that he means to treat this as a breach of the engagement. There is not a particle of evidence here to show that the pursuer ever remonstrated with the defender or indicated to her that he would treat her marriage as a breach of her contract with him, for which he intended to claim damages.

I therefore think with your Lordship that the Sheriff has taken a right view of the evidence in this case, and that the appeal ought to be refused.

LORD KYLLACHY concurred.

The LORD PRESIDENT and LORD KINNEAR were absent.

The Court refused the appeal,

Counsel for the Pursuer—Rhind—Hay. Agent—William Officer, S.S.C.

Counsel for the Defender—H. Johnston—Baillie. Agents—Watt & Anderson, S.S.C.

Wednesday, March 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CAMERON *v.* HENDERSON AND OTHERS.

Marriage-Contract—Annuity to Widow—Whether Trustees discharged thereof—Unstamped Receipt — Presumption — Proof.

By an antenuptial marriage-contract the husband agreed to give an annuity to his widow of £100 during his mother's lifetime, and after her death of £250. The husband died leaving a trust-disposition and settlement executed before his marriage, and his trustees in terms thereof paid the whole income of the trust-estate, about £600, to his mother. The annuity provided by the marriage-contract was not paid to his widow, who continued to live in family with her mother-in-law till the death of the latter in November 1882. On 4th December 1882 the widow was present at a meeting of her husband's trustees. The minute bore that the law-agent explained the provisions in her favour as including, "(3) An annuity of £100 a-year so long as the late Mrs Panton was in life, commencing the first payment at the first term of Whitsunday or Martinmas after Mr Panton's death. This annuity Mrs Panton stated had not been paid directly to her, but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last." This minute was not signed by the widow.

In 1885 the trustees drew up a statement of annuities due to the widow, showing each half-year's annuity less income-tax from November 11th 1880 to May 15th 1884. The widow signed this statement under these words, "I acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees," &c. This statement was not holograph or tested, and it was not stamped.

In an action by the widow against her husband's trustees for the arrears of the annuity which she averred they had not paid to her during her mother-in-law's life, the trustees founded on this minute and statement as showing that their obligations had been implemented and their actings homologated.

Held that the minute being a mere narrative of what the trustees understood to be in the pursuer's mind at the time, and the statement of annuity being a receipt and unstamped, there was no legal evidence that the pursuer had received payment of her annuity or had discharged the defenders.

Malcolm M'Bryd Panton and Margaret Lawrie Latta were married upon 22nd July 1876. Upon 21st February 1876 they executed an antenuptial contract of marriage by which Mr Panton bound and obliged himself to "pay to the said Margaret Lawrie Latta in the event of her surviving him during all the days of her life while his mother is alive a free liferent annuity of £100 sterling, and after the death of his mother a free liferent annuity of £250 sterling, payable the said annuity of £100, and after the event foresaid the said annuity of £250, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payments of the said annuity of £100, and after the event foresaid of the said annuity of £250, at the term of Martinmas or Whitsunday that shall happen next after the death of the said Malcolm M'Bryd Panton for the half-year succeeding, and the next term's payment thereof at the first term of Martinmas or Whitsunday thereafter for the half-year succeeding, and so forth half-yearly and termly during the lifetime of the said Margaret Lawrie Latta, with a fifth part more of each of the said termly payments of liquidate penalty in case of failure, and the interest of each of the said termly payments at the rate foresaid from and after the term of payment thereof during the not-payment. But declaring always that if the said Margaret Lawrie Latta shall enter into a second marriage then and in that event the said annuity of £100 shall be and is hereby restricted to a free liferent annuity of £50, with corresponding interest and penalty payable as aforesaid, and the said annuity of £250 shall be and is hereby restricted to a free liferent annuity of £125 sterling. After marriage they continued to live in the same house with Mrs Panton senior. One child was born of the marriage. Mr Panton died on 23rd June 1880. He left a trust-disposition and settlement dated 14th June 1866, in which, *inter alia*, he directed his trustees "to hold and apply the whole

residue and remainder of his means and estate for the use and behoof of his mother in liferent. After her death the estate was to be divided into eight shares and disposed of as he directed in the deed. In a codicil written after his marriage, and dated 29th July 1879, he directed his trustees in the event of his death leaving issue, which event happened, to hold the residue of his estate for behoof of his whole children. After Mr Panton's death his widow and her daughter continued to live with Mrs Panton senior until that lady's death on 16th November 1882, and during this period Mr Panton's trustees paid the whole income of his trust-estate, about £600, to Mrs Panton senior. They made no payment directly to the widow in satisfaction of her annuity, and she made no demand for it.

On 4th December 1882 the late Mr Panton's trustees met, and Mrs Panton was present. The minute of meeting bore that the law-agent explained her provisions under the marriage-contract as including "(3) An annuity of £100 a-year so long as the late Mrs Panton was in life, commencing the first payment at the first term of Whitsunday or Martinmas after Mr Panton's death. This annuity Mrs Panton stated had not been paid directly to her, but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last." The minute was signed by the trustees but not by Mrs Panton.

In 1885 the trustees drew up a statement of annuity due to Mrs Panton under the marriage-contract showing each half-year's annuity with income-tax deducted, from 11th November 1880 to 15th May 1884. Mrs Panton signed this statement under these words, "I acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees of the late Malcolm M'Bryd Panton." This statement was not holograph of Mrs Panton or tested, and it was not stamped.

On 14th August 1883 Mrs Panton married the Rev. H. P. Cameron, then minister of Milton Parish Church, Glasgow. The marriage proved an unhappy one, and Mrs Cameron on medical advice went to Manitoba in April 1885. She returned to Scotland in 1888, but in July of that year was seized by severe illness from which she did not recover until February 1889. She entered into a contract of voluntary separation from her husband in March 1889.

Upon 23rd May 1890 she brought an action against Robert Henderson and others, the sole surviving and accepting trustees, original and assumed, of her late husband, for payment of £250, being five half-years' annuity alleged to be due to her from 11th November 1880 till 11th November 1882, the time between the death of her husband and the death of his mother. She attributed her delay in bringing the action to her misfortunes and ill-health since 1883.

The trustees founded on the minute of meeting and statement above quoted, and averred that their obligations had been implemented by them, and discharged by the pursuer.

The pursuer averred—"After the death of the said Malcolm M'Bryd Panton, and during the time the pursuer and her mother-in-law lived together, the pursuer repeatedly asked Mrs Panton for payment of her said annuity, but she was never paid same. During this time, also, the pursuer defrayed, out of her own private means, her own and her daughter's personal expenses. The pursuer was ignorant, and continued to be so until shortly before the raising of this action, that she had a claim against the defenders for the instalments of her annuity now sued for, and that the same ought to have been deducted by the defenders from the entire income of the trust-estate before said income was paid over to Mrs Panton. The statement of annuity referred to in the answer is not holograph of the pursuer, nor tested. It was put before her by the law-agent of the defenders a day or two before she sailed for Canada, without explanations of any kind, and she was not aware that it referred in any way to the instalments of annuity now sued for. The pursuer specially denies that she, at the meeting of trustees in question, or at any time, agreed to set off or discharge her said annuity."

Upon 1st November 1890 the Lord Ordinary allowed a proof before answer.

"*Opinion.*—. . . Mrs Panton senior died on 16th November 1882. The defenders have produced receipts for payment of the annuity of £250 since her death. The series of receipts is not quite unbroken, but there are more than three consecutive receipts. The defenders plead that, in respect of these payments, she ought to be held to have discharged all arrears. She pleads the *apocha trium annorum*, and it was maintained that the presumption of payment thence arising could only be elided by the writ or oath of the debtor. While I think the defenders are entitled to the benefit of the presumption, I think their plea goes too far.

"I consider that the presumption may be redargued by evidence—*Cockburn* v. *Stuart*, 1669, M. 11,398; *Buccleuch* v. *M'Leish*, 24th June 1845, 7 D. 927; Tait on Evidence, 472; Hunter on Landlord and Tenant, ii., 445. The case of *Hunter* v. *Kinnaird's Trustees*, 5th March 1829, 7 S. 548, appears at first sight to favour the defenders' contention, where, in defence to an action for arrears of rent, discharges of rent for five consecutive years were produced, and Lord Corehouse, Ordinary, assoilzied the tenant, in respect the landlord did not offer to prove that the arrears were due by the writ or oath of the tenant. But that case presented this peculiarity, that each receipt bore to be for the balance of the rent, thereby, as observed by Lord Balgray in the Inner House, 'necessarily implying that the balance had been ascertained, struck, and settled.' If this opinion be read along with the report in the Faculty Collection, it would rather appear that the

proof was limited to the writ or oath of the debtor, rather because the receipts by their terms implied a settlement of all balances of rent than because of the force of the presumption arising from three years' consecutive payments.

"While I hold that the defenders are entitled to this presumption, I have not thought it necessary to affirm it at present in any finding which might possibly be embarrassing, partly because I am unable to affirm any plea of the defenders on the point.

"There are other defences, but it does not appear to me that they can receive effect at this stage."

The pursuer deponed—"(Q) At that meeting did you state that you were willing to let the annuity—that is the arrears of annuity—be set off against your maintenance with your mother-in-law prior to the term of Martinmas then last?—(A) No, I did not. (Q) Did you ever at any time agree to set off or discharge the past-due terms of annuity?—(A) No, never. At that time I thought that Mrs Panton, my mother-in-law, should pay the annuity, and on many occasions during the time that I lived with her between my first husband's death and her own death I had asked her for payment of it. She always put me off from time to time, saying, 'I cannot afford it.' As matter of fact she never paid me. During the time when I was living with my mother-in-law I had received nothing from the marriage-contract trustees or anyone else towards the support of my daughter. My own personal expenses and those of my daughter were defrayed by me out of the rents of certain property which I had through my grandfather."

Cross—"(Q) Did you not say to them that that being so you were willing to let the annuity be set off against your maintenance prior to the terms of Martinmas 1882?—(A) I never mentioned these words or anything equivalent to them. I never said that I did not claim arrears of annuity. The annuity must have been spoken about then, because the papers were all read, but I don't remember hearing it distinctly brought forward. Mr Panton, my first husband, explained to me that I was to get £100 a-year during his mother's life. I understood that that was to be paid to me by his mother, but she did not pay it. After she was gone I thought that my claim was gone. (Q) While she was living did you understand that she would pay it by giving you and your child board and lodging?—(A) No, I asked her for it over and over again. . . . That document [the statement of annuities] is signed by me. I don't think the rest of the document is in Mr Cowan's handwriting; it is not so good. I don't know in whose handwriting it is. I have read the words at the foot. The £516 set forth there seems to include the half-year's annuity sued for in this action. (Q) Is it the case that these annuities were duly accounted to you?—(A) It is not. I signed that document without ever reading it. I signed it in Mr Cowan's office one day shortly before I went to Manitoba. I was asked by Mr Cowan to sign it. I had gone there about business in connection with our leaving for Canada. It had reference to money matters. . . . Mr Cowan did not speak to me about arrears of annuity. I was just about to leave the office when he said, 'By-the-by, you had better sign this.' When I asked him what it was, he said, 'Oh! it is for the satisfaction of the trustees.' He told me it was about the annuity. I said I had given receipts, and it was not necessary. He said it was of no consequence, but that it was for the satisfaction of the trustees. That was all. (Q) When you said you had given receipts, did Mr Cowan say anything as to what the receipts were for, and what this document was for?—(A) No. There had been nothing said about the annuity before that. Mr Cowan just spoke to me about this paper as I was going out. He seemed to have had the paper ready, and had almost forgotten to ask me to sign it . . . In referring to the receipts I said to Mr Cowan, 'I cannot see that there is any necessity for signing this paper, because I have given you receipts for my annuity.' (Q) How did you come to say that?—(A) Because I did not see the use of signing twice for the same thing. I did not read any part of the document."

The trustees deponed that they understood she had agreed to give up her claim to the arrears of her annuity as a set-off to the aliment she had obtained in her mother-in-law's house.

The defenders produced separate receipts for payment of the pursuer's annuity since the death of Mr Panton senior.

The Lord Ordinary upon 6th January 1891 pronounced this interlocutor:—"Finds (1) that the pursuer is the widow of Malcolm M'Bryd Panton, who died on 23rd June 1880, leaving a trust-disposition and settlement, and that the defenders are his trustees; (2) that the pursuer was entitled, under her marriage-contract, to an annuity of £100 per annum during the life of her husband's mother, and to an annuity of £250 after her death, subject to restriction in the event of a second marriage; (3) that the said Malcolm M'Bryd Panton directed his trustees to pay the income of his estate to his mother; (4) that the pursuer and her daughter resided in family with Mrs Panton senior until her death on 16th November 1882; (5) that Mr Panton's trustees paid the full income of his estate to his mother during her survivance of him; (6) that the pursuer, while resident with her mother-in-law, did not demand and did not directly receive payment of the said annuity; (7) that at a meeting of Mr Panton's trustees held on 4th December 1882, the pursuer agreed to hold her maintenance by her mother-in-law as an equivalent for her said annuity; (8) that thereafter, and till immediately prior to the raising of this action, Mr Panton's trustees paid to the pursuer the annuity due to her under her husband's marriage-contract, and that she granted receipts therefor: Finds that in these circumstances the pur-

suer must be held to have discharged her claim for her annuity during the period of her residence with her mother-in-law: Therefore assoilzies the defenders from the conclusions of the action, and decerns.

"*Opinion.*— . . . . . After careful consideration I have found myself unable to sustain the pursuer's claim.

"She had undoubtedly a good claim against her husband's trustees for her annuity. They could not have resisted her demand for it. But it is to be noticed that the payment of it was not imposed on them as a special trust duty. She did not demand her annuity while her mother-in-law was alive, and it has never been paid to her directly. Further, I think there is nothing in process which can be received as a written discharge of the annuity during the period in question. The document No. 14 of process bears to acknowledge that it has been accounted for; but I have great difficulty in accepting that document as a discharge or receipt or acknowledgment. If it be put forward as a receipt or discharge, it would, I apprehend, require to be stamped. But it is not holograph nor tested, and although the pursuer has admitted her signature, I think her admission must be taken with the qualification she attached to it, namely, that she did not duly understand it. It is, besides, rather fictitious, and does not represent the facts as they occurred. It acknowledges the annuity half-yearly under deduction of income-tax when in fact it never was paid at all. Had Mr Cowan been alive, and had he explained the circumstances, the case might have been different. As matters stand, I do not proceed on the document.

"The unfortunate circumstances attending the pursuer's second marriage, the condition of her health, and her absence abroad afford some explanation of her delay in bringing this action, and some excuse for it; and cases might readily be imagined in which the presumption arising from consecutive termly discharges might be more conclusive than in this case.

"I have much more difficulty in accepting the pursuer's explanation that she did not fully understand the nature of her right to this annuity. Her husband had told her of it. She knew that her annuity after her mother-in-law's death was payable by her husband's trustees, and it is not easy to see how she took up the idea that during her mother-in-law's life it was payable by her and not by the trustees. Besides, it is not explained why, if she thought so, she made no demand for it against her mother-in-law's trustees.

"I consider that the case of the defenders depends on the circumstances set forth in the minute of the trustees of 4th December 1882. The pursuer lived with and was maintained by her mother-in-law. She knew that Mrs Panton senior was receiving the whole income of Mr Panton's estate, and she made no objection. It was very fair and reasonable that she should hold that the trustees had practically paid her annuity when they paid the whole income of the estate to her mother-in-law with whom she and her daughter lived in family. It was practically a payment to her, and I think if it be proved by parole that she assented to that arrangement, that such proof, taken along with the consecutive discharges for subsequent termly payments, will competently and sufficiently instruct a discharge.

"The minute of meeting bears that Mr Cowan explained the pursuer's rights under her marriage-contract, and that she stated her willingness to allow her claim for arrears of annuity to stand against her maintenance. The three trustees who sign the minute depone to its substantial accuracy, although naturally they cannot speak to precise words. The evidence of Mr Lyon, who was one of Mrs Panton's trustees, is not it is true so satisfactory. But he is eighty-seven years old, and could not be expected to recollect precisely the details of a meeting in 1882.

"I am unable to hold the pursuer's evidence as meeting that of the three trustees. There cannot be any doubt that Mr Cowan went over the provisions in the marriage-contract. It is not a complicated deed, and the provisions in favour of the pursuer are clearly and simply expressed. I am really unable to accept the pursuer's explanation that she did not understand them. She is a lady of intelligence and clear apprehension as to matters of business, and I must think that in this matter her recollection is at fault. It would, considering her misfortunes and her illness, be no wonderful matter if it were, and the fact that she really did forget having received the £100 of aliment should not be left out of account.

"It is much to be regretted that Mr Cowan's evidence has been lost. The action no doubt was raised while he was alive, but his evidence would have been available but for the delay in the pursuer's claim. There can be no doubt about his view on the whole matter, for he was the author of the minute, and perhaps it is not going too far to say that Mr Cowan's character and professional standing exclude all doubt as to the minute expressing the facts as he understood them.

"On the whole, I think it proved that the whole liferent of Mr Panton's estate was paid to Mrs Panton senior, with the knowledge of the pursuer; that the pursuer knew that she was entitled to £100 a-year out of this liferent; that she received it practically and substantially, although not directly; that she verbally agreed to accept her maintenance in her mother-in-law's house as an equivalent for her annuity; and that she afterwards for a period of eight years received and discharged her annuity; and I am of opinion that these circumstances amount to a discharge of the annuity during the period of her residence with her mother-in-law.

"When allowing a proof, I expressed the opinion that the receipt for so many consecutive years of the annuity gave rise to a presumption of discharge or satisfaction. That there is such a presumption is, I think,

settled by authority, and it appears to me that the true question in this case is, Has that presumption of satisfaction or discharge been displaced? I think not. The pursuer has proved, no doubt, that she did not receive the annuity directly, and I have held that it has not been shown that she gave a written discharge; but the presumption of law cannot possibly be a presumption in favour of a written discharge, but in favour of a verbal or implied discharge. I consider that the weight of the evidence is not against, but is strongly in favour of such a discharge, and that the defenders are therefore entitled to absolvitor."

The pursuer reclaimed, and argued—She was entitled to these arrears of her annuity as they had been provided for her use by the marriage-contract, and had not been paid to her. The claim was made as a debt against the testamentary trustees as the trust-estate was the only fund left by Mr Panton to pay his debts. The only defence made by the trustees was that the pursuer had agreed to hold that payment to her mother-in-law was to be taken as payment to herself, but they had no writing to that effect as the minute of the meeting on 4th December was not signed by the pursuer. The pursuer denied that she ever agreed to homologate the trustees' actings, or give up her claim to the arrears, and the parole evidence did not bear out the defenders' contention. On the face of the deeds it appeared that everything was left to Mrs Panton senior, and therefore the pursuer thought she was to get the annuity from her, and repeatedly asked her for it. The alleged receipt signed by her was not stamped, and therefore could not be looked at by the Court. No doubt the pursuer had signed receipts for her annuity after this meeting for several years without making any protest, but the unfortunate circumstances in which she was placed by her second marriage, and her ignorance of her rights, were sufficient to explain that matter.

The defenders argued—Discharge of a debt was to be presumed, among other things from the actings of the parties. Here the minute of the meeting on 4th December 1882, and the acknowledgment given by the pursuer in April 1885, were enough to show that the payments made to the mother-in-law must be taken as homologated by her—*Irvine* v. *Lang*, March 6, 1840, 2 D. 804. But it was competent to prove this by parole evidence—*Henry* v. *Miller*, March 18, 1884, 11 R. 713. The evidence was sufficient to establish that the pursuer agreed to give up her claim for arrears of annuity. Payment could be presumed from circumstances—*Russell's Trustees* v. *Russell*, December 11, 1885, 13 R. 331. The acknowledgment of April 1885 was good evidence although not stamped—*Steven* v. *Pirie*, 10 S. 279; *Arnot* v. *Countess of Orkney*, March 6, 1611, M. 16,960; *Rule* v. *Aiton*, June 11, 1628, M. 16,961. It was not a receipt but a fitted account—*Fell* v. *Rattray*, January 28, 1769, 41 S.J. 236. A receipt for a legacy neither holograph nor tested after proof that the signature was genuine had been held competent evidence of payment—*M'Laren* v. *Howie*, November 6, 1869, 8 Macph. 106. The signature to this acknowledgment was admitted to be that of the pursuer, and it must be taken as good evidence of payment to her. This claim was not made till eight years after the proceedings upon which the defenders founded had taken place, and the person who could best have explained the whole matter, Mr Cowan, was dead, so that perhaps the evidence was not so clear as could be desired; but ever since that time the pursuer had received payment of her annuity half-yearly, and given receipts for it, without making a protest or claiming the arrears she now did. That was sufficient to bar her from recovering—*Hunter* v. *Lord Kinnaird's Trustees*, March 5, 1829, 7 S. 548; *Duke of Buccleuch* v. *M'Turk*, June 25, 1845, 7 D. 927.

At advising—

LORD JUSTICE-CLERK—This is a somewhat curious case. It appears that Mrs Panton, the pursuer, after her husband's death, continued to live with his mother so long as that lady lived, and during that time she did not demand from her husband's trustees payment of an annuity of £100 which was due to her during her mother-in-law's lifetime, and after her death was to be increased to £250. Now, the mother-in-law was well enough provided for—I think she had about £600 a-year—and it could hardly be suggested that she intended to get this £100 a-year, and keep it as against her daughter-in-law's aliment. There is at least no evidence that any such thing was intended.

It appears that in 1882 the trustees held a meeting at which Mrs Panton was present, and questions arose as to her rights, and what money she was to receive. There was a question of mournings and a question of interim aliment. The mournings she had got, but she had not received the interim aliment, and the trustees agreed to pay it to her. Then the minute goes on—"(Third) An annuity of £100 a-year as long as the late Mrs Panton was in life, commencing the first payment at the first term of Whitsunday or Martinmas after Mr Panton's death. This annuity, Mrs Panton stated, had not been paid directly to her; but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last." Now that is the statement in the minute, and it is signed by the three trustees only who were present at the meeting. If Mrs Panton was to be bound by the statement in the minute, and was willing to be bound by it, there would have been no difficulty in getting her effectually bound by writing a couple of lines at the end of the minute, and getting her to sign them. Everybody will admit that if that was really the arrangement come to at the meeting, and the matter had been carried out in a business-like way, something of that sort would

have been done. But I think that this minute is a mere narrative of what the trustees understood to have been in the mind of Mrs Panton at the time, and I do not think that she is bound by it. It is certainly not a discharge to the trustees.

But then it is said that her claim is barred by the lapse of time that has taken place. That however tells as much against the trustees as against the pursuer, because if the matter had been carried out in a business like manner there would have been no question of difficulty created by the lapse of time.

The next thing we find is that Mrs Panton puts her name to an account which we have had before us. We have had a great deal of argument as to whether this is a receipt or not. The defenders maintain that it is not, but they found on it as a settlement of accounts. My opinion is that if this document is anything it is a receipt, but if it is a receipt it is entirely invalid. Then it was said that this document was of the nature of a fitted account; in my opinion there is nothing of that nature about it. It is headed, "Statement of the Annuity due to the Widow of the late Malcolm M'Bryd Panton, under the Contract of Marriage between them." That is just the sort of heading that would be put at the top of an account which is to be settled and receipted; then follows at the bottom a list of the half-yearly payments of the annuity of £100 with income-tax deducted, and these words, "I acknowledge that my annuity as above detailed has been duly accounted for to me." I take that to mean only that her annuity had been duly paid. There is nothing of the nature of a docquetted account about it. That being so, I do not think that this is a receipt upon which the defenders can found. Therefore as they cannot show any writ entitling them to say that the pursuer has discharged them, as they have no writ and cannot get Mrs Panton to say that the annuity was actually paid to her, they cannot succeed. I think it has not been proved that Mrs Panton has either received this annuity or discharged the trustees.

LORD YOUNG—I am of the same opinion. The issue is a simple one. The pursuer sues her deceased husband's trustees for the amount of five half-years' annuity due to her under the marriage-contract. There is no question but that the annuity was well constituted, and that the money for these terms was due, and is still due to the widow, unless it has been paid to her or otherwise satisfied. Neither is there any question that the trustees are the debtors if the money is still due. Then the question is this one only, Have these terms of the annuity been paid to her? It is not suggested that they were paid to her personally. Then were they paid to any other person with her authority? It is not suggested that they were. They were paid to her mother-in-law, but it is not said that the trustees had any authority to pay them to her mother-in-law. Then lastly—and this concludes the cases that may be imagined—the trustees say that they paid the annuity to the mother-in-law, and that the pursuer subsequently ratified the payment, so that they must be held to be as good as if they had been made to herself. That is the only issue in the case.

Is that issue proved. I do not think there is any evidence in the case sufficient to prove the contention of the trustees. No doubt there is some parole evidence that the pursuer stated by word of mouth what is embodied in the minute of the meeting of trustees—"This annuity Mrs Panton stated had not been paid directly to her, but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last." I am not at all satisfied with the evidence that she was willing to set off the payment of her annuity against her aliment, I think there is no proof of ratification.

A document was produced which has given rise to a good deal of discussion. That document is in the form of a statement of the annuity due to the pursuer, with a docquet on it signed by her dated 18th April 1885. That account contains a statement of the annuity due from 11th November 1880 to 15th May 1884, amounting to £516, 19s. 8d. This account, therefore, does not include all that is sued for, and it includes a great deal which is not sued for, and which was paid to herself and her own receipt granted for it. Now what does she say at the end, "I duly acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees of the late Malcolm M'Bryd Panton." That looks like a receipt. The only question therefore is, whether there has been payment of the money? This is the only receipt the trustees have for the payment of the sums now sued for, it is a receipt or nothing, but it is not stamped, and therefore we cannot look at it as a valid receipt. I think, however, it was not intended as a receipt but as a ratification. It is curious that it is useless as a ratification of the greater part of the account, because the trustees had receipts for those amounts under her own hand. I cannot look upon it as a ratification of what the trustees had done with the terms which are now sued for; it therefore follows that in my opinion the pursuer is entitled to decree.

LORD RUTHERFURD CLARK—In my opinion the pursuer is entitled to succeed. The constitution of the debt is not disputed, the only question is, whether the debt has been discharged? There was no written evidence of discharge produced except this document with the docquet attached. I hold that that was a receipt only falling within the definition given in the Stamp Act, and cannot be looked at from the want of a stamp. There is, therefore, no written evidence of payment or discharge.

Is there then any legal evidence that the pursuer has discharged the debt? The question on this part of the case was, whether the pursuer had homologated the payments of her annuity to her mother-in-law and accepted them as having been properly made to herself. I have great doubts whether parole testimony is permissible on such a subject. If the payments which the trustees made had been alleged to have been made after the verbal agreement had been come to, that might have been provable by parole testimony, but we have no such case here. The payments were made by the trustees without the pursuer's authority, and the question was whether she had ratified them. I must say again that I have doubts whether parole testimony is competent to prove such a thing, but apart from that I am clearly of opinion that there is not sufficient proof of ratification.

LORD TRAYNER—I agree in the result and in the reasoning. It was admitted that these terms of the annuity were due to the pursuer if they had not been paid; the only question was whether they had been paid. It is clear that there is no competent written evidence of payment, and it was not suggested that they had been paid to herself. The defence was that the trustees had paid the annuity away to somebody else, and that the pursuer afterwards ratified their deeds. I think that that defence fails, and therefore I concur with your Lordships.

The Court recalled the Lord Ordinary's judgment, and gave decree in terms of the conclusions of the summons.

Counsel for the Reclaimer—Asher, Q.C.—Aitken. Agent—W. A. Hyslop, W.S.

Counsel for the Respondent—C. S. Dickson—Grey. Agents—Ronald & Ritchie, S.S.C.

Wednesday, March 18.

SECOND DIVISION.

(Before Seven Judges).

[Dean of Guild Court, Edinburgh.

WATT *v.* BACKHOUSE (BURGESS'S TRUSTEE).

Property — Common Property — Common Interest — Tenement in Burgh — Attic Floor—Roof—Ownership of Roof—Title.

Held that the proprietor of a top flat in a tenement in burgh was not entitled, against the will of the other proprietors, to warrant to dismantle his flat and build two storeys in place thereof, although it was not proved that injury to the flats below would result.

The proprietors of a building lot in burgh built thereon a tenement consisting of a basement and shop flats, and three upper flats. They sold the second flat above the shops and the attic storey, and bound the disponee to relieve them of 1s. of feu-duty, and to pay one-fourth of the expense of upholding the roof. This property was separated, and the attic storey was disponed along with a cellar and right to the water-pipe in common with the other proprietors, under burden of 6d. of feu-duty and one-eighth part of the expense of upholding the roof. The proprietors of the tenement disponed the other flats to other persons with similar titles, and retained a part of the basement in their own hands. The proprietor of the attic craved warrant from the Dean of Guild to turn the attic floor into a square storey and erect another square storey on the top of it. He was opposed by the proprietors of the lower floors. It was reported to the Dean of Guild that if the petitioner took certain precautions no injury would result from the proposed operations to the lower flats.

The Court *refused* the petition, in respect (1)—*dub.* Lord Trayner—that, considered as a question of contract, when the tenement was divided, the bargain of each buyer was for one flat in the tenement, and the petitioner's claim amounted to a claim to more than that; (2) that considered as a question of real right, the proprietor of the undivided tenement, who had a right of indefinite extension of his property, parted with that right in the petitioner's case to the limited extent of conveying to his predecessor one stratum of the property; that a conveyance so defined carried nothing but the property conveyed, the rest remaining with the disponer, against whose will therefore there was no power in the petitioner to extend his right.

Between 1799 and 1804 Mr and Mrs Fell erected a tenement now numbered 13-19 South St David Street in Edinburgh. In 1804 Mr and Mrs Fell sold to John Cockburn "these two dwelling-houses or flatts, being the second flatt above the shops and the attic storey" of this new tenement, "with two cellars and a necessary house, and a right to the water-pipe in common with the other proprietors, under burden of payment of one shilling of feu-duty and a fourth part of the expense of upholding the roof of said tenement." After various transmissions the attic storey was conveyed by the trustees of the late Mordaunt Gray to Thomas Watt, saddler, in 1889, in terms similar to those just above quoted, and the disponee was taken bound to pay sixpence as his proportion of the feu-duty and one-eighth part of the expense of upholding the roof, and to maintain and keep in repair the pavement above the cellar. In 1815 Mr and Mrs Fell sold two of the shops in the tenement to Henry Duncan junior, who was bound to pay a sixth part of maintaining the roof. Of this tenement a dwelling-house and two shops and perti-