guidance; and sometimes these rules operate hardly in cases to which they are applied. But I should wish, in the case of a new point like this, that the rule laid down should be a convenient rule, consistent with practical trust administration, and fair to all parties. I may say with the greatest deference and respect, and I do think, that the rule which your Lordships are laying down is one that will operate with the most cruel hardships and injustice to families, because it means this, that wherever there are outstanding obligations—and nothing is more common in trust management, where the testator was a merchant or manufacturer, than outstanding obligations—the whole estate, heritable and moveable, is to be laid under an interdict, and not one penny can be paid to the family of the testator, because probably at some future period investments which appeared ample may fail, and the creditors will hold the trustees responsible.

I am quite sure that if I had been consulted at the bar in such a case as this, I would without a moment's hesitation have advised the trustees not only that it was permissible, but that it was their positive duty to make these payments to the beneficiaries. I should have so acted myself as a trustee, and I may say I am not sure that I would not do so again if the occasion should occur. It is really impossible to work out a trust upon the principle that the trustees must hold their hands for years until everything is paid off.

For these reasons I must dissent from the judgment which your Lordships propose, in holding the trustees personally liable for the payments made out of income. On the other points, as I have already said, I agree with your Lordships.

Lord Kinnear was absent,

The case again came before the Court on the question of what interest the trustees were bound to pay on the sums which the Court had found them liable to replace.

The pursuers maintained that they were entitled to 5 per cent.

The defenders submitted that in the circumstances of the case the trustees should not be found personally liable in interest until date of summons, or at anyrate that interest at bank deposit rates was all that should be allowed.

The Lord President delivered the judgment of the Court:—"As regards interest, the pursuers will, if we allow only the average rate of trust interest, be put in the same position as they would have occupied if the estate had been duly administered by the defenders. No profit has been made or has been sought to be made for themselves by the trustees, and we do not consider this a case where penal interest should be required."

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the surviving and acting trustees under the settlement of the deceased John Stevenson Miller, as such trustees, to make payment to the pursuers of the sum of £40,150, 16s. 10d., with interest at 5 per cent. per annum from 31st December 1890, and to grant the pursuers a conveyance of Glenfoot House, and to assign them the bond for £1200: Further, decerned against the said surviving and acting trustees, as individuals, and the representatives of deceased trustees (with regard to the sums paid away prior to the decease of each), to make payment of the sum of £2163, 17s. 7d., with interest at 3 per cent. from 8th August 1878; the sum of £1534, 14s. 5d., with interest at 3 per cent. from 30th May 1884; the sum of £157, 7s. 8d., with interest from 31st December 1884; and the various sums paid to the beneficiaries, with interest at 3 per cent. from the date of the several payments.

Counsel for the Pursuers — Sol.-Gen. Asher, Q.C.—W. Campbell—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders—D.-F. Sir Charles Pearson, Q.C. — Ure — Guthrie. Agents—Maconochie & Hare, W.S.

Thursday, January 26, 1893.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

DURIE'S EXECUTRIX *v.* FIELDING.

Donation — Proof — Bill of Exchange — Insufficiency of Stamp—Stamp Act 1870 (33 *and* 34 *Vict. c.* 97), *sec.* 17.

Section 17 of the Stamp Act 1870 enacts that, save as is provided in the said Act, no instrument shall be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped.

D's executrix sued for repayment of a sum which she alleged had been lent the defender by D. The defender admitted the loan, but averred that D had taken a bill for the amount thereof from the defender and his sisters; that he had subsequently endorsed and made a donation of said bill to his sister M, and that she alone had right to the sum sued for. The bill was in M's possession at the date of D's death, but was not duly stamped. Apart from the fact of the bill being in M's possession, the only material evidence in favour of donation was that of the donee herself.

The Court *held* that the bill could not be looked at as evidence in favour of the alleged donation, and therefore *decerned* against the defender for the sum sued for.

This was an action raised in the Sheriff Court at Aberdeen by the executrix of Charles Durie against Henry Fielding for payment of the sum of £200, with interest from Whitsunday 1880, being the amount of a loan which the pursuer alleged that

the deceased Charles Durie had made to the defender.

The defender admitted that he had received the alleged loan, but stated—"In or about November 1889 the late Mr Durie obtained from the defender and his two sisters a bill for the debt now sued for. The said bill remained with him till the month of July 1890. The said bill, which is dated 22nd November 1889, represents and is in point of fact the sum now sued for. The said bill is the property and is in the possession of Miss Maggie Fielding, as after mentioned, and the sum therein belongs to her. In May 1890 the defender paid to the said Charles Durie £5, being the half-year's interest on said loan to May 1890, which sum the said Charles Durie remitted to the said Miss Maggie Fielding. In or about July 1890 the said Charles Durie wrote to the said Miss Maggie Fielding, with said bill, and giving her the same as a gift, to be used by her as her own absolute property. The said bill (which is endorsed by the said Charles Durie) has been in her possession ever since, and is herewith produced and referred to, and the defender has paid interest thereon since then to his sister the said Miss Maggie Fielding."

The defender pleaded—"(3) The pursuer's author having gifted the sum sued for to a third party, the defender is not liable therefor to the pursuer."

The result of the proof was as follows—Charles Durie was an intimate friend of the Fielding family, and was engaged to be married to the defender's sister Maggie. Towards the end of 1889 he lent the defender sums amounting to £200. In a letter sending part of this sum he enclosed a bill for £205, drawn by him upon the defender and his two sisters, the extra £5 representing the first half-year's interest on the loan. This bill the defender and his sisters accepted and returned, and the first half-year's interest was paid by the defender to Durie at Whitsunday 1890. Durie died on 6th November 1890. At the date of his death the bill, blank endorsed by him, was in the possession of Miss Maggie Fielding. The stamp upon it was one applicable to a bill for £200. Apart from the fact that the bill was in Miss Maggie Fielding's possession, the only material evidence in favour of donation was that of the alleged donee herself.

Section 17 of the Stamp Act 1870, provides—"Save and except as aforesaid, no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done in any part of 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."

On 20th June 1892 the Sheriff-Substitute (ROBERTSON) pronounced this interlocutor:—"Finds, in point of fact (first) that the pursuer's author Charles Durie lent to the defender the sum of £200 sterling, and that the said sum has not been repaid; (second) that it has been averred by defender that pursuer is not the true creditor, in respect the said debt was while due by defender given and transferred by the said Charles Durie to Miss Margaret Fielding, defender's sister; (third) that a bill was produced by defender for £205, drawn by Charles Durie upon and accepted by defender, and by his sisters Margaret and Mary Ann, which was endorsed by Charles Durie, and which it was averred had been granted in respect of the said loan of £200, and had been afterwards given by Charles Durie to Margaret Fielding: Finds in fact and law (1) that the said bill was insufficiently stamped and cannot be looked at by the Court to any effect whatever; (2) that defender has failed to prove otherwise donation of the said sum of £200 to Margaret Fielding: Therefore finds that defender is liable to pay said sum to pursuer, and decerns against him in terms of the conclusions of the action: Finds the pursuer entitled to expenses, &c.

"*Note.*—[*After narrating the facts of the case*]—These are the facts as disclosed by the proof, and there appears to me to be no reason to doubt the story told by the Fieldings. Their appearance in the witness-box was, in my opinion, in their favour, and I have little doubt that Miss Margaret was telling the truth when she says that Mr Durie sent her the bill, and I have further little doubt of what his intention was in so sending it. The case would in my view have been clear, but unfortunately the bill is not sufficiently stamped. The stamp upon it is one applicable to £200, which probably was the sum intended at first to be on the bill, but Mr Durie for some reason appears to have added the sum of £5 for the half-year's interest, and the bill is one of £205, and the stamp is insufficient. The main question in the case therefore is, whether in these circumstances the Court can look at the bill to any effect at all, and if not, the further question remains whether defender has otherwise instructed that the £200 was given to Miss Margaret Fielding. The words of the statute are very plain—'No instrument shall be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped.' There is, so far as I have found, or has been quoted to me, no case where a bill insufficiently stamped or unstamped (which of course is incurably void) has been looked at by the Court. The Court refused to look at such a bill in the case of the *Greenock Banking Company* v. *Darrock*, December 12, 1834, 13 Shaw, 190. Lord Gillies in disposing of that case said as follows—'The bill must be laid entirely aside, and the pursuers must adduce evidence independently of it that the defender lies under an obligation to them.' And the same result was arrived at in *Ogilvie* v. *Taylor*, December 7, 1849, 12 Dunlop, 266. The Lord Justice-Clerk (Hope) remarked in that case—'A bill without a stamp is not produceable, and cannot be founded on to any effect.' Lord Moncreiff in giving judgment said—'I do not find it an easy

matter to hold that this is legal proof of the debt without any aid taken from the bill of exchange, which cannot be used in evidence and which we cannot look at;' and further, 'I am not aware of any case in which it has been held that an inland bill not stamped can be used to prove a debt to any effect whatever.' These cases seem to me very much in point in this question. In the case of *Mathieson* v. *Ross*, March 27, 1849, 6 Bell's App. 374, the House of Lords allowed a document of the nature of a receipt to be looked at (it being unstamped), not as tending to show the payment of the sum of money referred to in it, which was admitted, but as showing the state of accounts between the parties at the time, and it is there laid down that an unstamped receipt may be looked at when it is used for a 'collateral purpose'—*i.e.*, when it is not in any way used as showing the receipt or payment of money, but, as was the case there, where it is proposed to be used in proving the state of accounts. Lord Campbell in that case was doubtful even of the extent to which the judgment of the Court went, stating, as his criterion of the possibility of such a document being used in evidence, not whether the party founding on it seeks to make use of it as a receipt, but whether it can be made use of as a document to settle any question litigated between the parties, and if the sum in the receipt in that case had been litigated, he indicated he would not have allowed the use of the document. Whether the rule laid down in that case could apply here seems to me, in any case, doubtful. A bill without a stamp is absolutely null and void, and, according to the cases already quoted, it seems to me open to question whether it would be looked at by the Court except for some such purpose as to the identification of handwriting; but even if the rule in *Mathieson* was applicable to a bill, it could not apply here. No doubt the bill is not attempted to be enforced; it is not founded on in that sense; but the sum in the bill is litigated between the parties, and the possession of the bill is founded on as proving the transference of money. This seems to me to bring the case directly within the words of the statute. That being so, in my opinion the question remains, whether, putting the bill out of sight altogether, there is sufficient evidence of donation, and on this point I have felt constrained to hold, though with great regret, and a feeling that it may quite well be contrary to the justice of the case, that donation has not been proved. So far as I see, the only evidence, or only material evidence, is that of the alleged donee herself, and that with the legal presumption against donation is not sufficient." . . .

The defender having appealed, the Sheriff (GUTHRIE SMITH) on 28th June pronounced this interlocutor:—"Recals the said interlocutor: Finds (1) that the defender Henry Fielding being indebted to the late Charles Durie in the sum of £200, granted on 22nd November 1889, along with his two sisters Mary Ann Fielding and Maggie Fielding a bill for £205, being the amount of said debt and interest for six months; (2) that at Whitsunday 1890, when a further sum of £5 of interest fell due, the same was paid by the defender and noted on the back of the bill at his request by the said deceased; (3) that a few days after Mr Durie sent the £5 which he had received for interest to Margaret Fielding, and later in the year sent her the bill, blank indorsed, accompanied by a letter which has not been preserved, but which was to the effect that the bill was hers, and she should put it in one of her most private places; (4) that the bill has been in her possession ever since and was so at the date of this action: Finds in law that these facts amount to a *pactum de non petendo* on the part of the deceased, either as regards the bill or the debt for which it was granted, and that this action at the instance of his executrix is not maintainable: Therefore assoilzies the defender from the conclusions of the action: Finds the defender entitled to expenses," &c.

The pursuer appealed, and argued—The bill being insufficiently stamped was an absolute nullity, and could not be received in evidence for any purpose—*Greenock Bank* v. *Darrock*, December 12, 1834, 13 S. 190; *Ogilvie* v. *Taylor*, December 7, 1849, 12 D. 266; *Walker* v. *Speirs*, May 16, 1834, 12 S. 586; *Sweeting* v. *Halse*, 1829, 4 M. & R. 287; *Jones* v. *Ryder*, 1838, 4 M. & W. 32; *Castleman* v. *Ray*, 1801, 2 Bosanquet & Puller's Rep. 383. At all events the bill could not be looked at as evidence of the transfer of a debt or money obligation, and that was the purpose for which the defender asked the Court to look at it—*Mathieson* v. *Ross*, March 27, 1849, 6 Bell's App. 374. Setting the bill aside, the evidence in favour of donation was insufficient, and the pursuer was therefore entitled to the decree she sought.

Argued for the defender—Although the bill was insufficiently stamped, and could, therefore, not be founded on as evidence of the existence of the money obligation contained therein, it could be founded on for the collateral purpose of proving the alleged donation—*Paton* v. *Earl of Zetland*, May 24, 1843, 5 D. 1049; *Mathieson* v. *Ross*, *supra*. There had been no intention in the present case to evade the Revenue laws by understamping, and it was not the duty of the Court to strain the construction of a Stamp Act so as to deprive a litigant of the means of evidence, *per* Lord Brougham in *Mathieson's* case, 6 Bell's App. 386. The possession of the bill by the defender's sister, even though no action could proceed upon it, was strong evidence that the deceased had made her a donation of the debt in respect of which the bill had been granted—*Macvean* v. *Maclean*, June 26, 1873, 11 Macph. 764; Bills of Exchange Act, 1882, 45 and 46 Vict. cap. 61, sec. 21 (3).

At advising—

LORD PRESIDENT—This is an action brought to recover payment of a loan, and it is admitted by the defender that the money was advanced to him on loan, and

therefore the constitution of the debt as a loan is admitted. The next question is, has it been repaid? And that question must be answered in the negative. There is one defence, and one defence only, stated to the action, and that is founded on the granting of the bill for £200, because the defence is that the loan has now come to be a debt in the hands of the defender's sister, and her alleged right is founded on the theory that the loan of £200 was novated or converted into the bill for £205, which is now in her possession, and she is said by the defender to hold the bill as a document of debt to which she has right. It seems to me, therefore, that the defence is rested on the bill as its necessary basis.

Now, the bill is insufficiently stamped, and therefore open to objection under the Stamp Act of 1870, and I cannot say that I think it doubtful that the 17th section of the Act applies to the position which the bill occupies in the defender's case. I think he pleads upon it and uses it, not as collateral to but as the substantial basis of his defence. He can only prove that the loan has been discharged by identifying the loan with the bill, and saying that his sister is now in possession of the bill. I do not think that the defender can say that the transference of the bill to his sister had the effect of extinguishing the liability of the co-obligants therein, because he says that it did not have that effect upon record.

Therefore, while it may be matter of regret that Mr Durie took the method he did of effecting his friendly purpose towards Miss Fielding, and it may be towards her family, we are here to administer the law, and I think the defence cannot be sustained.

LORD ADAM—I think the instrument in question falls under the provision contained in section 17 of the Stamp Act, as not being duty stamped, and cannot be looked at as evidence in support of the defender's case. It is not used for a collateral purpose, but as the basis of the whole defence, and without it there is no sufficient evidence of donation. Apart from that I have a difficulty in seeing how there can be any donation except of the lender's right of action, and that cannot be proved by parole.

LORD M'LAREN—The important question raised in this case, to which the chief part of the argument has been directed, is how far and on what principle we may look at an unstamped bill of exchange for the purpose of proving a fact. The cases in which unstamped bills of exchange have been looked at as evidence apparently form a very limited category, and certainly, giving a fair reading to the words of the Revenue statute, I think that any person who in seeking to make use of a document of debt, founds in any way upon the obligatory part of the document, must be taken to be founding on the document or seeking to make it "useful or available in law or equity." I rather think the principle of the excepted cases will be found to resolve itself into this, that a question of fact may be proved by an unstamped instrument, which a third party not otherwise interested in the document is interested in proving. I agree with your Lordship in the chair, that in order to establish the defence put forward—no doubt quite fairly and honourably—it must first be assumed that the original debt was novated and converted into a negotiable obligation, because it is the negotiable obligation which is said to have been assigned by Mr Durie sending the bill to Miss Maggie Fielding. That being the hypothesis of the defender's contention, it seems to me to involve the production of the bill, and the establishment of the right under the bill as a matter of obligation—the very thing which the Revenue statute discharges the Court from considering.

I am therefore of opinion that the alleged assignation of the bill which is said to disable Mr Durie's executrix from suing is not proved, and that the pursuer having proved the loan is entitled, there being no sufficient defence established on the evidence, to recover the sum for which she sues.

LORD KINNEAR—I am of the same opinion, and I do not think that the judgment which we are about to pronounce throws any doubt on the doctrine that an unstamped instrument may be used for a collateral purpose, that is to say, that such an instrument, if it contains evidence of a fact foreign to the purpose for which it was executed, may be admitted in evidence notwithstanding the terms of the Stamp Act. In the present case I think it is clear that the defender proposes to use the bill of exchange for the main purpose for which such an instrument is executed and no other, because his statement is that by acceptance of the bill he came under an obligation to the drawer, and that the bill being an effectual contract against him was well transferred to his sister by indorsation and delivery. If the bill does not serve its true purpose, it serves no purpose at all effectual for the defence, and we are therefore asked to look at it as a bill of exchange and as nothing else. I agree that we cannot do that, though I regret that we should be unable to look at all the evidence in support of a case which the Sheriff-Substitute, who saw the parties, thought a perfectly honest one.

I therefore agree with your Lordships that the evidence in favour of the alleged donation is insufficient.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff dated 28th June 1892 appealed against: Find in fact that the deceased Charles Durie lent to the defender the sum of £200 sterling, and that the said sum has not been repaid: Find that it is averred by the defender that in or about November 1889 the said Charles Durie obtained from the defender and his sisters Margaret Fielding, and Mary Ann Fielding, a bill for the

debt now sued for, that the said bill was endorsed by the said Clarles Durie, and was by him delivered and given to the said Margaret Fielding to be used by her as her own absolute property: Find that a bill has been produced by the defender purporting to be for £205 drawn by Charles Durie upon and accepted by the defender and his sisters Margaret Fielding and Mary Ann Fielding, and to be endorsed by Charles Durie: Find in law that the said bill is not duly stamped in accordance with the law in force at the time when it was first executed, and cannot be regarded by the Court in support of the pleas of the defender: Find in fact that apart from the said bill the defender has failed to prove donation of the said sum of £200 to Margaret Fielding: Find in law that the defender is liable to pay said sum to the pursuer, and decern accordingly against the defender for said sum of £200, with interest as concluded for: Find the appellant entitled to expenses both in this Court and the Inferior Court," &c.

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

Counsel for the Defender — Dundas — Craigie. Agents—Mackenzie & Black, W.S.

Tuesday, January 26.

SECOND DIVISION.

THE CHARTERED INSTITUTE OF PATENT AGENTS *v.* LOCKWOOD.

Patents, Designs, and Trade-Marks Acts of 1883 (46 *and* 47 *Vict. cap.* 57), *sec.* 101, *and of* 1888 (51 *and* 52 *Vict. cap.* 50), *sec.* 1 —*Board of Trade—Power to Make Rules—Rules Laid before Parliament and not Objected to, Held ultra vires.*

By section 1 of the Patents, Designs, and Trade-Marks Act 1888, amending the Patents, Designs, and Trade-Marks Act 1883, it was enacted (1) that after 1st July 1889 no person should describe himself as a patent agent unless registered as such in pursuance of the Act; (2) that the Board of Trade should from time to time "make such general rules as are in the opinion of the Board required for giving effect to this section," and the provisions of section 101 of the principal Act should apply to all rules so made; (3) "provided that every person who proves, to the satisfaction of the Board of Trade, that prior to the passing of this Act he had been *bona fide* practising as a patent agent, shall be entitled to be registered as a patent agent in pursuance of this Act."

Section 101 of the Act of 1883, *inter alia*, provides that any rules made in pursuance of it shall be laid before both Houses of Parliament, and that if either House of Parliament should, within 40 days after the rules had been laid before them, resolve that the rules ought to be annulled, the same should be of no effect after the date of such resolution.

The Board of Trade, in virtue of the powers thus conferred, issued certain rules providing *inter alia* that an annual fee of £3, 3s. should be paid by every registered patent agent, and that the name of any patent agent not paying such fee should be removed from the register. These rules were laid before Parliament and not objected to.

Thereafter a person who had proved, to the satisfaction of the Board of Trade that he had practised *bona fide* as a patent agent prior to the passing of the Act of 1888, and who had been registered as a patent agent, refused to pay the annual registration fee.

The keepers of the register thereupon removed his name from the register, and as he continued to describe himself as a patent agent they brought an action of interdict to stop him from doing so.

Held that the rules were *ultra vires* of the Board of Trade, and that as the defender had been improperly struck off the register, the application for interdict should be dismissed.

By section 101 of the Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57) it is enacted—(1) The Board of Trade may from time to time make such general rules and do such things as they think expedient, subject to the provisions of this Act, (*a*) For regulating the practice of registration under this Act . . . "(4) Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the Comptroller. (5) If either House of Parliament, within the next forty days after any rules have been laid before such House, resolve that such rules, or any of them, ought to be annulled, the same shall, after the date of such resolution, be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule, or to the making of any new rules or rule."

The Patents, Designs, and Trade-Marks Act 1888 (51 and 52 Vict. c. 50), which was passed to amend the Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. c. 57), contains in section 1, sub-sections 1 to 5, the following provisions with regard to the registration of agents for obtaining patents in the United Kingdom:—"(1) After the 1st day of July 1889 a person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act. (2) The Board of Trade shall, as soon as may be after the passing of this Act, and may from time to