Argued for the third party—"Net annual proceeds" did not mean the proceeds after payment of income tax. Further, income tax was not a "burden" upon the trust. The trustees merely acted as collectors of income tax, and deducted from the amounts payable to the beneficiaries a tax which was really due by them. *Murdoch's* case (*cit.*) was special, and turned on the relation of the terms of the codicil to the will. *Kinloch's Trustees* v. *Kinloch*, 1880, 7 R. 596, 17 S.L.R. 444, and *Mackie's Trustees* v. *Mackie*, 1875, 2 R. 312, 12 S.L.R. 222, were referred to.

LORD PRESIDENT—The question for our consideration in this case is certainly not free from difficulty, but on the whole I have come to the conclusion that the bequest of £750 sterling yearly to the niece of the testator is free of income tax. My reason for coming to that conclusion is that the testator expressly directs that the sum I have mentioned is to be paid out of the net annual proceeds of half the residue of the estate, and I think the fair construction of the expression "net annual proceeds" is that it means a sum from which income tax has already been deducted. That construction is, I think, reinforced by the passage in which the testator directs his trustees to add the balance of the said net annual proceeds to the capital of the said net part or share. I read "net annual proceeds" as meaning the whole balance of free income—once more, a sum from which income tax has already been deducted.

This construction of the settlement appears to be still further reinforced by the expression used in that portion of it in which the nephew's bequest is found. There we find throughout, in many parts, the expression "net annual proceeds" used, and I cannot conceive that it was intended by the testator that different conditions should apply to the bequest to the niece from those which apply to the case of the nephew.

The case of *Murdoch's Trustees* v. *Murdoch*, 1918, 55 S.L.R. 664, was pressed as an authority for the view I have indicated. I think it is. There the expression used is "the free revenue" of "the free residue" of the testator's estate. We had no difficulty in coming to the conclusion that that expression meant a sum from which income tax had already been deducted, and I am unable to draw any distinction between the expression used in *Murdoch's Trustees* v. *Murdoch* and the expression used here. "Net annual proceeds" seems to me to be equivalent to "free revenue" of "free residue."

If that is so, then there can be no doubt that although this bequest does not contain the words which are usually found and are decisive where a testator intends a bequest to be paid free of income tax, nevertheless we can, construing the deed as a whole, come to the conclusion that that was the testator's intention.

I propose to your Lordships, therefore, that we should answer the first question put to us in the affirmative and the second in the negative. I observe that the parties have agreed with regard to past payments of income tax which are to be repaid.

LORD MACKENZIE—The decision of this case depends upon the true construction to be put upon the trust disposition and settlement as a whole, and particularly what the testator intended by the term "net annual proceeds." I agree that the questions should be answered in the manner proposed by your Lordship. In arriving at that conclusion I consider that we are construing the terms of this settlement in a way similar to that which we followed in the case of *Murdoch's Trustees*.

LORD CULLEN—I am of the same opinion. I think this is a special question depending entirely upon the terms of the trust deed before us. On a consideration of the will as a whole, and using the light which is thrown upon the question by the provisions in favour of the nephew, I think that when the testator uses the words "net annual proceeds" in the fifth purpose he means the free income of the estate after paying income tax. He directs that such proceeds are to be divided between the second party and the capital interests in the estate. The second party is to receive £750 thereof and the balance, that is, the whole balance after deduction of the £750, is to be added to the capital. Now I do not see how the balance could be added to the capital unless the trustees had already paid the income tax due on the income of the trust estate, because, if they had not, a very considerable portion of the balance after paying the £750, instead of being free for addition to the capital, would go to the Government in the shape of income tax.

LORD SKERRINGTON was absent.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First and Second Parties—Constable, K.C.—R. M. Mitchell. Agents—Cowan & Stewart, W.S.

Counsel for the Third and Fourth Parties—Watt, K.C.—Macquisten. Agents—Alex. Morison & Co., W.S.

---

*Thursday, November 28.*

## FIRST DIVISION.

[Lord Hunter, Ordinary.

## LINDSAY *v.* CRAIG.

*Contract—Evidence—Principal and Agent—Sale—Competency of Parole Evidence.*

A document was granted by one party acknowledging the receipt from another of £150 "in payment of purchase price of 150 shares of £1 each (fully paid)" in a certain company, "the transfer for which will be sent you for signature in due course." In an action by the latter for delivery of the transfer, or alterna-

tively for repayment of the £150, the defender, who granted the document, averred that he was to the knowledge of the pursuer acting as agent for another party. *Held* (*dis.* Lord Skerrington) that the document in question was a written contract of sale, that the defender was personally liable under it, and that parole evidence was not competent to prove that in granting the document the defender was acting solely as agent for another.

Arthur Bruce Lindsay, *pursuer*, brought an action against Robert Archibald Craig, *defender*, concluding for decree that the defender was bound to execute and deliver to the pursuer a valid and effective transfer of 150 shares of and in the company called Iron Ore Processes, Limited, or alternatively for payment to the pursuer of £150 with interest from 11th September 1917.

The defender *pleaded, inter alia*—"1. The action is irrelevant as laid. 3. The defender having acted merely as agent between the pursuer and the said J. W. Houldsworth, principals known to each other in the purchase and sale of the shares in question, is not liable to the pursuer, and should be assoilzied from the conclusions of the action."

The *facts* of the case and the averments of the parties appear from the opinion of the Lord Ordinary (HUNTER), who on 18th July 1918 decerned against the defender for payment to the pursuer of £150 with interest as concluded for.

*Opinion.*—"I do not think that a proof is necessary in this case.

"The pursuer sues for 150 shares in the company, or alternatively for £150, under the following circumstances:—In the autumn of 1917 he arranged with the defender to pay that sum for 150 shares in the Iron Ore Processes Company, Limited. The contract between the parties is evidenced by the receipt which was granted by the defender to the pursuer on receiving the £150. The receipt is in the following terms:—'11*th September* 1917.—Received from Arthur Bruce Lindsay, Esq., 3 Abercorn Avenue, Edinburgh, the sum of one hundred and fifty pounds sterling in payment of purchase price of 150 shares of £1 each (fully paid) in Iron Ore Processes, Limited, the transfer for which will be sent you for signature in due course.—R. A. CRAIG.'

"No transfer has been sent by the defender to the pursuer. The defender retains the pursuer's money. At all events he has never sent it back to the pursuer. What he does allege is that in connection with this transaction he was acting for a Mr Houldsworth, and that he has handed the pursuer's money to Mr Houldsworth, and he therefore alleges that the pursuer ought to sue Mr Houldsworth. Well, there is nothing in the contract to indicate that the pursuer ought to sue anyone else except Mr Craig, and if a person puts a contract in writing without a qualification I think he must answer for it.

"The matter seems to have been brought out in authoritative statements made in two English cases to which I was referred by Mr Christie—*Jones* v. *Littledale*, 1837, 6 A. & E. 487, and another case, *Higgins* v. *Senior*, 1841, 8 M. & W. 834. The position is summed up by Lord M'Laren, 1 Bell's Comm. 540 (7th ed.). In dealing with that matter he says—'In the case of written contracts the question who is the party to, or personal obligant directly bound by, the contract is determined by the writing, which cannot be contradicted or varied by extrinsic evidence. The general presumption is that the party executing the contract intends a personal liability, unless it appear expressly on the face of the contract that he does not contract personally; and words of description merely, denoting his character of agent, and not exclusive of personal liability, are insufficient for this purpose.'

"In the present case there are not even such words of limitation on the face of the document. On the contrary, there is nothing to suggest here that anyone else than the defender is liable in respect of this money which he received from the pursuer. He did not receive the money on the footing of its being a gift or anything of that sort; he received it to pay for shares, a transfer for which was to be sent. As no transfer has been sent, I think the pursuer is entitled to decree in terms of the conclusion of the summons."

The defender reclaimed, and argued—The averments of the pursuer were irrelevant, for they did not set out that the transaction between the parties was one of sale. If the averments of the pursuer were not irrelevant the defender was entitled to proof of his averments. No doubt a formal written contract would exclude parole evidence, but in the present case the document founded on, considered in the light of the surrounding circumstances, was not a formal contract, but a receipt for money received by the defender to be applied by him in making a purchase—*Rankin* v. *Mollison*, 1738, M. 4064; *Brown* v. *Macdougall & Company*, 1802, M. *sub voce* Factor, App., Part 1; *Higgins* v. *Senior*, 1841, 8 M. & W. 834. Consequently parole proof of the defender's averments was competent. The defender was entitled to prove the pursuer's knowledge that he was acting for a principal—*Long* v. *Millar*, 1879, 4 C.P.D. 450; *Buchanan & Company* v. *Macdonald*, 1895, 23 R. 264, 33 S.L.R. 200; *Christie* v. *Hunter*, 1880, 7 R. 729, *per* Lord President Inglis at p. 730, 17 S.L.R. 481; *M'Adam* v. *Scott*, 1913, 50 S.L.R. 264.

Argued for the pursuer—The document in question set out a contract of sale between the pursuer and defender. If so the defender was bound to fulfil the contract—*Jones* v. *Littledale*, 1837, 6 A. & E. 486, *per* Denman, C.J., at p. 490; *Higgins* v. *Senior* (*cit.*). The pursuer had not elected to sue the defender's undisclosed principal, and accordingly the defender was not liberated. There was nothing on the face of the document to indicate that the defender was not acting in his own personal capacity, and parole proof was incompetent to prove the contrary—1 Bell's Comm. (7th ed.), 540, note i.

LORD PRESIDENT—The writing, dated 11th September 1917, founded on by the pursuer in this action, is not a simple receipt in my

opinion, but fully and accurately expresses a contract of sale. It contains all the essential requisites of a contract of sale clearly set out. There is the subject-matter of the contract—150 fully-paid shares of the Iron Ore Processes, Ltd.; there is the purchase price—£150 sterling; there is the name of the buyer who has paid the purchase price—the pursuer in this action; there is the name of the seller who received the purchase price—the defender in this action; and there is finally, as I read this writing, an obligation on the part of the seller to deliver the shares to the pursuer, who is the buyer.

Now it is said by the defender that he cannot or will not deliver the shares. Be it so. Then he must repay the money which he has received as the purchase price of the shares. Happily for himself, as appears upon the record, he has not paid that money away. But in my opinion the defence stated here is irrelevant. It is nothing to the purpose to say, as the defender does, that he does not possess the shares, that X possesses the shares, that X is the seller of the shares, and that X will not deliver. It appears to me that he (the defender) has in the writing before us undertaken all the obligations of the seller, and it is neither here nor there that he is not in possession of the article which he professed to sell.

The passage quoted in the Lord Ordinary's opinion from Lord M'Laren's note in Bell's Commentaries appears to me to be a correct and apposite statement of the law of Scotland applicable to the subject-matter in hand. If this defender, who has undertaken to deliver the goods, is unable to do so he must, I think, return the money.

I am therefore for affirming the interlocutor of the Lord Ordinary. But our attention has been called to the fact that the writing before us, which I hold to be a written contract of sale, is not properly stamped, and in accordance with the usual practice we shall give the pursuer an opportunity of having it stamped and adjudicated, and for that purpose I propose we should continue the case and issue no interlocutor until the document has been properly stamped.

LORD MACKENZIE—In this case the defender, who is a chartered accountant, received £150 from the pursuer and granted the document printed in condescendence 2. In my opinion the terms of that document are sufficient to impose upon the defender the obligations of a seller under a contract of sale. The Lord Ordinary has taken this view and has granted decree for £150, because the defender failed to fulfil his bargain. There is no trace in the writing of any suggestion that the defender was binding himself merely as an agent. Even if it be the case that the pursuer knew he was acting for a disclosed principal this would not, in my opinion, entitle the defender to say that he was not liable. On the terms of the document it is a final and conclusive expression of a complete transaction between the parties.

Even if the writing be not regarded as the constitution of a contract of sale, there is an alternative view under which the defender is liable, and that is because of the words "the transfer for which will be sent you for signature in due course." By this I think the defender undertook personal responsibility for the forwarding of the transfer. Because he failed to do so he is liable in damages.

LORD SKERRINGTON—It is a fundamental rule of evidence that a written contract or a unilateral obligation in writing cannot be varied by parole evidence intended to establish either that the writing does not correctly and completely set forth the terms of the contract or obligation, or that the original terms have been altered by a later agreement. This rule applies not only to a writing which is probative or holograph, and therefore binding in itself, but also to one which has been made binding *rei interventu*—*Clark* v. *Clark's Trs.*, 1860, 23 D. 74. It also holds good notwithstanding that the agreement was originally a verbal one, provided that the parties afterwards reduced it to writing in a document which they intended to have legal effect as their agreement. On the other hand, the rule does not apply to a mere memorandum in writing of a verbal agreement—*Ireland & Son* v. *Rosewell Gas Coal Co., Ltd.*, 1900, 37 S.L.R. 521. In this connection a well-known English case may be referred to where an informal writing delivered by the seller of a horse to the buyer was construed not as a written contract of sale but as a memorandum of the transaction or as a receipt, and accordingly the purchaser was allowed to adduce evidence of a verbal warranty by the seller—*Allen* v. *Pink*, 1 M. & W. 140.

The applicability of this rule of evidence to the present case depends upon whether the writing of 11th September 1917 founded on by the pursuer unequivocally and necessarily imports that the defender agreed to deliver to the pursuer a transfer of the shares therein referred to. If this question can only be answered in the affirmative, it would follow that the defender cannot acquit himself of his written obligation by parole evidence to the effect that he contracted solely in the capacity of agent for a disclosed principal, and that neither he nor the pursuer intended that he should be personally bound to deliver the transfer. On the other hand, if the language of the writing is susceptible of two constructions, so that if interpreted in one way it imports an obligation by the defender to deliver a transfer, and if interpreted in another way it does not import such an obligation, then there is not only no objection to, but on the contrary every necessity for, a proof of the circumstances under which the writing was delivered. The question here is not whether the former construction is the natural and preferable one, but whether it is the only one that is admissible irrespective of what may have been the relation and circumstances of the parties. It is only in such a case that parole evidence would be incompetent, seeing that the object in view would

then be not to explain but to contradict a writing which *ex hypothesi* was susceptible of only one meaning.

The statement in the writing that a transfer will be sent to the pursuer for signature in due course does, I think, *prima facie* mean that the defender bound himself to deliver a transfer of the shares to the pursuer, and if nothing more appear, that is the proper construction of the writing. On the other hand, these words, occurring as they do in a writing which is primarily a receipt, may be construed in a descriptive or referential sense, and as intended merely to identify the transaction or the subject-matter in respect of which the money was paid. Shares previously transferred, shares immediately transferable, and shares which are to be transferred at a future date are very different things, and it is right that a receipt for the price of shares should explain whether the price is in return for a past, a present, or a future transfer. Moreover, the writing of 11th September was obviously not in itself the contract of sale, but was subsequent thereto. I may remark in passing that I do not understand the suggestion that the writing expresses the whole terms of the contract of sale. There may, for all we know, have been many stipulations binding either upon the seller or the purchaser as such, of which no trace is to be found in the writing. So far as appears from the receipt, the antecedent contract of sale might have been either verbal or in writing, and the vendor might have been either the defender or some third party. Let us suppose that a written contract of sale could be produced, dated 10th September 1917 (the day before the money was paid), in which the defender contracted solely as agent for a disclosed principal, and in which it was stipulated that the vendor should send a transfer to the pursuer for signature in due course after payment of the price to the defender. In such a case might it not be an admissible interpretation of the writing of 11th September to hold that it was intended to operate merely as a receipt for money paid in pursuance of the contract of the preceding day, and that it was not intended to constitute a new and unilateral and gratuitous obligation on the part of the defender. In deciding between these two constructions much might turn upon the circumstances in which the second writing was granted. If it appeared from the evidence that the pursuer had pointed out to the defender the inconvenience of having to deal with a gentleman resident out of the jurisdiction and not personally known to him, and had requested the defender to interpose his personal credit, it might be easier to reach a conclusion in favour of the pursuer's construction of the document than if it appeared that the writing of 11th September was delivered and accepted without the suggestion by either party of any purpose except the carrying out of the antecedent contract between the pursuer and the defender as agent for a disclosed principal.

In the present case the contract of purchase and sale which preceded the writing of 11th September was a verbal one. That circumstance may make it difficult for the defender to prove his case, but it cannot make it incompetent for us to construe the writing of 11th September in the light of the relation in which the parties stood to each other at its date and the circumstances in which it was delivered and accepted. Accordingly I am of opinion that the interlocutor of the Lord Ordinary should be recalled and that the defender should be allowed a proof of his averments.

LORD CULLEN—It is not disputed by the defender that he executed and delivered to the pursuer the document mentioned in the second article of the condescendence, the terms of which are there recited. The first part of the document acknowledges the receipt by the defender from the pursuer of £150 in payment of the purchase price of certain specified shares. Then follow these words, "the transfer for which will be sent you for signature in due course." I read them as importing an obligation to deliver the shares. The alternative view would make them amount to a mere remark by the defender devoid of any contractual significance or practical efficacy. I am unable so to regard them. The pursuer had paid the purchase price in anticipation without receiving the shares in exchange for his money. It was therefore only proper business dealing that he should be given not only a receipt for his money but also an obligation for future delivery of the shares of which he could demand fulfilment. I think the said words in the latter part of the document were intended to, and did, give him such an obligation.

*Esto*, however, that the document contains such an obligation, the defender avers that he acted in the matter within the knowledge of the pursuer as selling agent for a Mr Houldsworth, who was disclosed to the pursuer as his principal, and that the contract of sale of the shares was thus made between the pursuer and Houldsworth. But an agent acting for a disclosed principal may interpose his own personal credit and obligation in the transaction. The rule of law is succinctly stated in Pollock on Contract (p. 103) to the effect that an agent "is personally liable if he expressly undertakes to be so: such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification." Now while we do not have here in the document in question a bilateral contract to buy and sell the shares—the pursuer having already implemented his obligation as buyer to pay the price, in anticipation of delivery—the document, if I have construed it aright, expresses the obligation on the vendor's side to make delivery in respect of the price already so paid; and this written obligation delivered to the pursuer is signed by the defender in his own name without any qualification, either *in gremio* or adjected to his signature, expressing a limitation of his capacity

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