, viz., £2, 14s. duty, being the *ad valorem* duty payable on the discharge of a security.

Lord Gifford concurred, observing that in exercising his option to redeem Mr Belch was not buying, he was paying in one of the forms of payment agreed to in the contract of sale.

Counsel for Belch moved, in terms of the Stamp Act (33 and 34 Vict. cap. 97), sec. 19, sub-sec. 4, for an order for repayment of the excess of duty erroneously paid, and for payment of costs in the appeal.

The Court pronounced the following interlocutor:—

"Find that the instrument referred to in the Case is liable to be assessed and charged with a stamp-duty of £2, 14s., being the amount chargeable in respect of the discharge or renunciation of a security, and therefore order the sum of £51, 6s., being the excess of duty paid by the appellant, to be repaid to him by the said Commissioners, together with the costs incurred by him in relation to the appeal: Remit to the Auditor to tax the said costs and to report, and decern."

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

Counsel for Inland Revenue—Solicitor-General (Macdonald)—Rutherfurd. Agent—The Solicitor of Inland Revenue.

Friday, March 2.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

WATT *v.* M'PHERSON'S TRUSTEES.

Agent and Client—Contract of Sale—Reduction.

An agent may purchase his client's property, but there is an *onus* on him to show that the transaction is fair, and that he has acted openly and without disguise, and has not taken advantage of his position; but if an agent ostensibly purchases for another, while in reality he does so for himself, the transaction will not stand.

Circumstances which were *held* (*diss.* Lord Shand, and *rev.* Lord Curriehill) insufficient to impress the character of agent upon one who had occasionally acted for a trust.

Observed (*per* Lord President and Lord Mure) that it is a legal impossibility that the same man should act as agent both for buyer and seller in a contract of sale.

Observations contra per Lord Shand.

Thomas Watt, M.D., brought an action of declarator and implement to have it declared that a contract of sale between him and the defenders Miss Ann and Miss Jessie Macpherson was entered into and concluded, and that the defenders were bound to implement that contract. The subjects of the alleged contract of sale were four houses in Aberdeen belonging to the trust-estate of the deceased John Macpherson, under whose trust-disposition the defenders were sole trustees. The contract of sale was alleged to have been constituted by the following missives:—(1) A letter written and addressed by John Watt jun., advocate in Aberdeen, the pursuer's brother, to Hugh James Macpherson, the defender's brother, dated November 9, 1875, running thus:—"Dear Sir,—I am authorised by my brother Dr Watt, Darlington, to offer the trustees of your late father the sum of One thousand nine hundred pounds sterling for the four half houses at Ann Place belonging to them, on the understanding that he shall bear the whole expense of transfers; the entry to the purchaser to be at Whitsunday next, when the price will be paid to the sellers, who will receive the Whitsunday rents, the rents falling due at Martinmas 1876 being payable to the purchaser. I shall feel obliged by your submitting the offer to the trustees, and letting me hear from you if it be accepted.—Yours truly, JOHN WATT jun. H. J. Macpherson, Esq., Gilcomston Combworks, Aberdeen." (2) Another letter of the same date by John Watt jun. to H. J. Macpherson, in the following terms:—"*Aberdeen, 9th Nov.* 1875.—Dear Sir,—The offer for the houses at Ann Place is made on the understanding that the feu-duty for the whole is £20 sterling per annum, and that the subjects are liable to duplicate in feu-duty every 19 years, the first duplicand being payable in 1877." And (3) a letter by the said Hugh Macpherson to the said John Watt jun., also dated 9th Nov. 1875, in the following terms, viz.:—"Dear Sir,—I am in receipt of your two letters of this day, and having duly submitted the offers for the 4 (four half) houses at Ann Place to my sisters, surviving trustees of my late father, they have authorised me to accept of the same on the conditions named—viz., One thousand nine hundred pounds, say £1900 cash, the purchaser paying all expenses connected with the transfer, a yearly duty of £20 with a duplicand every 19 years, first duplicand 1877. Purchase money payable and entry given at Whitsunday next, 4th June, for entry, the rents up to then being payable to the sellers.—Yours very truly, H. J. M'PHERSON. John Watt jun., Esq., advocate.

The defenders also brought a summons against Dr Watt and John Watt jun., for reduction of the three letters above quoted. The Lord Ordinary, on the motion of both parties, held their summons as repeated in the first action.

The defenders pleaded—"(1) The pursuer not being the true purchaser, and his name having been used in the letters constituting the alleged contract of sale merely for the purpose of concealing the fact that the defenders' law agent and adviser Mr John Watt jun., advocate, Aberdeen, was the purchaser, in whole or in part, and at an inadequate price, of the property thereby proposed to be sold, the pursuer is not entitled to require the defenders to implement the said alleged contract of sale, and the defenders are entitled to absolvitor. (2) The pursuer not being the true purchaser, and his name having been used in the letters constituting the alleged contract of sale, merely for the purpose of concealing the fact that the defenders' said law agent and adviser was the purchaser of two of the four houses, being houses Nos. 3 and 4 Ann Place, Aberdeen, thereby proposed to be sold, and that at an inadequate price, the pursuer is not entitled to require the defenders to implement the said contract for the purchase of the said two houses, and in regard thereto the defenders are entitled to absolvitor. (3) The said John Watt jun. being the law agent and adviser of the defenders, and being also a trustee under the trust-deed of settlement of the deceased Mrs Ann Thomson or M'Pherson, and a trustee under the marriage-contract trust of Mrs Jane M'Pherson or Black, and as such interested in the trust-estate of the said John M'Pherson, was under a personal disqualification, disabling him from purchasing the trust-estate of which the defenders are the trustees, or at least he could not legally purchase from the defenders while the defenders were ignorant that he was interested in the contract, and while the relation of agent and client subsisted between the purchaser and the sellers."

The Lord Ordinary allowed a proof, appointing the defenders to lead. The result of the proof is fully given in the note appended to the following interlocutor, which was pronounced by the Lord Ordinary:—

"*Edinburgh*, 4*th July* 1876.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole productions in the reduction at the instance of the defenders, M'Pherson's trustees, against Thomas