with unreasonable conditions. But if it be such an offer as the deserted spouse cannot reasonably be expected to accept, then it will not form a defence to an action of divorce otherwise well founded.

"I think it proved in this case that in 1878 the defender maliciously deserted her husband without reasonable cause, and continued in malicious desertion for twenty years, seeing that she has not appeared to put any other colour on her conduct. If the law requires (which I doubt) that the pursuer should call on her to resume cohabitation, then he did so at intervals for two years and a half; and when she offers to resume cohabitation without full explanations as to her absence, which I take her offer to have been, then I think that was not a reasonable offer with which any husband could be expected to be satisfied. It may have been the law that the pursuer of a divorce was to be held as at all times ready to adhere, but I am of opinion that that cannot be held to be the law since the Conjugal Rights (Scotland) Amendment Act was passed."

Decree of divorce was granted.

Counsel for Pursuer—M'Lennan. Agent—W. Patrick Crow.

Friday, June 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DAY *v.* GLAISTER.

Revenue—Stamp—Receipt—Memorandum Endorsed on Specification for Contract—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *sec.* 101—*Payment—Proof of Payment.*

By the Stamp Act 1891, sec. 101, the expression "receipt" is declared to include "any note, memorandum, or writing whereby any money amounting to £2 or upwards . . . is acknowledged or expressed to have been received or deposited or paid."

D. and G. by joint adventure entered into a contract for the construction of certain waterworks. G. collected the instalments of the contract price, granting receipts to the employer, and accounted to D. for his share. The parties kept no business books, but the sums received by each were noted upon the specification for the contract. In an action by D. against G. for payment of £60, G. alleged in defence that he had paid this sum to D. *Held* that a memorandum endorsed on the specification and signed by D., "Received the sum of £60 st.," was not a receipt within the meaning of section 101, and therefore did not, under section 103, require to be stamped, and that it was competent evidence against D. that he had received payment of the £60 in dispute.

This was an action brought in the Sheriff Court at Lanark at the instance of William Day against Andrew Glaister, concluding for payment of £81, 4s. 5d. The parties, who were both contractors carrying on business separately in Lanark, entered into a joint contract with the District Committee of the Upper Ward of Lanarkshire for the construction of certain waterworks at Kirkfieldbank. The sum sued for was the balance of the share which the pursuer alleged to be due to him in respect of the execution of the said contract, and which had been collected by the defender from the County Council. The defender admitted the pursuer's claim to the extent of £21, 4s. 5d., but averred that he had on 19th October 1897 paid him the balance of £60. This was denied by the pursuer. In a counter action at the instance of Glaister against Day with reference to another contract Glaister credited Day with the sum of £21, 4s. 5d., which he admitted to be due.

A proof was taken on 2nd November 1899. From the evidence it appeared that although the parties offered for the work jointly each did his separate portion. The defender had the larger interest, and generally collected the instalments of the contract price, thereafter paying over to the pursuer a sum which roughly represented the latter's share. Neither party kept any business books, and the only record of the transactions between them consisted of certain entries or memoranda made upon the back of the specification for the contract, of the sums received by each in respect of his share. Among these there was an entry in the following terms—"Received the sum of £60 st. to account on Kirkfieldbank Waterwork. Oct. 19th 1897. William Day and Sons." It was proved that on that date the defender collected an instalment of £100, and he founded, *inter alia*, upon this entry as instructing the payment by him to the pursuer of the £60 in dispute. Several similar notes, of date prior to the 19th October 1897, were made and signed by the parties, and with regard to these no question arose.

The pursuer deponed with regard to the entry of 19th October—"The third (*i.e.*, the entry in question) is not mine. I am not aware of signing it. It looks like my signature. I cannot point out any particular thing about the signature which causes me to say that it is not mine. The reason why I say it is not mine is that at that time I know I did not get any money from Glaister." The defender deponed—"I would not have paid Mr Day his share of the money without getting his acknowledgment for the money. I would not have been content with a note in my own handwriting that he had been paid. If instead of having it endorsed on the specification I had noted it in a book, although I had made an entry in my own writing in my cash-book, I would also have required a receipt from Mr Day. I suppose if I had got a receipt from Mr Day it would have been very much in the same terms as the indorsements on 7/1 of process."

It was contended on behalf of the pursuer that the entry of 19th October, being a receipt within the meaning of the Stamp Act, and being unstamped, could not be

received as evidence of the payment to him of the £60.

The Sheriff-Substitute (FYFE) repelled the objection, and on 11th November 1899 pronounced an interlocutor finding that the payment of the £60 was proved; and in respect that the defender credited the pursuer with the £21, 4s. 5d. in the counter action, assoilzied him from the conclusions of the action.

The pursuer appealed to the Sheriff (BERRY), who on 6th March 1900 recalled the interlocutor of the Sheriff-Substitute, found that in respect the memorandum of 19th October was unstamped, it could not be looked at as instructing the receipt of the £60 by the pursuer, and found that the payment in question was not proved. He accordingly decerned against the defender for £30, 2s. 8d., being the difference between the said £60 and a sum of £29, 17s. 4d. admittedly due by the pursuer.

The defender appealed to the Court of Session, and argued — The Sheriff was wrong in refusing to look at the memorandum of 19th October. That document was not a receipt within the meaning of section 101 of the Stamp Act. It was true the words of the Act were very wide—"Any writing whereby any sum of money is acknowledged or expressed to have been received or deposited or paid." But if taken literally, that would include an entry in a man's own books, which was clearly not intended. The words must be limited to a writing of the nature described, passing from one person to another. The memorandum was not of that character; it was really a note in Day's own book of the sums received by him under the contract, for the specification was as much his as Glaister's. A receipt for the money had been already granted to the proper debtor, viz., the County Council. The fact that Glaister said that he regarded it as a receipt could not alter its legal character. If it was not a receipt, then it did not require a stamp, and was habile evidence of the payment of the £60 in dispute. — *Fraser* v. *Bruce*, November 25, 1857, 20 D. 115; *Finney* v. *Tootell*, January 28, 1848, 5 C.B. 504; *Fell* v. *Rattray*, January 28, 1869, 41 Scot. Jur. 236; *Welsh* v. *Forbes*, March 18, 1885, 12 R. 851.

Argued for the respondent—The document in dispute was in express terms a receipt, and fell within the definition of section 101. It was granted by one party to the other, as an acknowledgment of money received; and Glaister's evidence was that he regarded it as a receipt. No doubt proper entries in a firm's books were admitted as evidence without a stamp; but the specification was as matter of fact kept by Glaister, and it could not be regarded as Day's book. Moreover, it did not contain all the transactions between the parties.—*Cameron* v. *Panton's Trustees*, March 19, 1891, 18 R. 728.

At advising—

LORD JUSTICE-CLERK—[*After stating the circumstances giving rise to the case*]—On the back of the specification of the work to be done by the two contractors jottings were made by them, which took the form in words of acknowledgments of money received, but without any indication of whom it had been received from. The dispute in this case relates to a sum of £60, which appears from the evidence to have been part of a sum of £100 which had been paid to Glaister, and which to the extent of the £60 Glaister says that he handed to Day. It is said that the passing of this sum of £60 cannot be proved against Day, because the memorandum with regard to it upon the back of the specification is a receipt and cannot be referred to because it is unstamped. The words of the Stamp Act are wide, but they are capable of construction, and I am quite unable to hold that this is a receipt in the sense of the statute. It is certainly not a receipt to the person who is due the money. It is just a jotting by Day in what is practically his own business book. Day does not actually deny that the signature is his, but he says that he cannot have signed it, because he does not remember having received the money. I therefore think that the judgment of the Sheriff-Substitute is right and should be reverted to. This is not a document which required a stamp, and it is therefore admissible as evidence against Day that the sum in question came into his hands just as an entry in a book of his would have been.

LORD YOUNG—Having had an opportunity of reading Lord Trayner's opinion, I have only to say that I concur in it, and find it unnecessary to add anything.

LORD TRAYNER—I am satisfied that the writing or memorandum endorsed on No. 7/1 of process, dated 19th October 1897, is the genuine endorsement of the party Day, and further that of that date he received the sum of £60, as the endorsement bears, to account of his claim against the County Council for work done in connection with the Kirkfieldbank water-works. But as Day claims that sum now from Glaister, the question arises, whether the Court can look at the endorsement as evidence of the fact that Day received the money, it not being stamped. Day contends that it is a receipt within the meaning of the Stamp Act 1891, and therefore requiring a stamp to make it available as evidence.

The terms in which the Stamp Act defines or describes a receipt are very broad and comprehensive. But they are open to construction and may from the context admit of qualification. When the statute says that a "receipt" shall include "Any note, memorandum, or writing" whereby any sum of money amounting to £2 or upwards "is acknowledged or expressed to have been received or deposited or paid," it is obvious that the language is capable of covering more than it was intended to express. For, if taken literally, it would cover and include any note or memorandum which a man might make in his own books acknowledging the receipt of £2 or upwards from another. This is plainly not intended by the Act. An entry in his cash book

made by A to the effect that he had received £60 from B would fall within the words of the Act descriptive of a receipt, but are plainly not within its intention or meaning. It appears to me that what the statute provides for is limited to any note, memorandum, or writing given by one person to another, to be retained by the recipient as his voucher, either of the discharge of a payment made, as in the ordinary case of payment of a debt, or acknowledgment of an obligation undertaken in respect of the receipt of money, as in a deposit. The 102nd and 103rd section of the Act appear to me plainly to refer to "receipts" which have passed from one person to another, and these are, in my opinion, the kind of notes or memoranda to which section 101 alone refers. If the writing in question was of that character, I should, of course, hold that it required a stamp, and could not (without a stamp) be looked at as evidence that Day had received the £60 to which it refers. But in my opinion the writing or memorandum in question is of a different character. It is material to notice where that writing appears. It is endorsed on the back of the specification (or contract), in respect of which (or work done under which) the £60 was payable. That specification was as much the writ of Day as of Glaister; it specified the work each had to do, and the payment to which, for that work, each was entitled. Accordingly, we find that the specification was sometimes in the possession of the one and sometimes in the possession of the other. It certainly never was, in any proper sense, the writ of Glaister. Neither the one party nor the other—certainly not the party Day—kept in any book or on any other paper an account of the sums received from time to time under the contract. Each appears to have been content to note the several sums received by them respectively on the back of the specification. I take this memorandum to be in effect Day's entry in his own book or paper of the money he had received from his debtor, the County Council, in respect of the work done under the contract. It will be noted that it is not a note or memorandum acknowledging receipt of money from Glaister or from any other. It discharges nobody. It simply notes that towards payment of what was due to him under the contract he (Day) had received £60. Glaister in like manner notes what he had received from time to time, but his memoranda cannot be regarded as receipts granted by him to Day. No more, in my opinion, can Day's memoranda be regarded as receipts to Glaister. It was the record of their respective receipts from their common debtor. In this view of the writing it needed no stamp, and I think it evidence against Day, under his own hand, that he received £60 to account of the contract price on 19th October 1897, just as an entry to that effect made by himself in his cash-book would have been.

I think the Sheriff proceeds on too narrow a ground when he bases his judgment on some words used by Glaister as a witness. The recorded words are probably the words of the cross-examining agent, assented to but not chosen by the witness. But however that may be, these words, or the views they express, do not affect the opinion I have formed as to the meaning and effect of the statute. It is on the meaning of the statute that the question turns.

On the whole I concur in the conclusion at which the Sheriff-Substitute arrived.

LORD MONCREIFF—It is not surprising that there should have been a difference of opinion in the Sheriff Court, because the writing which was under consideration was very near the line which divides those documents which require to be stamped and those which do not. Section 101 (1) of the Stamp Act of 1891 is expressed in very wide terms, and it is not without some hesitation that I have come to the conclusion that we should revert to the judgment of the Sheriff-Substitute.

I regard the jottings upon the back of the specification as merely a rough record under the hand of the two co-contractors of the proportions which they respectively received of the payments made by the County Council under their contract. This becomes plain when it is observed that entries are made and signed by Glaister in precisely the same terms as the entries by Day. For instance, "Received to account, Thomas Glaister, £310;" "Received to account of contract, £110—Thomas Glaister," and so forth.

Now, these entries signed by Glaister are not receipts for money to anyone; they simply record the fact that he had received so much of the money paid by the County Council. And it is to be observed that in the entries signed by Glaister as in those signed by Day it is not stated from whom the money was received.

Keeping this in view, why should this memorandum made by Day be regarded in a different light from those made by Glaister? It may reasonably be regarded as simply recording the fact that Day received that amount (£60) of the instalment paid by the County Council. No doubt that money was received through the hands of Glaister; but it does not necessarily follow that the memorandum is a receipt to Glaister, and I think the Sheriff-Substitute is right in giving it just the weight which would have been attached to a holograph entry in a cash book if Day had kept one.

The only other point to note is, that the memoranda were made upon a specification which was not the property of Glaister but the joint property of Glaister and Day, and therefore the endorsements were not exactly in the position of receipts handed by a person who has received money to the person who has paid it. It is true that this memorandum signed by Day, or rather by Day & Sons, was as good as a receipt granted to Glaister; but an entry in similar terms in a book kept by Day would have had the same effect, and it would not have required a stamp.

On the whole matter, I think that this writing is not a receipt within the meaning of the 101st section of the Stamp Act 1891,

and that therefore it is admissible in evidence.

The genuineness of the writing does not admit of doubt; and I would only say that I am unable to take as charitable a view of Day's denial of his writing as the Sheriff-Substitute does.

The Court recalled the Sheriff's interlocutor of 6th March 1900, and decerned in terms of the Sheriff-Substitute's interlocutor of 11th November 1899.

Counsel for the Appellant—Deas. Agent—Charles George, S.S.C.

Counsel for the Respondent — J. D. Robertson. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, June 6.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BRUCE *v.* STEWART.

Sale—Sale of Heritage—Title—Objections to Title—Contract of Excambion Entered into by Trustees without Power to Excamb — Trust—Administration—Power to Excamb—Power to Sell Heritage.

The sellers of a heritable property tendered as one of the links in the title a contract of excambion entered into between two sets of trustees. No power to excamb was conferred upon either set of trustees by the deeds under which they acted, and neither had obtained power to excamb from the Court, but both had a power to sell heritage, and the trustees who under the contract had acquired the ground now in question had also power to buy. *Held* that a power to excamb could not be inferred from a power to sell heritage; that the title was not marketable; and that consequently the purchaser was not bound to accept it.

Sale—Sale of Heritage—Title—Objection to Title—Decree of Declarator of Irritancy Obtained in Absence.

The seller of a heritable property tendered as necessary links in the title two decrees of declarator of irritancy and removing pronounced respectively in 1891 and 1893. These decrees had been obtained in absence, and were consequently reducible at any time within twenty years. *Opinions* that the title was not marketable.

This was an action at the instance of John William Bruce, property agent, 161 Hope Street, Glasgow, against Andrew Stewart, writer, 116 West Regent Street, Glasgow, in which the pursuer concluded for decree ordaining the defender to implement his part of a certain missive of sale of two tenements with courts attached and offices thereon, forming Nos. 73 to 83 inclusive of Hopehill Road, Glasgow, or alternatively for payment of damages for breach of contract.

The pursuer averred that by missive of sale dated 14th February 1899 entered into between the pursuer and the defender, the defender agreed to buy and the pursuer agreed to sell the two tenements in question for the sum of £3300, and that although desired and required to implement his part of these missives the defender refused or delayed to do so.

The defender pleaded, *inter alia*—"(2) The pursuer never having tendered a valid marketable title to the subjects, the defender is entitled to absolvitor."

In support of this plea the defender averred that the title submitted to him by the pursuer for examination was radically defective in various respects. In particular, he objected (1) to a certain contract of excambion, under which the pursuer's author acquired 109⅝ square yards of the subjects contained in the missives; (2) to an extract decree of declarator of irritancy and removing part of the title to 839½ square yards of said subjects; and (3) to an extract-decree of declarator of irritancy part of the title to 109⅝ square yards of said subjects.

The objection stated to the contract of excambion, which was dated and recorded in 1894, was that it was entered into between the testamentary trustees of John Anderson Mathieson and the testamentary trustees of Miss Henrietta Scott, and that neither of these sets of trustees had power to excamb conferred upon them by the settlements under which they acted, or had obtained power to excamb from the Court.

The extract-decree first above mentioned was obtained under a contract of ground-annual at the instance of John Anderson Mathieson against Charles Simson Romanes, C.A., Edinburgh, trustee on the sequestrated estates of William Sillars and John Sillars, dated and extracted in December 1891, and recorded in January 1892. The objection to it was based, *inter alia*, upon the facts (1) that service upon the said William Sillars and John Sillars was made edictally, while *ex facie* of the decree itself their addresses were stated to be unknown, with the result that if they were within the jurisdiction of the Court the service was invalid; and (2) that the decree was pronounced in absence, and could be reduced or set aside at any time within twenty years of its date, there having been no appearance entered to defend the action.

The extract-decree second above mentioned was obtained under a contract of ground-annual at the instance of the trustees of Miss Henrietta Scott against Thomas Jackson, C.A., Glasgow, trustee on the sequestrated estates therein mentioned, and was dated May and extracted and recorded June 1893. This decree was objected to, *inter alia*, upon similar grounds to those stated above with regard to the decree first above mentioned.

In the contract of excambion the 109⅝ square yards referred to were disponed by Miss Henrietta Scott's testamentary trustees to John Anderson Mathieson's testamentary trustees. In terms of Miss Scott's settlement her testamentary trustees had