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

shot off. That under the direction of the petitioners and by their efforts and the efforts of those whom they represent the 'Carmel' was towed to Peterhead, a distance of over 90 miles, and she was brought into Peterhead harbour of refuge on 13th June 1917, at 5·30 p.m., and she now lies anchored in a safe position at the south end of the harbour of refuge, Peterhead, in custody of the Receiver of Wreck, Peterhead. That the said barque 'Carmel' is believed to be of about 900 tons register, and was built in 1882, and her value in her present condition is believed to be not less than £1000. The value of her cargo of pitprops, which has also been saved, is unknown, but is believed to be considerable. But for the prompt and meritorious assistance rendered by the petitioners to the said barque the 'Carmel' and her cargo would have been entirely lost to the respective owners. It is believed that the said barque 'Carmel' is owned by the Aktieselskabet Durban Hansen, of Christiania, and the petitioners have a claim against the owners of the said barque and cargo for salvage, and in the special circumstances they estimate this at one-half of the value of the ship and cargo and stores on board. The petitioners desire to enforce their maritime lien over said barque 'Carmel' and cargo for the salvage due. No security has been found, and the petitioners believe the owners may come forward and claim said barque and cargo, and unless arrested the said barque may then proceed to sea with her cargo, and thereby deprive the said petitioners of their lien over same. In the circumstances above set forth it is necessary that a warrant be granted to petitioners to arrest the said vessel and cargo."

On 20th June 1917 the Lord Ordinary (ANDERSON) granted warrant to arrest the "Carmel" and her cargo *ad interim*. The vessel and her cargo were subsequently arrested at Peterhead. She became a wreck, and her wreck and cargo were sold. The petitioners subsequently brought an action before Lord Anderson against the owners of the "Carmel" for payment of £2500 for salvage in respect of the services rendered by them, and in that action they obtained an award.

On 2nd November 1918 the Lord Ordinary (SANDS) officiating on the Bills reported the cause to the First Division.

Note.—"This is an application by salvors, who arrested a ship and subsequently successfully prosecuted a claim for salvage, for the expenses of the proceedings in the arrestment. It appears that a year ago I awarded expenses in a similar case. According to my recollection the matter then came before me as an incidental though opposed motion in the motion roll, and I proceeded upon the ground that the arrestment was not merely a diligence for security, but was the initiation of proceedings *in rem* for the enforcement of liability against the ship in case no other debtor was found. I am now asked to reconsider the matter. It appears to me that the question deserves reconsideration, but that I am not in a favourable position to reconsider it. If I came to a different conclusion there would be two conflicting judgments by the same Judge upon a rule of practice. Further, a difference would be recognised in regard to practice in a matter of maritime law which is one of substance and not of technicality between the law of Scotland and the law of England. If this is to be so it is desirable that it should have the authority of the Inner House.

"It is a well-recognised principle of our law that a creditor is entitled to payment not merely of his debt but of all the judicial expenses of its recovery. On the other hand the law will not presume that a debtor against whom decree may be pronounced is unable or unwilling to meet his obligations. These two principles explain why the expenses of diligence in execution are allowed and those of diligence in security disallowed. The arrestment of the ship may provide security, but it is represented that it also initiates proceedings *in rem* which may eventually turn out to be the only remedy available to the creditor. It may not be necessary to follow out these proceedings, but that is because the arrestments bring the debtor into the field.

"In the present case an argument was submitted to the effect that arrestments were unnecessary for the initiation of proceedings *in rem*, because the ship was in the hands of the receiver of wrecks, who must hold it subject to the salvors' claims. I cannot say that this point was very satisfactorily argued. But in any view it seems to me inconvenient to consider whether this case forms an exception to a hypothetical general rule. The satisfactory course as regards practice is first to ascertain what is the general rule."

In support of the application counsel for the petitioner referred to the following cases—*Taylor* v. *Taylors*, 25th January 1820, F.C.; *Symington* v. *Symington*, 1874, 1 R. 1006, 11 S.L.R. 579; *Black* v. *Jehangeer, Framjee, & Company*, 1887, 14 R. 678, 24 S.L.R. 476; *Clan Line Steamers, Limited* v. *Earl of Douglas Steamship Company, Limited*, 1913 S.C. 967, 50 S.L.R. 771; *M'Connachie*, 1914 S.C. 853, 51 S.L.R. 716; *Boyle* v. *Olsen*, 1912 S.C. 1235, 49 S.L.R. 894; *The Dictator*, [1892] P. 304, *per* Jeune, J., at p. 313; Marsden's Collisions at Sea (6th ed.), p. 73; Williams & Bruce's Admiralty Practice, pp. 249 and 469; Abbott's Merchant Ships and Seamen, pp. 994 *et seq.*; Maclachlan's Merchant Shipping, p. 726; the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 518; Bell's Prins., secs. 443, 1397, 1427.

Counsel for the respondents did not contest the point upon which the case was reported by the Lord Ordinary.

LORD PRESIDENT—On the only question remitted to us by the Lord Ordinary for his guidance I entertain no doubt whatever. His Lordship says that in a former action before him *in rem* directed against a shipowner in order to recover salvage he held that the expenses of the arrestment to initiate the procedure *in rem* were recoverable. I think his Lordship was quite right in taking that course, and, indeed, in the

debate before us to-day it was not disputed that that was so. I cannot see how it could well be otherwise, because, as Mr Bell points out in his Commentaries, although there is a personal action for the recovery of salvage, the first and the most proper remedy is *in rem*, and that is the remedy which had been taken both in the former action to which his Lordship refers and in the case before us. It is a perfectly correct course, and I think his Lordship ought to be directed to act upon the view he originally took, and to find the petitioners here entitled to have the expenses for arresting this vessel in respect that that constituted an initiatory step in the action *in rem* which was quite properly raised.

Upon the other question which has been argued to us to-day the Lord Ordinary does not invite our guidance. He says he has not heard the argument, that he has not considered the question, and that he desires guidance only on the question upon which I have already expressed my view.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

The Court directed the Lord Ordinary to find the respondents liable to the petitioners in the expenses of the proceedings in the arrestment.

Counsel for Petitioners—Constable, K.C. —Greenhill. Agents—Boyd, Jameson, & Young, W.S.

Counsel for Respondents—Hon. W. Watson, K.C. — R. M. Mitchell. Agents — Beveridge, Sutherland, & Smith, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, December 4.

(Before the Lord Justice-General, Lord Mackenzie, and Lord Anderson.)

MACPHERSON *v.* CRAIG.

Justiciary Cases—Evidence—Competency —Character of Women Frequenting Brothel.

In a summary complaint charging the accused with keeping a house as a brothel, the prosecutor proposed to lead evidence as to the character of women who frequented the house. The accused objected to the evidence on the ground that there was no notice in the complaint with regard to the women, that they had not been convicted of any offence involving prostitution, and that they were not adduced as witnesses. *Held* that the evidence was competent in respect that it was led to prove the character of the house.

Rachel Craig or Crisp, *respondent*, was charged in the Police Court at Edinburgh, upon a summary complaint at the instance of Charles Angus Macpherson, *appellant*, "that between 5th April and 25th May 1918, both dates inclusive, you did keep and manage the house occupied by you at No. 40 Jamaica Street, Edinburgh, as a brothel, contrary to the Edinburgh Municipal and Police Act 1879, section 278, as amended by the Edinburgh Corporation Act 1906, section 77, whereby you are liable as for a first offence to the penalties set forth in said section 278."

The respondent pleaded not guilty. On 15th June 1918 the Judge of Police (DUNLOP) found the charge not proven, against which decision the appellant appealed by Stated Case.

The Case stated—"The following *facts* were found proved:—"That the respondent during the period libelled occupied a house consisting of one apartment situated on the top flat of the common stair at No. 40 Jamaica Street, Edinburgh. The room contained one bed. That the respondent has been convicted in the Police Court of Edinburgh of loitering and importuning as a prostitute. That observations were conducted on the house of the respondent by plain-clothes constables David Brown and Andrew Ramsay, of the Edinburgh City Police, on a number of dates during the period libelled, what came under their notice being narrated hereunder. That on Friday, 5th April 1918, at 11 p.m., the respondent and a woman who was known to the police witnesses as Margaret Greig, and alleged by them to be a prostitute, accompanied by two sailors, entered the house together, all being still there at midnight, when the observation ceased. That on Saturday, 6th April 1918, at 3·45 p.m., the police demanded admission to the house, and were admitted by the respondent. They found there also the said Margaret Greig and an American sailor on temporary leave. He gave the police an explanation of his presence—the respondent being present when this was being given. The police-officers informed the respondent, who was under the influence of liquor, of their belief as to the character of the woman Greig. That on Monday, 8th April 1918, the respondent and the said Margaret Greig at 9 p.m., accompanied by two sailors, entered the house together, where they remained until 11·30 p.m., when the sailors left. That on Wednesday, 10th April 1918, at 7·10 p.m., the police again demanded admission to the house, and were admitted by the said Margaret Greig. They found, besides the respondent and Greig, a man who gave a name and address, since discovered to be false, and who made a statement to the police, in presence of the respondent, in explanation of his presence there. The police again cautioned the respondent as to their belief regarding the character of the woman Greig. That on Friday, 12th April 1918, at 10 p.m., the respondent and the said Margaret Greig entered the house in company with two sailors. . . . That on Monday, 22nd April 1918, at 4 p.m., a woman, who was known to the police witnesses as Ina Bethune or Fraser, and alleged by them to be a prostitute, accompanied by two Colonial soldiers, left the house. . . .