ence which I think justifies the observation which his Lordship has made on that subject. But however that may be, it appears to me that the various matters to which Lord Mure has referred, and which I do not mean to go into in detail again, as to the conduct of both parties, go very far indeed to demonstrate—I might almost say—that they did not intend to create, and did not in fact create, marriage by that letter and the intercourse that followed upon it. It is quite clear, as it appears to me, from the evidence, that Mr Macadam did know of her conduct with the other men who are referred to on the record and in the proof; and I confess the general impression left on my mind by his letters and by the statements made by the pursuer herself and sworn to by various witnesses, that Mr Macadam was quite willing that she should marry if she chose, and was also willing to make some provision for her in order that she should be married—living in his neighbourhood, as the pursuer explains it was intended she should do. That conduct on the part of both of them seems to me to be very strikingly inconsistent with the idea that they were at that time husband and wife, and had intended marriage by that letter. Then, as Lord Mure has observed, their letters are quite different in expression from letters passing between husband and wife. They are such as would be addressed to a housekeeper living with him on such terms as she admits she was doing during the whole period of that correspondence. They are letters rather that a man would write to a housekeeper who was his mistress than to a housekeeper who was his wife. That is corroborated very strongly not only by the fact that she is entered in his books from time to time as receiving wages, but that in point of fact she does receive wages like other servants in the house. And further, there is the circumstance that Mr Macadam signed a will in which he designed her as housekeeper and gave her £1000, which was quite an inadequate provision for her if she had been his wife, and she took that document into her own custody and kept it for a considerable time. And following upon that we have perhaps as important a piece of evidence as any other—I mean the solemn conversation on deathbed, when Mr Macadam again spoke of the pursuer as his housekeeper, no doubt regretting that he had not made a larger provision for her; and I am not surprised at that, considering that she had lived so long with him and was the mother of his two children. In these circumstances one would have expected a better provision, but still there is no suggestion that he regretted not having put his wife in her proper place. On the whole, I agree with Lord Mure in thinking that we are not bound by the terms of the letter, but are called on to look to the whole surrounding circumstances which can throw light on what was intended by it, and all that has occurred since in the conduct of the parties, and having done so, the conclusion I arrive at without doubt or difficulty is that this is a case in which the pursuer has failed to make out that there was a marriage between her and the late Mr Macadam. It is therefore, as your Lordship has observed, unnecessary to express any opinion upon the question of law upon which the Lord Ordinary has given an opinion, as to whether an action of this kind can be maintained after the death of the person who is alleged to have made the promise. On that subject I shall only say that we have had a very anxious and careful argument, that I think it a very important and delicate and difficult question, and that I am not at this moment prepared to say that I could concur in the view of the Lord Ordinary, while on the other hand I desire to reserve my opinion in case the question should occur in any future case.

Lord President — The view which I take of the evidence in this case has been so fully, and at the same time so clearly expressed by Lord Mure that I find it quite unnecessary to add anything. I may also say that I concur in the additional observations of my brother Lord Shand. With regard to the question of law which the Lord Ordinary has decided, it is quite plain that the decision of that question is not at all necessary for this case, and I am not prepared to concur in his judgment in that respect. I must not be misunderstood as saying that I entertain an opposite opinion upon that question, but I do go the length of saying that I have not yet been convinced that it is incompetent to constitute or establish a marriage between two parties in respect of promise *subsequente copula*, after the death of one of them.

The judgment will be to recal the interlocutor of the Lord Ordinary, find that the pursuer has failed to establish that marriage was constituted between her and the deceased Andrew Macadam, either by promise of marriage *subsequente copula* or by declaration *per verba de præsenti:* Therefore assoilzie the defenders from the conclusions of declarator of marriage and legitimacy, and decern.

Lord Deas was absent.

The Court recalled the interlocutor of the Lord Ordinary, found that the pursuer had failed to establish that marriage had been constituted between her and the deceased Andrew Macadam, either by promise of marriage *subsequente copula* or by declaration *per verba de præsenti;* therefore assoilzied the defenders from the conclusions of declarator of marriage and legitimacy, and decerned.

Counsel for Pursuer — Trayner—J. P. B. Robertson—Goudy. Agent—J. Young Guthrie, S.S.C.

Counsel for Defenders—Sol.-Gen. Asher, Q.C. —Mackintosh—Young. Agent—John Macmillan, S.S.C.

Friday, December 19.

SECOND DIVISION.

[Lord Lee, Ordinary.

WELSH AND OTHERS (WELSH'S TRUSTEES) *v.* FORBES.

Loan—Proof of Resting-Owing—Unstamped Receipt—Stamp-Duties Act 1870 (33 *and* 34 *Vict. c.* 97), *secs.* 17, 120, 122.

Forbes granted to Welsh a document which was unstamped, in the following terms:—"*Hydropathic Establishment, Moffat.*—Re-

ceived from Thomas Welsh, Esquire, on loan, £400.—R. Thomson Forbes. *10th November* 1881." After the death of Welsh his executors sued Forbes for £400, founding upon the document as an acknowledgment of debt. Forbes averred in defence that the document was granted by him as a memorandum of money advanced by Welsh for behoof of a third party who was the real debtor, and to whose use it had been applied, and pleaded that the acknowledgment being unstamped, was not a valid document of debt. The Court (*rev.* judgment of Lord Lee; *diss.* Lord Rutherfurd Clark) *allowed* to the parties, before answer, a proof of their averments—the Lord-Justice Clerk and Lord Lord Craighill holding that the document was of the nature of an agreement, and could be rendered admissible as an item of evidence by being stamped with the appropriate stamp; Lord Young holding that it was a mere acknowledgment of indebtedness of the nature of an I O U, and was admissible as an item of evidence without being stamped.

Lord Rutherfurd Clark was of opinion (1) that the document was a "receipt" in the sense of sec. 120 of the Stamp-Duties Act of 1870, and therefore invalid for want of a stamp; and (2) that even if it were not a receipt requiring a stamp, no proof was competent except as regarded its genuineness.

Section 120 of the Stamp-Duties Act 1870 (33 and 34 Vict. c. 97) provides—"The term 'receipt' means and includes any note, memorandum, or writing whatsoever whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory-note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Section 122 provides—"A receipt given without being stamped may be stamped with an impressed stamp upon the terms following, that is to say—(1) within fourteen days after it has been given, on payment of the duty and a penalty of five pounds; (2) after fourteen days but within one month after it has been given, on payment of the duty and a payment of ten pounds." . . .

It is provided by sec. 17 of the same Act, that save and except in cases before provided for (being the provisions of sec. 16, that an instrument chargeable with duty and produced in evidence without being stamped, may, if it be one which may be legally stamped after execution, be stamped on payment of duty, penalty, and the further sum of £1), "No instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any . . . . matter or thing done or to be done in the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed." The duty upon an "agreement or any memorandum of an agreement under . . . . in Scotland, without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument," is by the Schedule to the Act fixed at 6d.

The trustees of the deceased Thomas Welsh, Esq. of Earlshaugh, who died at Ericstane, Moffat, in December 1882, raised this action against Robert Thomson Forbes, physician and surgeon, Moffat, for payment of £400. The ground of action alleged by the pursuers was as follows—"(Cond. 2) The said Thomas Welsh, on or about this date [10th Nov. 1881], advanced to the defender on loan the sum of £400, conform to acknowledgment of debt, holograph of the defender, dated 10th November 1881, herewith produced. This loan has never been repaid, nor has any interest been paid thereon." The document produced was — "*Hydropathic Establishment, Moffat.*—Received from Thomas Welsh, Esquire, on loan, £400.—R. Thomson Forbes. *10th November* 1881."

The defender denied this averment, under reference to the following statement of facts—"The defender was resident medical superintendent of the hydropathic establishment at Moffat, the property of the Moffat Hydropathic Company (Limited), from the date of its opening in April 1878 until January 1883, when he resigned the said office. He was also during the said period one of the directors of the company. From the date of the opening of the said establishment till his death in December 1882 the late Mr Thomas Welsh of Earlshaugh was chairman of the said company, and during the whole of the said period the burden and responsibility of the financial management of the company devolved on him and the defender. From the outset the company was involved in financial difficulties, and the defender was obliged, in order to satisfy the claims of urgent creditors, to make large advances on behalf of the company out of his own pocket. On the occasion in November 1881, when the acknowledgment founded on was granted, the defender was obliged to apply, on behalf of the said company, to Mr Welsh as chairman thereof, for money to meet the demands of certain creditors of the company. Mr Welsh provided for the said purpose the sum of £400, and the acknowledgment in question, which bears no stamp, was granted as a memorandum of the transaction. The money was, with Mr Welsh's knowledge and approval, paid over by the defender to the creditors of the said company. The money was truly lent by Mr Welsh to the said company, and it was arranged and agreed between the defender and Mr Welsh that it was to be regarded and treated as repayable by the company. No part of the said sum has been repaid to the defender by the said company."

The pursuers denied the defender's account of the loan, and particularly that Mr Welsh knew for what purpose the defender wished it. They alleged that the loan was granted on the personal security of the defender alone. They admitted that Welsh was chairman of the company, and that the defender was medical superintendent of it.

The pursuers pleaded—"(1) The defender being due and resting-owing to the pursuers, as trustees and executors foresaid, the sum sued for, they are entitled to decree as concluded for, with expenses. (2) The averments of the defender

contained in his statement of facts are irrelevant, and, *separatim*, can only be proved by writ or oath."

The defender pleaded—"(1) The averments of the pursuers are irrelevant, and, *separatim*, can only be proved by writ or oath. (2) The acknowledgment libelled not being stamped, cannot be founded on as a valid document of debt. (3) No sum being due to the pursuers by the defender, he is entitled to absolvitor, with expenses."

The Lord Ordinary sustained the second plea-in-law for the defender, and dismissed the action.

"*Opinion.*—The present action is founded upon the document No. 6 of process. That document is in the following terms:—'*Hydropathic Establishment, Moffat.*—Received from Thomas Welsh, Esquire, on loan, £400. R. Thomson Forbes. 10*th November* 1881.' It is alleged that this writing is holograph of the defender, and that of the date mentioned in it Mr Welsh advanced the sum of £400 to the defender conform to the acknowledgment therein contained. Mr Welsh died on December 13th 1882. No evidence of the alleged debt is offered excepting the document referred to,

"The defender, besides making an explanatory statement regarding the document, which the pursuers say is irrelevant, and ought not to be admitted to probation, pleads that the acknowledgment not being stamped, cannot be founded on as a valid document of debt.

"It was contended for the pursuer that the document is sufficient to instruct the receipt of the money in loan, and that a mere receipt or acknowledgment of debt did not require a stamp. Reference was made to the cases of *Pirie* v. *Smith*, 11 Sh. 473, and *Allan* v. *Ramsay*, 15 Sh. 1130, and *Christie's Trustees* v. *Muirhead*, 8 Macph. 461.

"It was replied that in *Muirhead's* case the document was stamped as a receipt, and the judgment proceeded on the ground that a receipt for money in absolute terms is sufficient evidence of loan. The other cases were prior to the Stamp Act of 1870, which requires all receipts, save those specially excepted, to be stamped, and in section 120 puts an interpretation upon the word 'receipts' much wider than that attached to the term in the Acts 35 Geo. III. c. 55, and 55 Geo. III. c. 184, to which the cases of *Pirie* and *Allan* refer.

"I am of opinion that the defender's answer is well founded, and that under the 17th and 120th and 122d sections of the statute the defender's objection to the document being pleaded is insuperable.

"In forming this opinion I hold it to have been settled that under the old statutes a mere acknowledgment of debt or memorandum acknowledging the receipt of money did not require to be stamped—(See in addition to the cases mentioned by the pursuer, *Melanotte* v. *Teasdale*, 13 L.J. (Exch.) 358; *Cory* v. *Davis*, 14 C.B. (N.S.) 370.

"But I think it clear that these decisions proceeded upon grounds which are excluded by the terms of sec. 120 of the statute of 1870.

"I therefore dismiss this action. But I may add that if I could have considered the document in question as a document of debt, I should have had difficulty in excluding inquiry into the circumstances in which it was granted; for the relation in which the parties stood to the Hydropathic Establishment and to one another, as admitted on record, appear to leave room for doubt whether the writing was intended to instruct the receipt of the money by Mr Forbes for his own purposes. It is however unnecessary, in my view, to express an opinion on this point. I hold that the document cannot be pleaded or founded on in evidence; and as it cannot now be stamped the present action cannot be maintained."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in treating the document as a receipt under sec. 120 of the Stamp Act of 1870. It was not a receipt but either an acknowledgment of debt in the nature of an I O U which required no stamp to make it a good document of debt, or it was in the nature of an informal bond or agreement which could be afterwards stamped. Sec. 120 of the Stamp Act of 1870 did not include every document which acknowledges the receipt of money, for all formal bonds do that. Had a bond stamp been on it originally it could not have been objected to as a receipt which had not a penny stamp. This document was similar to those in *Pirie* v. *Smith*, Feb. 28, 1833, 11 S. 473, which were held not to be receipts, and nearly in the same words as that in *Tennent* v. *Crawford*, Jan. 12, 1878, 5 R. 433, which was held to be in the nature of a bond, and stampable *ex post facto*. (2) If the document were to be construed as not a receipt, it was evidence of loan, and the defender's averments could not be admitted to proof *prout de jure*.

The defender replied—No doubt under the earlier Stamp Acts the document would not have required a receipt stamp, and therefore the case of *Pirie* was no authority. The theory of the former Acts was that a receipt was only a document which extinguished a past obligation—only a quittance or discharge—not one which constituted a future obligation. But the words of the Act of 1870 were framed so as to include in the class "receipts" a document which constituted an obligation to repay. It was not in the nature of an I O U, for it contained an acknowledgment of money received. Nor was it an agreement, for there was only one party to it, and it expressed no agreement to anything. Proof was competent of the circumstances which led to the granting of the document.

At advising—

Lord Young—This is an action by the trustees of the late Mr Welsh of Earlshaugh, against the defender, R. Thomson Forbes, for payment of the sum of £400 alleged to have been lent to him by the late Mr Welsh on 10th November 1881. The averment on the record is contained within the second condescendence—"The said Thomas Welsh, on or about this date, advanced to the defender on loan the sum of £400, conform to acknowledgment of debt, holograph of the defender, dated 10th November 1881, herewith produced. This loan has never been repaid, nor has any interest been paid thereon." And the document alleged to be holograph is in these terms—"*Hydropathic Establishment, Moffat.*—Received from Thomas Welsh, Esquire, on loan £400. R. Thomson Forbes. 10*th November* 1881." The pursuers' averment which I have read is their account of the matter; the defender's account,

which he refers to in a general denial of the pursuers' statement, is in these words, which I read from his first statement:—"On the occasion in November 1881, when the acknowledgment founded on was granted, the defender was obliged to apply, on behalf of the said company [the Moffat Hydropathic Company], to Mr Welsh, as chairman thereof, for money to meet the demands of certain creditors of the company. Mr Welsh provided for the said purpose the sum of £400, and the acknowledgment in question, which bears no stamp, was granted as a memorandum of the transaction. The money was, with Mr Welsh's knowledge and approval, paid over by the defender to the creditors of the said company. The money was truly lent by Mr Welsh to the said company, and it was arranged and agreed between the defender and Mr Welsh that it was to be regarded and treated as repayable by the company." If you abstract from these respective averments the fact of a written acknowledgment being granted, a very shrewd question would have been raised between the parties as to whether the conflict between their statements as to the purpose for which the money was provided by the one party and handed to the other might be cleared up by the leading of parole evidence. I say I think a very shrewd question would have been raised independent of the document altogether; because it is not only averred by the pursuer but admitted by the defender that the money was provided by Mr Welsh and handed by him to the defender, and that there was a transaction between them in reference to that, the conflict being whether it was given in loan to the company or in loan to the defender. The question would have been, was parole evidence admissible in such a conflict? But it is said that the document, although written, is not admitted to be genuine and holograph, and it is at least capable of being proved. I rather think, however, we must take it as admitted. It is called by both parties an acknowledgment. The name given to it by the pursuer is "a form of acknowledgment of debt;" and the defender speaks of it as an "acknowledgment" and a "memorandum of the transaction." It is therefore founded on as an acknowledgment of debt on the one side, and a memorandum of the transaction on the other. And the question which we have had argued, and which we have considered very carefully—conferring upon it together more than once—is, whether this may be received as an item of evidence, not being stamped, or, if it requires a stamp, whether it can now be stamped. For my own part, I think the pursuers are entitled to a proof upon this record. I think that the document should be put into process, and that with regard to the conflicting averments respecting it—the occasion and purpose for which it was granted—the pursuers are entitled to a proof. I do not mean that the alleged loan of money upon which the action is founded can be established by parole evidence, or otherwise than by written evidence; but the written evidence may be such as to require explanation and clearing up by parole evidence; and I differ from the Lord Ordinary, and think that the document which the pursuers have produced will be available to them as evidence, admitting that it is—at all events is capable of being proved to be—genuine. The objection to that view which the Lord Ordinary has sustained is that it is a "receipt" within the meaning of the last Stamp Act requiring a penny stamp, and is not stampable if originally made and delivered without a penny stamp. The Lord Ordinary has proceeded on these words in the last statute defining a receipt—"The term 'receipt' means and includes any note, memorandum, or writing whatsoever whereby any money amounting to £2 or upwards, or any bill of exchange or promissory-note for money amounting to £2 or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of £2 or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Now, these words are exceedingly comprehensive, and occasioned the difficulty which has led to this case being so long under consideration, and so frequently the subject of consultation among ourselves. I have indicated as the result upon my own mind of that lengthened consideration, that comprehensive as the words are, they do not comprehend this document in question. I think the word "receipt" does not comprehend an acknowledgment of debt, whether by loan or otherwise, and that that is foreign to the meaning of the term "receipt" as accepted in our legal language. "Foreign" is perhaps too strong an expression, but it is, at all events in my view, different from the accepted meaning of the word "receipt" with us. An acknowledgment of debt by our law does not require a stamp at all. I do not think an acknowledgment of debt is by this statute, contrary to the law existing when it was passed, made to require a stamp. There are multitudes of decisions in England and in the Courts of this country which have proceeded upon the assumption that it does not. To take the most common form of cases in point, an I O U is just a document of debt. We borrowed that useful document from England. It originated there, and as I have indicated, we have found it to be a useful document. We have got into the habit of using it, and it is a *prima facie* evidence of a debt due by the party granting it to the party to whom it is granted. Everybody knows that it means "I owe you." The English books say that, there being no other evidence, what is presumed is that the pecuniary state of matters between the parties has been taken account of, and that the party granting that document acknowledges that he is indebted in the sum stated in the document to the party to whom he grants it—"I owe you £60, £20," or whatever number of pounds it may be. It is an acknowledgment of debt, and looking to the legal character of the instrument, I say it does not in our law require a stamp. I think, further, it would be inconsistent with the decisions since the last Stamp Act to which I have referred to say that it had altered the law in that respect. There have been a number of cases where I O U's have been received as evidence without any question. Always looking to the legal character of the instrument, and not to any particular word which happens to occur in any specimen, I do not think the legal character of an I O U as a docu-

ment of debt is changed by adding to the words "I owe you £10" these other words, "which I received from you," or by changing the form of the sentence to "I have received £10 from you, which I owe you." In short, it would signify that the debt acknowledged is in respect of money received; it is still an acknowledgment of debt, and as such is of the legal character not requiring a stamp.

But let me pass to another kind of case—that of a document or instrument which does require a stamp, but which is stampable *ex post facto*. The legal character of that is not in the least degree affected or altered by its bearing or not bearing the receipt of money. Most bonds do bear it—"I acknowledge to have instantly received from you the sum of so-and-so, and I bind and oblige myself to pay it." The words of binding and obligation are the words which constitute the bond, and it would not cease to be stampable because it bore expressly the receipt of the money, which, as I have pointed out, it would do. For those words of receipt made it a receipt within the definition clause of the last Stamp Act, which I have just read. There again, I imagine, we should proceed upon the general legal character of the instrument as stampable, and not changed into an instrument of another description because it bore words acknowledging the receipt of money. So here, regarding the instrument as an acknowledgment of debt which does not require a stamp at all, I do not think the defender's argument applies. It means—"I acknowledge the loan of £100 as just," or "I owe you a hundred pounds;" and introducing the language of acknowledgment and receipt does not, in my opinion, change the legal character of the instrument.

Besides, there is this consideration, which I cannot say has been without its influence upon my mind, that it would be a misfortune if by this decision on those very comprehensive words in the Stamp Act, a change should be operated upon the law, so that acknowledgments of debt, which were theretofore binding as acknowledgments of debt, although not bearing a stamp, were thereafter rendered utterly worthless. I do not think that was the intention of the Legislature. I am of opinion that the intention of the Legislature was to provide a universal uniform penny stamp for all receipts. I think so, notwithstanding the legal character of the words used, and the variety of the words used. I read "receipt" always with reference to the legal meaning of the words used, as we have heretofore regarded that meaning, namely, as an acknowledgment of money in discharge of something, not as creating a debt, but as discharging a debt. It seems to me that that is the general meaning of the word, and that it carries that general meaning with it, notwithstanding the words which are associated with it in that definition clause.

There is another view which would not at all interfere with the result which I have stated to be the right one, namely, to allow the pursuer a proof, with the intimation that in our opinion this document will be available to him as an item of evidence—that is, that it may be regarded as an agreement of loan—a loan as constituted by contract or agreement, and an acknowledgment of that contract or agreement of loan would be, not a receipt, but the agreement constituting the contract with certain legal consequences. A contract of loan is a contract with well known legal consequences. In this view, although not available without a stamp, the document would be stampable, and the pursuer would then use it as an item of evidence. But whichever view in this respect may be taken, whether (which is according to my impression) that it is a document not requiring a stamp at all, or that it is a document which, being of the nature of an agreement, is stampable, the result would be that the pursuer should have a proof with an expression of our opinion that the document will be available to him as an item of evidence.

I propose, therefore, that the judgment should be altered, and the case disposed of accordingly.

Lord Craighill—That the writing in question, if it is only one by which money of more than two pounds in amount is acknowledged or expressed to have been received, would be bad for want of stamp appears to me to be plain upon the terms of sec. 120 of the Stamp Act of 1870. Reading the two portions of that clause together, the first must on a reasonable construction be taken to apply to receipts for money received, though the money has not been received in satisfaction in whole or in part of a debt or obligation. The decisions on the relative provision in the Stamp Act of 1815 are inapplicable to the present case, because, as the Lord Ordinary explained, "these decisions proceed upon grounds which are excluded by the 120th section of the statute of 1870." The next question for consideration therefore comes to be, is the writing in question in anything essential to its character and comprehension more than a mere receipt as defined by section 120? If it is, one or other of two results will ensue, the first being, that the document is not a writing on which any stamp-duty has been imposed, and the second, that by virtue of the additional matter which has been introduced, it is made a document chargeable with another duty than that payable upon a mere receipt. Now, there is in the writing in question more than the simple acknowledgment of the receipt of money exceeding two pounds in amount, for it bears that there had been received from Thomas Welsh, Esq., on loan four hundred pounds. If these two words "on loan" are of no value unless as an explanation of the footing on which the money was received, and consequently are not to be taken as the expression of something by which liability to repay was intended to be, and by necessary implication is in effect acknowledged, they are of no materiality in a question as to the character of the writing, which therefore will remain a receipt in the sense of that word as used in section 120. But the words "on loan" cannot be taken to be or to have been intended to be insensible when the character and the value of the writing arises for consideration and determination. On the contrary, they force themselves upon notice as words which are employed not because they merely state a fact which leaves unaffected the character and the value of the document of which they form part, but because the explanation they impart carries *in gremio* liability for repayment. Their effect is, in short, to raise the acknowledgment of money received, with which they are

associated, into evidence of a contract or obligation for repayment.

This being so, the writing in question must be viewed as an agreement or a memorandum of agreement, as defined in the schedule to the Act of 1870, which though unstamped is still stampable on payment of the prescribed duty and penalty. This is the conclusion which I have reached, but there are some difficulties undoubtedly which lie in the way. One of these is the consideration that though the words "on loan" are parts of the document, and may have the effect imputed to them, it is, as truly as if no such words had been introduced, a receipt for money. But the same may be said of the most formal bond. The receipt of money is there the first thing set forth, and what follows is the expression of an obligation for repayment.

This document, however, does not take its character from the acknowledgment that money has been received, but from the acknowledgment involving an obligation whereby the granter becomes bound for its repayment. The case of *Tenant* v. *Crawford*, 5 R. 433, in which there were first, words of receipt, and next words showing that the sum received was to be repaid, may be referred to as a plain authority upon this point. Another difficulty is the consideration that a receipt for money deposited is included among the writings which must be stamped as a receipt. Thus it may fairly be said that we have a document which may be so expressed as to imply an obligation for repayment or restitution, and which nevertheless is for the purposes of the Stamp Act to be regarded as a receipt. Then why, it may be asked, is a receipt for money, bearing that the money was received in loan, to be differently regarded? The answer appears to me to be obvious. The one is expressly provided for, the other is not provided for at all, and as to the latter we must deal with the question according to the principle by which such a case is governed. Finally, the consideration that the writing in question is signed only by one of the parties concerned with it, appears at first sight to be a specialty which prevents its being regarded as an agreement. But we find on inquiry that this difficulty has been removed by a decision upon the point. In *Hughes* v. *Budd*, 8 Dowling, P.C. 478, and 4 Jurist 654, it was held that "a writing signed by one party only, if obligatory on him as an agreement, is liable to duty as such."

For these reasons the interlocutor reclaimed against ought, I think, *hoc statu*, to be recalled and a finding to the foregoing effect to be pronounced by the Court.

Lord Rutherfurd Clark—The question in this case is, Whether the document on which the pursuers sue is a receipt within the meaning of the Stamp Act of 1870? It acknowledges the receipt of £400 in loan. So far as the legal value of the document is concerned, there would have been no difference if the words "on loan" had been omitted. For it is quite fixed that a document which acknowledges the receipt of money implies an obligation to repay—*Allan*, 15 S. 1130; *Thomson*, 23 D. 693. But the document in question leaves nothing to presumption. It acknowledges the receipt of the money, and expresses the footing on which it has been received. It does nothing more. It contains no obligation or promise to pay.

Previous to the Act of 1870 a receipt within the meaning of the stamp laws signified a document which acknowledged the payment of money in discharge of a debt. A receipt for money deposited did not require a stamp—*Tomkins* v. *Ashby*, 6 B. and C. 541. This was made clear from the words of the older Act, which while it imposed a stamp on "every receipt or discharge given for or on the payment of money," declared that "any note or memorandum given upon payment of money, whereby any sum of money, debt, or demand shall be acknowledged to have been paid, settled, balanced, or otherwise paid, shall be deemed a receipt." The definition necessarily excludes receipts granted for money deposited or lent.

But the Act of 1870 is very different. It declares that a receipt "means and includes any note, memorandum, or writing whereby any money is acknowledged to have been *received or deposited or paid, or* whereby any debt or demand is acknowledged to have been settled, satisfied, or discharged." There is thus a clear contrast between the two members of the definition. Like the former Act it includes receipts which acknowledge the payment in discharge of debt. Unlike it, it includes any document whereby any money is acknowledged to have been *received or deposited or paid*, and these words are used in contradistinction to the other class of receipts whereby debts are satisfied or discharged. For the two classes of documents are separated and distinguished by the use of the word "or." In other words, the Act of 1870 includes all the receipts which were included in the former Act, and others besides. These others are described in the universal words—"any note or writing whereby any money is acknowledged or expressed to have been received or deposited or paid."

I cannot conceive any document which more clearly falls within this comprehensive definition than one which merely acknowledges the receipt of money, though it also imports the obligation to repay it. Nor can I see why a document which expresses the footing on which the money has been received can fall without it. It is not the less a writing whereby money is "acknowledged or expressed to have been received." I do not see how we can determine within what class a document falls otherwise than by the manner in which it is expressed. It contains no obligation to repay so as to make it a bond, and no order or promise to pay so as to make it a bill of exchange or promissory-note. It is not an I O U, for such a document contains nothing more than an acknowledgment of indebtedness, which may arise from other reasons than the receipt of money. It is not an agreement, for it expresses no agreement. It is nothing more or other than a receipt for money lent, and whenever it is made clear that receipts are not limited to the class by which debts are discharged, it must, I think, fall within the definition of the Act of 1870. By taking the opposite view it seems to me that we would refuse all meaning and effect to the additional and differentiating words which are to be found in the Act of 1870.

I think therefore that the interlocutor of the Lord Ordinary should be affirmed.

Lord Justice-Clerk—I have felt this to be a very difficult and troublesome question. Lord Rutherfurd Clark has stated the difficulty that arises upon it very powerfully. There were substantial difficulties that had led me at one time to come to the same conclusion. But I have considered this matter very narrowly, and the conclusion at which I have arrived is similar to that expressed by Lord Young. The difficulty arises from the fact—why it should be so I do not know—that these Revenue Acts are conceived, I should say uniformly, in phraseology of studied ambiguity. If the meaning of the first of these statutes—the Act of 1815—had been what it was found to be in that case of *Tomkins*, there should have been no difficulty in expressing that result clearly in the first statute—that it was not to apply to receipts constituting an acknowledgment of debt. And yet that was the result arrived at with some difficulty and much discussion under the former statute, and it was universally held to be the law, and universally acted upon from that time onward. Then came the Act of 1870, which is said entirely and absolutely to have altered the law, and to have brought under revenue-duty a class of documents that had been deliberately decided not to be within the former statute. There was no difficulty in expressing that alteration in unambiguous language, but instead of that, that is left in a state of obscurity which it was possible to state with clearness. And the obscurity is all the greater, that in the latter part of the clause there is a re-assertion of the principle upon which the former statute was construed, namely, any acknowledgment or writing whereby any debt was acknowledged to be discharged. What could have been more easy than to have added to that declaration "any debt acknowledged to be constituted." But no such thing is to be found in the statute. But it might have been quite as well said upon the clause in the Act of 1815 as it is now, that any receipt acknowledging money to have been paid was covered by the words in question, for the words are—"Every receipt or discharge given for or upon a payment of money." Well, this document was given on or for a payment of money, and yet under the case of *Tomkins*, and but for the Act of 1870, it would have been found not to be within the injunction of the Legislature in regard to the stamp-duty. And this is a most important question, in the view that many of the documents on which stamp-duties are exigible may be stamped after their issue, but in regard to receipts within the same Act they are not stampable afterwards. It is said by the Lord Ordinary that this is all changed, and that the law must now be held to be, that receipts that acknowledge the payment of money, whatever the object of them may be, must be stamped, under section 120 of the new Act. He says—"I think it clear that these decisions proceeded upon grounds which are excluded by the terms of sec. 120 of the statute of 1870." I must say I cannot come to that conclusion with any satisfaction. And I find I am not alone in that matter. The English text-writers have not discovered that any such alteration has been operated by the Act of 1870. I have before me Mr Addison's book on Contracts, the edition of 1883, in which he deals with this matter. He first quotes the Stamp Act of 1870, sec. 120, and the words "'Receipt' means and includes any note," and so on; and then he ends the chapter by saying —"If the receipt bears to be an acknowledgment of the receipt of money, paid by way of gift and gratuity, and not in discharge of a debt, claim, or demand, it is not within the Stamp Act." And then in Mr Tildesley's book I find not the slightest reference to the Act of 1870 as being an enlargement to the extent contended for, or as bringing within its scope documents acknowledging the constitution of a debt. Therefore although we are perhaps left in bewilderment as to the true meaning of the words in question, I think they do not extend to or intend that a document which is purely constitutional of a money debt shall be held to be within the provision for stamping receipts, although they may bear within them a statement that the money which constitutes the debt has been received. I say I think that cannot be held. And I am the more inclined to come to this conclusion when I find that the real nature of this document is totally different from that of a receipt. The words indicating receipt of money are immaterial to the document in its true conception. It was meant to be an obligation for repayment, because a loan had been made to the party by whom the obligation is granted. It might have been quite as well expressed without any words being used to indicate the receipt of money. A loan might have been made in many other ways then by paying over money *in specie* to the grantee. It might have been done by an advance to a third party. Other variations in the mode might quite well have been adopted. It does not seem to me to be material that a receipt for money implies a loan. I do not think that would take the receipt out of the Stamp Act. That might be a question, and would depend on circumstances. But here there is no doubt at all; there was an acknowledgment of loan and nothing else. Lord Craighill suggests—and I think there is some strength in it—that although not raised within this case, still it is an agreement, and such an agreement as would have been constituted by an acknowledgment of loan, without any words of receipt. I repeat I think there is a great deal in that. But if it be only an agreement, it is stampable; and it probably should bear an agreement stamp before we can give effect to the views we have expressed. On the whole matter, I think the simple course would be to allow the parties a proof of their averments. The question as to the competency of the proof would come up during the trial. We are not allowing parole proof on a mere averment by one party We have on the record itself the acknowledgment, which Lord Young has referred to, that the document was granted. Therefore if, when the proof is led, the document is produced with an agreement stamp on it, I myself should be quite prepared to admit that as evidence, and so, I understand, is my brother Lord Young. I think it is not producible in evidence without any stamp at all.

Lord Rutherfurd Clark—Of course, if I am wrong as regards what the document is—if it is not a receipt in the sense of requiring a stamp—I do not see the least necessity for a proof, except in so far as it may be disputed that the document is genuine. What we have is a legal document

in the handwriting of the defender, in which he says—"I have received from you £400 in loan." Now, for myself, I do not see what the parties can go to proof upon, except upon this point, which is not in dispute, that the document is holograph of the defender. If it be not admitted to be holograph writing of the defender, of course a proof is required. If that is not in dispute, it seems to me that there is clearly an obligation to repay the money which he acknowledges to have received in loan.

WALLACE, for pursuer—That was our contention, if the document can be looked at all.

LORD YOUNG — That is not my opinion. I think there ought to be a proof. I had myself occasion—and the Court were unanimous on the question in a case in this Division recently—to express my opinion as to the distinction between a document of this character acknowledging a sum of money and a document containing an obligation—that the one was sufficient in the absence of evidence, and the other only an item of evidence in a question of loan—an essential item of evidence, but still only an item of evidence. In the case to which I refer — I cannot give a name to it at this moment—[*John Neilson's Trustees* v. *William Neilson's Trustees*, Nov. 17, 1883, *ante*, vol. xxi. p. 94]—we held against the document that the debt had not been established. If this document had contained an obligation to pay, it would have been a bond, and would have required a bond stamp. My opinion is that it requires no stamp, that it is a mere acknowledgment of a debt, which may be conclusive or not, according to circumstances. And I think a proof is eminently desirable here, because upon the pleadings of the parties, which may to a great extent dispense with the necessity of evidence, the advance or loan of money is admitted. The defender admits that he got the money in loan, and by his averment only raises the question whether he got it for himself or as agent for the Hydropathic Company; and it was in view of that that I took the liberty of saying that if there had been no document at all, I should have thought a shrewd question would have been raised as to whether parole evidence was not admissible to clear up the contradiction or discrepancy in their averments. The defender says in his first statement that he applied to Mr Welsh on behalf of the company for money to meet the demands of certain creditors, and Mr Welsh provided for that the sum of £400. And then he goes on to say that the money was with Mr Welsh's knowledge and approval paid over by the defender, who by the document acknowledges that he got it, for otherwise he could not have paid it over to the creditors of the company. Then he adds the explanation that the money was truly lent by Mr Welsh to the company, and it was arranged and agreed between the defender and Mr Welsh that it was to be regarded and treated as repayable by the company. I think it is eminently a case for proof, not as allowing parole evidence of a loan, but as allowing parole evidence of the nature which has frequently been allowed under such circumstances on the occasion of conflicting averments by the parties on the record as to the granting of a written document.

LORD JUSTICE-CLERK—I have already said the case is one in which the averments ought to be admitted to proof. There is no doubt at all that with the document by itself, or if it were received with the agreement stamp, the case would present a different aspect in regard to evidence than that which it would have presented if there had been no writing produced at all. Then there would only have been the admission on the record, and the question whether the qualifications were so intrinsic as to affect the result would probably appear on the evidence. I agree with Lord Young that the rule about not proving money payments by parole may not affect the question. The real object of the proof is to clear up the circumstances in which the alleged debt was contracted. But that is a delicate matter, or would be, if it were not for the document itself. If our opinions are right, it is quite within the power of the parties to produce it. I do not think that will import any perplexity into the trial of the case.

LORD CRAIGHILL — I have a great difficulty here, and all the more since I think this was a matter which was not seriously argued at the bar. The point taken into consideration was the document being unstamped—can it be looked at?—and the conclusion to which the majority of the Court have come is that when an agreement stamp is put upon it we may receive it. But I agree with Lord Rutherfurd-Clark, that once that document is presented, it is evidence of a loan, and evidence of a loan by the lender Welsh to the borrower, who at the time was manager of the Hydropathic Company. There is nothing in the name of the individual by whom the money was received to suggest that it was a loan to the Hydropathic Company. I do not know of what nature the parole proof to be brought forward may be, or whether there is ground for the apprehension that this document is to be changed in its character as an obligation on the part of the person who received the loan into one by which some other person than the borrower is to be made debtor. At the same time I hesitate to run counter to what has been suggested by your Lordship in the chair and by Lord Young as to the course of procedure. At the same time I could almost agree to it on condition that any proof which may be allowed should be before answer.

LORD JUSTICE-CLERK—I understood Lord Craighill to be of opinion that proof should be allowed. Probably we might postpone the allowing of proof until they have considered whether they shall have the document stamped as an agreement. My opinion is that it is an agreement, and might be so stamped.

LORD YOUNG —I have no objection, if that would meet Lord Craighill's objection—a proof before answer.

LORD CRAIGHILL—I agree to that.

The Court recalled the Lord Ordinary's interlocutor, and before answer allowed the parties a proof of their averments.

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