COURT OF SESSION.

Saturday, May 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THORBURN *v.* THE CALEDONIAN RAILWAY COMPANY.

Process—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40—*Fixing Place and Date of Jury Trial*

In an action of damages arising out of a railway accident, issues were adjusted before the Lord Ordinary on the 27th of May. His Lordship appointed the trial to take place before himself on a day which he named. The pursuer objected to the time and place fixed by the Lord Ordinary, who thereupon, in terms of the 40th section of the Court of Session Act of 1850, verbally reported the case to their Lordships of the First Division. In support of his objections to the time and place fixed by the Lord Ordinary, the pursuer stated that but for wilful delay on the part of the defender the case would have been ready for trial before the end of the Winter Session, at which time he would have been prepared to have moved the Court to fix the approaching Spring Circuit Court to be held in Glasgow as a suitable time and place for the trial. He further argued that as the *locus* of the accident was not far from Glasgow, in the neighbourhood of which the pursuer and the majority of the witnesses resided, their Lordships should fix Glasgow as the place, and the Circuit Court to be held there in September as the time, for the trial of the cause. The defender objected, and urged that as another claim arising out of the same accident (Pennilee) was to be tried on the day preceding that which the Lord Ordinary had fixed for the trial of this cause, and as the defender had all his evidence prepared, it would impose great hardship and expense upon him if the trial of this case was postponed till autumn, and further, that it was in the true interest of both parties that the two cases should be tried consecutively. Their Lordships found that no sufficient cause had been shown for altering the day fixed by the Lord Ordinary.

Counsel for Pursuer—M'Kechnie. Agents—Duncan, Archibald, & Cuningham, W.S.

Counsel for Defender—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, May 27.

OUTER HOUSE.

[Lord Kinnear.

WOOD *v.* WOOD.

Husband and Wife—Aliment—Process—Proof.

In an action for aliment at the instance of a wife deserted by her husband it is unnecessary to lead evidence if the husband fails to appear.

This was an action for aliment brought by Mrs Janet Wood against her husband, who had deserted her and gone to live apart from her about a year after marriage.

The pursuer claimed that as she had shown a *prima facie* case for aliment, and the husband had not lodged defences, she was entitled to decree in terms of her summons, as in an undefended action, without proof of her averments.

Pursuer's authorities—*Coutts* v. *Coutts*, June 8, 1866, 4 Macph. 802; *Williamson* v. *Williamson*, January 27, 1860, 22 D. 599; *Crombie* v. *Crombie*, May 19, 1868, 6 Macph. 776; *Arthur* v. *Gourlay*, March 9, 1769, 2 Pat. App. 184; Fraser on Husband and Wife, i. 841.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary finds, declares, and decerns in absence against the defender, conform to the first and second conclusions of the libel, but under deductions of the payments mentioned and referred to in the summons, with expenses.

Counsel for Pursuer—Salvesen. Agents—Miller & Murray, S.S.C.

Wednesday, May 31.

FIRST DIVISION.

SMITH AND OTHERS *v.* SMITH OR FERGUSON.

Process—Proving of the Tenor—Presumption—Husband and Wife—Marriage-Contract—Casus Amissionis—*Special* Casus Amissionis *necessary where Lost Document may have been Lawfully Destroyed—Whether Marriage-Contract may ever be Lawfully Destroyed.*

In an action of proving the tenor it was alleged that a husband and wife had entered into an antenuptial marriage-contract by which the husband bound himself to provide the wife, in the event of his predecease, in a liferent of his household furniture and an annuity of £200 a-year, to be restricted to £100 a-year in the event of her second marriage, in which event also the liferent of the furniture was to be forfeited. In consideration of this annuity the wife discharged her legal rights and bound herself to aliment and educate, if necessary, out of her annuity the children of a previous marriage of the husband, as well as any children of the contemplated marriage. After the marriage the husband's means largely increased, and he expressed a wish to make a better provision for his wife. He died intestate, and the contract of marriage which was said to have been in his possession was nowhere to be found. In a proving of its tenor at the instance of the children of the marriage, and the husband's children by his first marriage, in which the widow denied that it had ever been executed—*held*, after a proof (*diss.* Lord Deas), that assuming it to have been duly executed, it was rather of the nature of a unilateral deed by which the husband was to benefit, than of a mutual deed; that the husband was therefore entitled to destroy it in order that his widow might take her legal rights; and that therefore the pursuers were bound to aver and

prove a special *casus amissionis*, such as fire or accident, in order to exclude the presumption that it had been designedly destroyed by the husband.

On 22d September 1868 Mr William Black Ferguson was married at Stonehaven to Miss Helen Louisa Smith. Mr Ferguson was then a widower with five daughters. Of his second marriage there were born four daughters. His means at the time of his second marriage were somewhat narrow, but they increased considerably thereafter, and at his death, survived by his wife and nine daughters, in September 1881, his personal estate amounted to between £18,000 and £20,000, and his heritable estate was of the value of about £5000. He left no settlement, and his widow was decerned executrix-dative *qua* relict to him. Mr Thomas Hector Smith was appointed in November 1881 factor *loco tutoris* to three of the daughters who were still in pupillarity, and *curator bonis* to another who was in minority. In December 1881 he, as such factor and curator for the children of the second marriage, together with the five daughters of the first marriage, raised this action against the widow Mrs Helen Louisa Smith or Ferguson as her husband's executrix, and as an individual, for the purpose, as set forth in their summons as amended, of having it found and declared that a marriage-contract had been entered into, and duly and validly executed by Mr Ferguson and the defender at Stonehaven on 18th September 1868, and to have the tenor of it proved to have been as follows:—"It is contracted, agreed, and matrimonially ended between the parties following, viz., William Black Ferguson, civil engineer in Aberdeen, of the first part, and Miss Helen Louisa Smith, eldest surviving daughter of Thomas Smith, merchant in Stonehaven, of the second part, in manner following: That is to say, the said parties have accepted and hereby accept of each other for lawful spouses, and promise to solemnise their marriage with all convenient speed: In contemplation of which marriage, and in consideration of the conveyance and assignation after written, the said William Black Ferguson binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, to content and pay to the said Helen Louisa Smith if she shall survive him, for her aliment, a free liferent annuity of £200 sterling, and that at Whitsunday and Martinmas yearly, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen next after the death of the said William Black Ferguson, for the half-year succeeding, and the next term's payment thereof at the first term of Whitsunday or Martinmas thereafter for the half-year succeeding, and so forth, half-yearly, termly, and continually thereafter, 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 of £5 per centum per annum from and after the term of payment thereof during not-payment: Declaring hereby, in the event of the said William Black Ferguson not leaving at the time of his death sufficient funds and property to provide for the foresaid annuity, and also to provide for the suitable maintenance and education of the children of his former marriage, as well as of any child or children who may be procreated of the present intended marriage, that the said Helen Louisa Smith shall be bound and obliged to employ the foresaid annuity, or any part of it, which the said William Black Ferguson's estate may at the time of his death be sufficient to yield (if such estate shall not be sufficient to yield the whole of it), not only in supporting herself, but also in alimenting and educating the children of his said former marriage, and of the present intended marriage, until the said children shall attain majority or be married; and the said William Black Ferguson further hereby binds and obliges himself to give the said Helen Louisa Smith, if she shall survive him, the liferent use and enjoyment of the whole household furniture and plenishing, including silver plate, china, books, and pictures, which shall belong to him at the time of his death, as also to make payment to her within three months after the day of his death, if she shall survive him, of the sum of £50 as an allowance for her mournings, and to make payment to her at the rate of £200 per annum for the time that shall have to run from the day of his death to the term of Whitsunday or Martinmas thereafter, whichever shall first arrive, in name of aliment, and as the expense of maintaining the family, and for house-rent and servants' wages to that term, which aliment shall be paid to her at the same time with the allowance above provided for mournings, which sums the said Helen Louisa Smith hereby accepts in full of all she can ask in name of mournings, or for alimenting and supporting herself and the family to the first term after husband's death: Declaring hereby, that if the said Helen Louisa Smith shall enter into a second marriage, then and in that event her liferent right and use of the said household furniture and plenishing, plate, china, books, and pictures, shall, from the date of such marriage, cease and determine, and the said annuity of £200 provided to her shall be restricted to the sum of £100 sterling yearly, payable at the terms and with corresponding interest and penalty as aforesaid, which provisions above written, conceived in favour of the said Helen Louisa Smith, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relictæ* or otherwise could ask, claim, or demand from the said William Black Ferguson, or his heirs, executors, and representatives, by and through his death if she shall survive him: For which causes, and on the other part, the said Helen Louisa Smith hereby assigns, dispones, conveys, and makes over to the said William Black Ferguson, his heirs and assignees, all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally the whole property, heritable and moveable, now belonging or resting and owing to her, or that shall in any way pertain and be owing to her during the subsistence of the said marriage, surrogating and substituting the said William Black Ferguson and his foresaids in her full right and place of the premises, with the same powers in every respect as she herself enjoyed before granting hereof, excepting always from this conveyance the foresaid provisions which the said William Black Ferguson has by this contract made in her favour, and any other provision which he may hereafter think proper to

make in her favour, with all action and execution competent to her thereanent; but it is hereby provided and agreed upon and declared, that although the said intended marriage shall be dissolved within a year and a day of the date of the solemnisation thereof without a living child being born of the same, yet this contract, and whole clauses and provisions herein contained, shall subsist and remain in full force and effect, any law or practice to the contrary notwithstanding; and both parties consent to the registration hereof for preservation and execution."

The pursuers averred that the late Mr Ferguson had employed his brother Mr John Ferguson, advocate in Aberdeen, his agent, to prepare the marriage contract, and produced the draft contract which he had drawn up. They averred that the principal contract had been engrossed by him in his own handwriting. They produced also Mr John Ferguson's business ledger, which contained an entry by him of the drawing of the contract under date 4th September 1868. The ledger also showed that the contract had been engrossed on stamped paper on 17th September 1868, the day before its alleged execution. It also appeared from the ledger that the whole expense connected with the preparation of the contract had been paid by Mr Ferguson to Mr John Ferguson in the year 1869. The pursuers also produced a memorandum-book kept by Mr Ferguson about the period of his second marriage, which contained the following entries:—

"1868.

"Sept. 17. Went to Old Aberdeen with Ruxton and John to get proclamation of banns made.

"18. Left with John at 4·15 P.M. for Stonehaven. Dined at Mr Smith's. Marriage-contract signed. Returned to Aberdeen in evening.

"22. Left at 12·23 for Stonehaven. Married at 2·30 P.M. to Miss Helen Louisa Smith at Bank House. Left at 3·30 for Fordoun, and per express to Birnam Hotel, Dunkeld—Pople's."

The *casus amissionis* was thus libelled by the pursuers. "The said William Black Ferguson some time before his death applied to his brother for the said contract of marriage, and obtained delivery of it, and it remained thereafter in his custody. After the death of the said William Black Ferguson, a diligent search was made in his repositories, not only at his office (which he visited occasionally after the first attack of paralysis before referred to) but at his residence, both in town and in the country, by his law-agent and nephew Mr John Ferguson junior, but no trace of it could be found. It is not known where Mr Ferguson kept it or what he did with it. It has therefore been lost or destroyed."

Mrs Ferguson defended the action, denying that the contract which had been prepared in draft or any other marriage-contract had been executed by her, and pleading that none having been executed, the pursuers were not entitled to decree. She also pleaded, *inter alia*:—"(2) No *casus amissionis* has been averred by the pursuers sufficient in law to entitle them to an order for proof. (3) The adminicles libelled on by the pursuers are not sufficient in law to entitle them to a proof of the tenor of the deed which they seek to establish. (4) The averments of the pursuers are not relevant or sufficient in law to support the conclusions of the summons."

The Court after hearing a debate on these pleas, in which the defender argued that in respect that the marriage-contract alleged to have been executed by her and her husband was of the nature of a personal bond by the husband rather than of the nature of an ordinary marriage-contract, and that the pursuers were not therefore entitled to a proof of the tenor of it without setting forth a special *casus amissionis* sufficient to exclude the presumption arising from its mere absence that he had purposely destroyed it in order to give his widow the benefit of terce and *jus relictæ*, pronounced this interlocutor:—"Before answer as to the sufficiency of the adminicles, and of the *casus amissionis*, allow the pursuer to prove the tenor of the will libelled, and the *casus amissionis* thereof, and allow the defender a conjunct probation thereanent." The authorities cited at this debate will be found detailed *infra*. A proof was led before Lord Shand. The evidence as to the alleged execution of the contract on 18th September 1868 was very conflicting. Mr Thomas Smith, the defender's father, who was advanced in years at the time of the proof, and whose memory was considerably impaired, deponed that Mr Ferguson and his brother John had dined with him in Stonehaven a few days before the marriage, and that he then saw in the hands of Mr John Ferguson what was said to be a marriage-contract, the purport of which was that on Mr Ferguson's death his widow was to have £200 a-year, but that he had not read it, and did not, so far as he could remember, sign any deed as a witness on that occasion. He believed that his daughter, the defender, was not at home on that occasion. Mrs Smith, the mother of the defender, deponed that she remembered the visit of the two Fergusons a short time before the marriage, and that they came about the marriage-contract, but stated that no contract was signed that day, and that her daughter was not in the house that day. The defender herself deponed that she had signed no marriage-contract or other deed whatever previously to her marriage, and that she believed that on the 18th September, when, according to the note by her husband in the memorandum-book produced by the pursuers, the contract was signed, she believed she was not in Stonehaven.

On the other hand, Mrs John Ferguson, widow of Mr John Ferguson, deponed that she recollected her husband (who died in 1879) bringing home the draft marriage-contract between his brother and the defender, for the purpose of extending it at home, and that he did so extend it on stamped paper, and afterwards with her assistance compared the extended deed with the draft. She remembered her husband going to Stonehaven a few days before the marriage, and that he told her he was going there to have the marriage-contract signed, and that after his return she saw the marriage-contract on his dressing table, and that the first page of it was signed by Mr Ferguson and by the defender. She admitted, however, that her first impression had been, when speaking of the contract immediately after Mr Ferguson's death, that it had been signed at her husband's office in Aberdeen two months before the marriage. There was an entry in Mr John Ferguson's ledger of a payment of £1, 15s. for the stamp for the marriage-contract, but no entry of a spoiled stamp of that value having been returned to the stamp office.

It was proved that not long before his death Mr Ferguson had a shock of paralysis which seriously affected his health, and that subsequently to that he spoke to Mr Ruxton, advocate, about making a settlement, on which occasion he referred, as Mr Ruxton understood, to a marriage-contract under which his widow was to receive an annuity of £200 a-year, saying with regard to that sum, "Of course that is perfectly out of the question now." He expressed a wish that his widow should maintain after his death a style of living similar to that which she then kept up. The impression left on Mr Ruxton's mind by this conversation was that he made no will, but that there was a marriage settlement which he wished out of the way. There was then no suggestion of destroying the marriage-contract. The pursuers explained the absence of the names of the instrumentary witnesses in the draft by showing that Mr John Ferguson was not in the habit of filling in the testing clause into drafts after the principal deeds were signed.

On the Court resuming consideration of the cause with the proof, the pursuers argued—(1) On the facts. There was every probability that the statement in Mr Ferguson's diary was correct. There was no conceivable reason for the entry if the fact was not as there stated. It was most unlikely that on the occasion when the brothers Ferguson came out to Stonehaven about the marriage-contract, and dined there, in the bride's father's house, she would have been absent. The entries in the business books of Mr John Ferguson were almost as conclusive of themselves, and the observations made by the husband in his conversation with Mr Ruxton shortly before his death put the execution of the contract quite beyond dispute. (2) On the law. The husband had no power to destroy the marriage-contract, as the defender maintained he could do, and must be held to have done. It was a mutual deed on which the onerous consideration of marriage had followed, and one party could not therefore alter the position of affairs by destroying it. It made no difference that it was now the widow's interest to acquiesce in the destruction. Further, the husband and wife together were not entitled to destroy it. It contained stipulations on behalf of the children, both of the first and of the then contemplated marriage, and their children had a *jus quæsitum* in these provisions for them. *Donald's* case quoted on the other side was a case which would have been decided otherwise if there had been children of the marriage, or at least the fact that there were no children completely distinguished that case from the pre sent.

Authorities—*Macleod*, 27th May 1865, 3 Macph. 840; *Winchester*, 20th March 1863, 1 Macph. 685.

Argued for defender—(1) On the proof. The execution of the deed was not proved. The oral evidence of the persons who might have been most expected to remember such a thing as the execution of a marriage-contract was against the theory that it had ever been executed. (2) Assuming that it had been executed, no sufficient *casus amissionis* was set out. This was a marriage contract indeed, but not one of an ordinary kind, but one more resembling a bond by the husband. It was a mere obligation on him to provide an annuity for his widow, and he was entitled to destroy it so as to give her her legal rights. The pursuers must exclude the presumption that he had done so. The case of *Donald* v. *Kirkaldy*, M. 15,831, *aff.* 8th April 1788, 3 Pat. Ap. 105, was entirely in point. The wife not being, as in the case of *Fletcher* v. *Menzies*, 5th March 1875, 2 R. 507, so protected by a trust that she could not, even if she wished, give up a provision in her favour, was rather in a position which brought her within the rule of *Standard Property Investment Co.* v. *Cowe*, 20th March 1877, 4 R. 695, where there being no trust it was held that a wife could discharge a provision made for her. She could therefore have joined with her husband in cancelling the contract. If so, the argument founded on the children's interest here involved this, that they were entitled to hold her to a position which she could have renounced during the husband's life. The draft of a deed was not an admissible adminicle on a proving of the tenor. At least that was doubtful since the case of *Ritchie*, 10th June 1871, 9 Macph. 820. Without the draft the pursuers' adminicles were insufficient.

The Lords made avizandum.

At advising—

Lord President—The late Mr William Black Ferguson was married to a second wife, Helen Louisa Smith, on 22d September 1868. He died on 4th September 1881, survived by nine daughters, five of whom were children of his first marriage, and four of whom were children of his second. The object of the present action is to prove the tenor of a marriage-contract said to have been executed by the spouses on the occasion of this second marriage, and four days before its celebration on 18th September. The defender denies that she ever executed the contract at all, and a good deal of very contradictory—I may almost say painfully contradictory—evidence has been led. There is no one alive who saw such a deed subscribed, so that so far we have no direct contradiction of the lady's statement upon oath that she did not sign one; and it is not alleged or proved who were instrumentary witnesses, or whether they are alive or dead, but there is the evidence of one witness who saw or believes she saw the deed with the subscription appended to it. On the other hand, at least one other witness depones that on 18th September the defender was not at the place where the execution of the deed is said to have taken place. In that state of the evidence I should have difficulty in concluding that the pursuer has proved that the deed ever was executed. On the other hand, that matter of fact is left so narrow upon the evidence that I am not willing to found my judgment on the ground that the deed was or was not executed. I am rather disposed to assume that it was executed, for there is a separate ground on which I think that the defender is entitled to be assoilzied.

The *casus amissionis* is thus libelled—"The said William Black Ferguson sometime before his death applied to his brother for and obtained delivery of the said contract of marriage, and it remained thereafter in his custody. . . . . After the death of the said William Black Ferguson a diligent search was made in his repositories, not only at his office (which he visited occasionally after the first attack of paralysis before referred to), but at his residence both in town and

country, by his law-agent and nephew Mr John Ferguson junior, but no trace of it could be found;" and then the condescendence goes on to state with reference to these facts—"It is not known where Mr Ferguson kept it or what he did with it. It has therefore been lost or destroyed." Not to mention the peculiar logic of that statement, it seems to me that this is a mode of libelling the *casus amissionis* which is only admissible in a certain class of deeds, to which this marriage-contract does not belong. It is necessary to ascertain exactly what is the effect of this deed as set out in the summons in terms taken from the draft which has been preserved. There is in it no conveyance of any property by the husband to the wife, no conveyance to trustees, no trust at all, no provisions for the children of the marriage or the former marriage. It is simply an obligation in favour of the wife, if she should survive the husband, to provide her with an annuity of £200 per annum, without any security being given for that annuity, and with £50 for mournings, and with the household furniture in liferent. If the widow marry again she loses the liferent of the furniture and half the annuity, so that her provision in that case is only £100 per annum. In return for these provisions the wife renounces her *jus relictæ* and whole legal rights, and conveys to the husband her whole *acquirenda*. And, at the same time, she puts herself under a very serious obligation, which is as follows—"In the event of the said William Black Ferguson not leaving at time of his death sufficient funds and property to provide for the said annuity, and also to provide for the suitable maintenance and education of the children of his former marriage, as well as of any child or children who may be procreated of the present intended marriage, that the said Helen Louisa Smith shall be bound and obliged to employ the foresaid annuity, or any part of it, which the said William Black Ferguson's estate may at the time of his death be sufficient to yield (if such estate shall not be sufficient to yield the whole of it), not only in supporting herself, but also in alimenting and educating the children of his said former marriage and of the present intended marriage, until the said children shall attain majority or be married." That is the whole contract. The name antenuptial marriage-contract has something imposing in its sound, and it is generally a detailed and complete family arrangement. In its ordinary form and structure it contains not merely provisions for the widow, but for the children unborn and whose interests are afterwards to emerge, and it settles in what way, in the event of the death of either spouse, the provisions are to be enjoyed by the survivor. In short, it is a general settlement of the estates of the spouses. But what we have here is nothing resembling that. It consists of a provision for the widow of at least £200 a-year, and a liferent of furniture during her viduity. For that she has to pay a heavy price in the renunciation of her legal rights and the conveyance of her *acquirenda*, and in that singular obligation to support the children of the previous marriage which I have just read. This contract may be called a provision for the wife, but I think it is more a provision for the husband, having regard to the price the lady had to pay for the provisions in her favour. The course of events makes this clearer. After the marriage Mr Ferguson's means greatly increased, and he was quite alive to the fact that the provisions for his wife were totally unsuitable to his altered means, and he so expressed himself on an occasion referred to in the evidence when he spoke of undoing the state of matters which existed under his marriage-contract, and making a new provision for his widow, not, indeed, by destroying the marriage-contract, but by a deed of settlement. The evidence satisfies one of his intention to make such a deed as would afford an adequate provision for his widow. The supposition of the defender is that in the end he destroyed the contract for the purpose of effecting that result which he had contemplated accomplishing in a different way by the execution of a deed of settlement. I do not think that in such a case the *onus* of establishing that as the cause of the loss of the deed rests upon the defender, looking to the nature of the deed, which I think is of the nature of a moveable bond of annuity for a small sum. I think it is here indispensable that the pursuer should show a special *casus amissionis*, *i.e.*, he must show by the way in which the deed ceased to exist that the supposition of the defender is without foundation. I think that that burden is not an unreasonable one, and that it is in accordance with the doctrine of the institutional writers, who say that when a deed disappears which is not unilateral in character, and which generally requires to be extinguished by renunciation, the disappearance is presumed to have been accidental, but where, as in a case of this kind, the deed is one kept by the grantee, and in which all the advantages are on one side, a special *casus amissionis* must be proved, since the party in whose favour the provisions are may destroy it. This is a doctrine of a delicate and important kind, and, apart from authority, I should have reached the conclusion which I have stated with more hesitation. But the case of *Donald* v. *Kirkaldy* is directly in point. That was also a case of a marriage-contract which resembled in all essential particulars the case now before us. The husband James Donald settled on his wife by the marriage-contract a jointure of £50 per annum, and delivered one duplicate of the contract to the wife's father, retaining the other himself. Then Mr Donald's means greatly increased, just as was the case here with Mr Ferguson. The duplicate marriage copies of the contract was found after the husband's death to have disappeared (though the husband's had existed about eighteen months previously), the father-in-law alleging that he destroyed the duplicate kept by him at the desire of the husband, and the husband's duplicate having disappeared, as is the case here. There was no issue of the marriage, and Mrs Donald was therefore entitled to half her husband's moveables if the lost contract was to have no effect. The argument on both sides is very distinct. A special *casus amissionis* was held to be necessary; the argument on the other side was what we might naturally expect, and was just the argument for the pursuer here. It was this—"Writings of a permanent nature, which, in the words of Lord Stair, 'are designed to remain constantly and not to be paid as retired,' do not, like heritable documents, require the proof of a special *casus amissionis*. Of all transactions a marriage-con-

tract is perhaps the most solemn in its nature and most permanent in its effects. It is not retirable like a bond or a bill, but is a family compact, in which are involved the interests of different parties, some of them unborn—of husband, wife, and issue." All that is quite true and sound as to marriage-contracts of the ordinary kind, but then, as in the case now before us, the marriage-contract was just like a mere moveable bond of annuity, and it is quite obvious that that was the argument to which the Judges gave effect. The case was very thoroughly argued, and the judgment was unanimous. Further, the case was appealed to the House of Lords, and after an able argument the judgment was affirmed. With that authority before me, I am satisfied with the conclusion to which all the tendency of my views of the law on the subject carried me without respect to authority.

Lord Mure—The first question here is whether the allegation in the amendment which was made upon the summons after the debate on relevancy is proved in point of fact, that amendment being to the effect that the "marriage-contract contained a testing clause in the ordinary and proper style, and that the said marriage-contract was lawfully and duly executed by the said William Black Ferguson and the said Helen Louisa Smith or Ferguson at Stonehaven on the 18th day of September 1868." That was an averment of fact deliberately put on record in the amended summons, and I proceed to examine whether the contract was signed at Stonehaven on that day.

Of the relatives who might have been expected to be present on such an occasion there are four alive. None of these were instrumentary witnesses, and it is not alleged who these were. These four persons, however, are the widow herself, her father, mother, and her sister-in-law, the widow of the Mr John Ferguson, the man of business who prepared the draft contract. Now these persons are examined as witnesses by the pursuers to prove the execution of the marriage-contract, and the defender and her father and mother distinctly negative the allegation that the defender ever signed a marriage-contract or any deed on 18th September 1868; and on the evidence I think it proved that the defender was not in Stonehaven on the day of the alleged execution. Her own evidence is quite positive to the effect that she never signed such a document at Stonehaven, and equally positive that on that day she was in Aberdeen. The evidence of her father and mother is to the same effect. They were not present when any marriage-contract was signed on that occasion, though they remember the two brothers coming out to Stonehaven on that day. They think something would be said about the marriage-contract, but they never saw one signed, and are clear that it was not signed. As against this we have no doubt the evidence of the entry in the diary of Mr Ferguson that he signed the contract at Stonehaven on that evening, and the evidence of his brother's widow that she remembered her husband going out to Stonehaven with his brother that day, and on coming back in the evening putting the contract on his dressing-table. She had seen the draft of it before that. She says that she then saw the deed itself, and that the first page of it had two signatures—one that of Mr W. B. Ferguson, and one that of Miss Smith. But the evidence of that witness is not to my mind satisfactory. She is speaking from a somewhat vague recollection, and admits that a good deal of what she says differs from the recollection she had and which she expressed at an earlier period. Though she says that when her husband came back from Stonehaven he took out the contract from his pocket and laid it on his dressing-table, she afterwards adds—"When the contract was talked of, my recollection at first was that the contract had been signed at my husband's office, Union Street, Aberdeen, in the month of July previous to the marriage, but on reflection I am quite satisfied that it was signed at Stonehaven, as formerly deponed to." Then she says again—"With reference to what is deponed to as to my recollection of the deed being signed in my husband's office, I expressed this impression to my son John immediately after Mr W. B. Ferguson's death, but a short time afterwards I distinctly recollected that, as before deponed to, it had been signed at Stonehaven." So she had the impression till shortly before this action was raised that the deed had been executed in her husband's office and not at Stonehaven. The evidence, then, of Mr John Ferguson's widow is not sufficiently distinct and accurate to entitle me to hold that the statement of the witnesses who say that Mrs W. B. Ferguson, the defender, was not at the alleged place of execution at the time when it is said to have taken place is erroneous. Therefore I think that the pursuer has failed to prove the execution of the deed.

But if my view of the evidence be wrong, and the deed was executed then, I agree in the view of the law which your Lordship has expressed. I have looked carefully into the case of *Donald*, and the substantial reasons on which your Lordship's opinion proceeds are, I think, supported by that case. The only important difference in the facts is that in this case there are in existence children both of a former marriage and of the second marriage, while in that of *Donald* there were no children at all at the time of the case. But I think that that difference is not sufficiently great to take the case out of the rule of that case. The deed here is substantially a bond of annuity. There is no separate onerous obligation undertaken by the spouses on behalf of children, and no provision for them except the provision for their aliment, if necessary, out of the £200 which the widow was to have as an annuity. They were left to their legal rights, and under the judgment proposed by your Lordship, in which I concur, they are left to them now. I therefore concur in the result of your Lordship's opinion, but my own opinion is that the execution of the deed is not proved. It is quite possible that Mr Ferguson signed the contract as his diary bears, but that Mrs Ferguson was not present, and that there was an omission afterwards to obtain her signature.

Lord Shand—After a careful consideration of the evidence in this case, I am of opinion that it has been proved that an antenuptial contract, in terms of the draft libelled, was executed by the late Mr Ferguson and the defender Mrs Louisa Smith or Ferguson; that this deed remained in the custody of Mr Ferguson's brother, the late John Ferguson, advocate in Aberdeen, from the time of the marriage in September 1868 until

26th August 1877, when Mr Ferguson called on his brother and took the deed away with him. It does not appear that the deed was ever seen by any one thereafter; and Mr Ferguson died on 4th September 1881, fully two years after he obtained possession of it, having had a severe paralytic stroke in the end of December 1880, from the effects of which he never fully recovered. I think it may fairly be assumed that the deed was in existence on 11th June 1881, about three months before Mr Ferguson died, because Mr Ruxton, who gave his evidence with great intelligence and precision, says that in a conversation between Mr Ferguson and himself on that date Mr Ferguson spoke of a deed or document containing a provision of £200 a-year in favour of his wife (which must have been the deed in question) as being then in existence. The deed was not found in Mr Ferguson's repositories at his death, and neither party had been able to lead any evidence showing how it was destroyed or lost. The only other facts of importance proved in the case are that Mr Ferguson's means after his marriage and for a considerable time before his death had greatly increased, so greatly as to make the provision of £200 a-year, given in discharge of all legal rights by the marriage-contract, quite unsuitable and inadequate as an annuity to his widow, with whom he lived on very affectionate terms; that he was himself of opinion that the amount of the marriage-contract provision was, as he expressed it to Mr Ruxton, "out of the question now," and that he fully intended to set this right, having spoken of executing a new deed to that effect.

The question arises on this state of the facts, whether the pursuers are entitled to a decree of proving the tenor setting up the marriage-contract, which is no longer in existence as an effectual deed? The pursuers maintain that it must be held that the deed was accidentally lost or destroyed, while the defender disputes this contention, and maintains that the effect of the evidence is to lead to the conclusion that Mr Ferguson intentionally destroyed the deed; and at all events that the proof does not exclude this as a probable or at least possible occurrence, and so the decree sought ought not to be granted.

As to the execution of the deed, it is true the evidence of Mrs Ferguson and of her father and mother are to the effect that no marriage-contract was entered into. Mr Smith's memory is so much affected that his evidence cannot be relied on, nor can I give much weight to the evidence of his wife, for her statements do not necessarily exclude the possibility of the deed having been executed. On the other hand, there is a body of clear consistent evidence adduced by the pursuers on this part of the case. It is proved, I think, that the deed was carefully prepared and extended. The late Mr Ferguson recorded in his diary that it was signed. His sister-in-law Mrs John Ferguson remembers that she saw the extended and signed deed, which she had assisted her husband to compare with the draft brought home by him. She and her daughter speak of Mr John Ferguson having told them in August 1877 that his brother had called on him and taken away the deed; and finally, Mr Ruxton tells of his conversation, already referred to, with Mr Ferguson, three months before his death, when Mr Ferguson referred to the deed as being then in existence. I am unable to resist the effect of this evidence, and I can only suppose that Mrs Ferguson on the eve of her marriage, with much otherwise to occupy and engross her attention, had not attached importance to the execution of the deed, and so had forgotten her act of signing it.

But although the deed was executed, it does not follow that seeing it was not found amongst the deceased's papers it shall now be set up again. Of course, if it had been averred and proved that the deed had been accidentally destroyed by the deceased, or having been in existence at his death had been destroyed or mislaid since that event, the pursuers having thus established a special *casus amissionis*, would have succeeded in obtaining the decree they ask. There is no evidence, however, to establish either of these alternatives.

In these circumstances, it appears to me that the determination of the case depends on the particular nature of the deed, and the true purpose of the action—I mean the purpose or object which the pursuers seek to obtain by obtaining a decree of proving the tenor.

In questions of this kind we find that there are two different classes of deeds which come before the Court with reference to a demand for a proving of the tenor. In one of these classes a special *casus amissionis* must be proved, and in another no such proof is necessary, and I think that nowhere is that particular rule of our law more distinctly stated than in Erskine, iv. 1, 54. Mr Erskine there says—"Because it ought to appear to the Court not only that the deed said to be lost was once a genuine deed, but that it is a right or obligation not yet extinguished; the pursuer must libel and prove the *casus amissionis*, or the accident by which it came to be lost, before the tenor of it be admitted to proof. In obligations which are extinguishable barely by the debtors destroying and cancelling them, *e.g.*, in personal unregistered bonds, where the debtor who makes payment rests frequently secure by getting up the obligation from the creditor and destroying it, such a special *casus amissionis* must be proved as may shew that the bond was lost while in the creditor's hands by some particular accident, *e.g.*, fire, robbery, shipwreck, or other such misfortune; otherwise bonds truly paid might be again demanded from the debtor as obligations still subsisting—(Stair, b. 4, t. 32, § 3)." But referring now to the other class of cases, "in deeds which are intended to remain constantly with the grantee, or which requires contrary deeds of renunciation to extinguish them, as dispositions, seisins, wadsets &c., or where the debtor who makes payment does not commonly choose to rely for their extinction on the bare cancelling of them, as assignations, &c., a more general *casus amissionis* is sufficient (Stair, b. 4, t. 32, § 4), insomuch that most lawyers are of opinion that it is sufficient to libel that the deed was lost anyhow, even *casu fortuito*." In the present case it appears to me, in accordance with your Lordships' opinions, that the deed in question is of the former class. The marriage-contract is not one in which important rights are given to children or to third parties. It is true, no doubt, that there is an obligation given to aliment children on this small annuity of £200 a-year provided to the lady. But then, again, looking to the large means that Mr Ferguson left, that obligation would be of no value to these

children. If the case had been one in which independent rights had been given to children or third parties, and the marriage had followed, as it did, upon the deed, it would have been beyond the power of Mr Ferguson, or Mr and Mrs Ferguson jointly, by cancelling the deed, to deprive it of legal effect, and so when once such a deed was executed, and that in terms which gave such rights of an onerous character, the *casus amissionis* would be of little or no consequence, and the same rule would be applied as in the case of the loss of one of a series of title-deeds, in which case all that was to be proved is that the deed was in such and such terms and that it cannot be found. What are the terms and what the effect of the deed here? The sole operative part is that the lady—now the widow—will, if the deed be set up, be under an obligation to accept of £200 a-year instead of her legal rights, which will tell severely on one in her position. The effect of a decree in this action will be to set up this obligation and nothing else. The action is an action of proving of the tenor, but in substance it is a declarator that Mrs Ferguson shall be obliged to accept of an annuity of £200 a-year in place of her legal rights, and a declarator which there is no deed in existence to support. To succeed in the action the pursuer must set up this deed, but that is only a step in the process. I cannot doubt, looking to the nature of the deed, that the parties could have cancelled it by drawing a pen through their signatures and writing a docquet on it saying that they hold it as cancelled, nor that if it were distinctly proved that they jointly agreed to destroy it the same result would follow. If, again, the husband destroyed it with the view of relieving his wife of the obligation it contained, and the wife acquiesced in that act, the result would be the same, for in that case we would have the husband relieving the wife from her obligation just in the same way as a creditor who holds a bond or bill knows that if he destroys it it will cease to be effectual against the debtor, so as to make proof of a special *casus amissionis* requisite, such as force or accident, and so exclude the supposition of intention. The pursuer here cannot say that he has excluded the view that Mr Ferguson destroyed the marriage-contract, and unless he excludes that—and no such special cause is even averred—he cannot set up the deed so as to make it effectual. With a deed of this class, which is practically the same as a bond or a bill, a special *casus amissionis* must be averred and proved, and from the absence of such averment in this record the Court might, I think, have held the summons not relevant. But we thought it better to allow a proof before answer, and now after that proof I think that the pursuer's averments are not relevant, and not proved. I would so hold even if we had to deal with the question for the first time, but I am of opinion that the case of *Donald* is a direct authority for our decision. There the marriage-contract was executed in duplicate. The father-in-law said that he had been requested to destroy his duplicate, as the husband intended his wife to have increased provisions. The other duplicate had been in the hands of the husband himself, and was known to be in existence eighteen months before he died. There was no evidence as to how it disappeared, and there had been no consent by the wife to its destruction. He spoke of his affairs, and wished his law-agent sent for, but was thought too ill to see him. In that case there was an anxious argument to the effect that a deed such as a marriage-contract was unlike a bond or bill, which might be destroyed, whereas a contract could only be terminated or altered by writing. That argument is very forcibly put in p. 28 of the argument of Sir Ilay Campbell in that case—"It is submitted then how far your Lordships can in such a case found your judgment upon a presumption so unnatural, so violent, and the consequences of which as a precedent to other cases may be so detrimental to society, as that this contract being a retireable deed was actually retired. The plain rule of law and of good sense is to hold a contract of marriage to be a document not retireable, but of a permanent nature; and laying down this as the principle, it follows of course that the *onus probandi* in this case does not lie upon the petitioner, the heir of his brother, to instruct a special *casus amissionis* as a necessary ingredient in his libel, but that if the defender Mrs Donald means to insist that the contract was lawfully destroyed, and that the mutual obligations arising from it are discharged, she must state that proposition by way of defence, and must be able to make it out both in point of fact and relevancy. In short, the burden of proof lies upon her, and not upon the pursuer, who does all that is incumbent upon him when he shows, first, that a contract of marriage was entered into, and did exist at the time of the marriage, and long after it took place, though now amissing; and second, that it was of such a tenor. The whole discussion about the special *casus amissionis* arises upon the defence, and is in no way necessary in support of the action;" and again in another part of the pleadings we find that the facts dwelt upon show how closely that case comes to the one we are now dealing with. I refer to a passage on p. 34, which I do not think it necessary to read.

The result of that case, therefore, is that in the case of a deed of this class, where we have a peculiar marriage-contract, in which the sole operative provision was one which was in favour of the husband, if the deed is not found at his death the person desiring to set it up has the *onus* of proving a special *casus amissionis*.

On these grounds I am of opinion, fortified by the case of *Donald*, that we ought to refuse decree.

Lord Deas—This case involves various questions. On one of these I entirely agree with Lord Shand, and that is, that the marriage-contract was duly executed by both parties. I do not go into the details of the proof, but I think the execution of the marriage-contract proved by facts and circumstances detailed by witnesses who are beyond suspicion. There are some facts relating to the marriage-contract which I cannot resist. That the contract was prepared is beyond dispute. We have an account from the books of a law-agent for drawing and extending it, and for a stamp for it, which must have been used, for no spoiled stamp was ever asked back, and what clenches the matter most of all, we have it under the hand of Mr Ferguson himself that the contract was executed. In his memorandum-book we have it that he on 18th September "left with John at 4·15 P.M. for Stonehaven; dined at Mr Smith's;

marriage-contract signed. Returned to Aberdeen in evening." What does that mean if the contract was not truly executed? To my mind it is not short of absurdity to hold that it was not. The entry of the marriage immediately follows in the memorandum-book—"22d September.—Left at 12·23 for Stonehaven. Married at 2·30 P.M. to Miss Helen Louisa Smith at Bank House." The execution of the marriage-contract, then, is proved by evidence that carries full conviction to my mind.

As to the question of the *casus amissionis*, I am humbly of opinion that that deed does not require a special *casus amissionis* to be established in order that its tenor may be proved. We are quite familiar with the passage from Erskine's Institutes quoted by Lord Shand, which is to the effect that there are two kinds of deeds, of which one requires a special *casus amissionis*, and one does not. I think this deed is one of the class which does not require the allegation of a special *casus amissionis*. In the first place, it is a mutual deed, and it cannot be affirmed as a general proposition that a mutual agreement requires proof of a special *casus amissionis*. I can understand the argument which seems to have been urged in the old case to which we were referred, that though a document be an antenuptial contract everything in it may be unilateral, and therefore the husband may destroy it at pleasure. This deed contains one important thing, even though there were nothing else in it—the renunciation by the wife of her legal rights. The husband might place very great value on that. There were five children of a former marriage alive, and the husband had their interests in view, and that acceptance by the wife of the provision in lieu of her legal rights was most important to these children. I think it plain that that was in view in the acceptance of that arrangement. The husband was acting for those children in inserting that clause. Everbody knows how such a clause accepting provisions in lieu of legal rights affects the division of the personal estate when there are children of a former marriage. These children may claim their legal rights at their father's death, and these rights may be very different in amount if the widow has renounced hers. I think that here the husband stipulated this acceptance of a special provision by the widow for the benefit of these children. It does not follow from that that he was entitled to take the benefit of it away. If the husband and wife had concurred in the destruction of the deed there would have been a more favourable case for the argument addressed to us. But I doubt the wife's power jointly to destroy it. The husband would have been entitled to object to the destruction in consequence of the existence of the clause which affected the children of the former marriage. I do not think therefore that this is a unilateral deed which resembles a bill or a bond. I think, on the contrary, that the passage cited from Erskine is against that, and that according to the doctrine of that passage proof of a special *casus amissionis* is not necessary.

But supposing that we recognise, as we must do, the authority of the case of *Donald* in 1774, I do not think that it would be safe to draw it into a precedent in a case where there is a substantial difference. I have read the session papers in that case, and there seems to me to be a substantial difference between it and the present. The husband there was believed to have destroyed the deed for the purpose of giving the wife her legal provisions. In this case before us the husband has expressed a wish to make his wife's position better, but what alteration he wished made we do not know. There has been nothing to satisfy me that the alteration he wished made was to give her the whole share in his estate which she would have had but for the marriage-contract. If we hold that, the effect will be to make a will for him which he never made for himself. In the case of *Donald* it was not only proved that the husband wished to destroy the contract, but also that he directed it to be destroyed. There is no proof here of that fact. If there had been, then that case would have been on all fours with this, and narrow and ticklish—to use a common expression—as the case might have been, I would have been for following the case of *Donald*. But I think the cases are not the same. There seems to me to be a sufficient distinction to prevent us from applying the rule of *Donald's* case to this case. My difficulty in concurring with your Lordships is, I must say, much increased by the difference of opinion which exists as to the execution of the deed. That circumstance is the whole foundation for the application of *Donald's* case.

This interlocutor was pronounced :—

"Having advised the cause with the proof, find that the pursuer has not libelled or proved a sufficient *casus amissionis*: Therefore sustain the defences, and assoilzie the defender."

Counsel for Pursuers—Mackintosh—Jameson. Agents—Henry & Scott, S.S.C.

Counsel for Defender—Gloag—Low. Agents—Davidson & Syme, W.S.

Friday, June 2.

FIRST DIVISION.

[Sheriff of Ross, &c.

MORRISON *v.* CREAR.

Process—Debts Recovery (Scotland) Act 1867—*Running Account—Action Raised before Term of Payment of Debt Sued for.*

It is incompetent to raise action or to do diligence on a debt which is not yet due unless the debtor is *vergens ad inopiam*.

In a complaint under the Debts Recovery (Scotland) Act 1867, where the period of credit which was to be allowed to the defender upon a running account had not expired, *held* that it was incompetent to sue for the amount of the account, which was a debt not yet prestable, or to do diligence on the ground of such a debt, unless by alleging that the debtor was *vergens ad inopiam*, and using diligence on the dependence of the action.

Opinion (*per* Lord Shand) that the action would have been competent if either the prayer for decree had been qualified by such words as "the date being first come and bygone," so that no operative decree could have