father and sister. The defender says that the amount was only £275, and for the purposes of this case that may be taken to be the true amount. The fact that he received the money does not depend solely on his admission on record or in the witness-box. The pursuer's sister Mrs Cameron says that the money saved by her mother, which was uplifted by the pursuer, consisted of two one-hundred-pound notes, a fifty-pound note, a twenty-pound note, and some small notes. Now, the witness William Forsyth says that in 1890 the defender showed him the two one-hundred-pound notes and told him that it belonged to the pursuer.

It being thus fairly established that these notes were deposited with the defender, I am of opinion that it lay upon him to prove that they were restored or repaid to the pursuer. The onus of proving restoration is on the depositary. Otherwise a depositor would be at the mercy of a dishonest depositary. He would have to prove affirmatively, that the deposit was made, and negatively that it was not returned, while in the absence of corroborative evidence the depositary would go free in either case. In some cases little more may be required than the evidence of the depositary to discharge the burden of proof. Proof of circumstances may be sufficient, but in the absence of direct corroboration the depositary's evidence must at least be unambiguous and credible. In this case the defender's evidence is stamped with improbability. He says that within eight days after the pursuer gave him the notes he gave them all back to the pursuer just as he got them. That seems to be a very improbable statement. The money was given to the defender for the very purpose of keeping it out of the reach of the pursuer's father, and the last thing that the pursuer was likely to do was to give his father another chance of carrying it off.

Then the defender says that in a few days the pursuer brought him back £150 of the money, consisting of a one hundred pound note, two twenty pound notes, and a ten pound note; and the defender's statement is that he kept that money in that state, used neither by the pursuer nor by himself, for seven years until 1897, and that he thereafter paid the whole £150 back to the pursuer in three instalments of £50 each. I do not believe this story. In August 1899 the witness David Paterson had a conversation with the defender, who was apparently becoming alarmed on account of inquiries being made by Mrs Cameron as to money in his hands. He told Paterson that he had got money belonging to the pursuer to keep, and that the pursuer had got the money as he wanted it. He did not say that he had repaid the whole of the money; and the witness says—"I did not understand from what he said that he had had the money and had given it back. He did not say that he had at present money of the pursuer's in his possession. I gathered that he had had money at some past time, but I understood he still had it when he was speaking, although he did not say so."

There are two other matters in connection with the defender's conduct which do not impress me favourably. He knew quite well that the pursuer's sister had a claim upon the money, and yet for nine years he concealed from her the fact that he had at least part of it in his hands. And when an attempt was made to have an interview with him he sent evasive messages and kept out of her way. My impression on the whole matter is, that the defender, although at the outset he had no dishonest intention, retained and ultimately appropriated the balance of the money entrusted to him by the pursuer, trading on the fact that the pursuer had given out that he had burned all the notes, which the defender trusted would preclude him from denying the defender's averment that he had returned the whole of the notes to him. In any view the defender has failed to prove restoration beyond £150.

The Court pronounced an interlocutor in effect affirming the findings of the Sheriffs, and decerned against the defender for £125.

Counsel for the Pursuer and Respondent —Ure, K.C.—T. B. Morison. Agent—John Martin, Writer.

Counsel for the Defender and Appellant —Lees, K.C.—Chree. Agents—Adamson, Gulland, & Stuart, S.S.C.

Saturday, November 9.

SECOND DIVISION.

BRODIE *v.* MACGREGOR.

Expenses—Jury Trial—Breach of Promise — Tender — New Trial — Averments Impeaching Chastity — Damages Awarded Less than Sum Tendered.

In an action of damages for breach of promise, in which the defender made averments impeaching the pursuer's chastity, the pursuer obtained a verdict for £5000. The Court having granted a new trial on the ground of excessive damages, the defender made a judicial tender of £1500 and expenses, which was refused by the pursuer. At the second trial the pursuer obtained a verdict for £500.

On a motion to apply the verdict, the Court *found* the pursuer entitled to expenses up to the date of the tender, and found the defender entitled to expenses after that date.

Mrs Catherine M'Ewen or Brodie brought an action against David MacGregor, in which she concluded for £30,000 in name of damages for breach of promise of marriage.

The defender denied that he had ever promised to marry the pursuer, and averred that she had endeavoured to entrap him into a promise, with the object of compelling him to marry her, or of extracting money from him. He also made averments reflecting upon the pursuer's chastity.

The case was tried at the Christmas sittings of 1900 before the Lord Justice-Clerk and a jury, when the jury found for the pursuer and assessed the damages at £5000.

The defender moved for a new trial, and on 29th May 1901 the Court granted a new trial on the ground of excessive damages. On 24th September the defender lodged a minute in which he made a tender of £1500 and expenses. The pursuer refused the tender.

The case was again tried before the Lord Justice-Clerk and a jury on 11th, 12th, and 14th October 1901, when the jury found for the pursuer, and assessed the damages at £500.

The pursuer moved for a rule on the defender to show cause why a new trial should not be granted, on the ground of insufficient damages. The Court refused a rule.

On a motion by the pursuer to apply the verdict, the defender maintained that he was entitled to all his expenses since the date of the tender, and argued that the rule was absolute that a defender who had tendered more than the pursuer recovered was entitled to all expenses since the date of the tender. The pursuer maintained that neither party should be found entitled to expenses since the date of the tender, and argued that there was no absolute rule as to expenses, the matter being entirely in the discretion of the Court. The pursuer was justified in persevering in her action in consequence of the attack made upon her character by the defender—*Lawson* v. *Ferguson*, July 10, 1866, 38 Sc. Jur. 528, 2 S.L.R. 177.

LORD JUSTICE-CLERK—I think that justice will be done by giving the pursuer her expenses up to the date of the tender, and finding the defender entitled to expenses after that date.

LORD TRAYNER and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court found the pursuer entitled to her expenses down to 24th September 1901, and found the defender entitled to expenses since that date.

Counsel for the Pursuer—Guthrie, K.C. — Hunter. Agent — R. Ainslie Brown, S.S.C.

Counsel for the Defender—Salvesen, K.C. —M'Clure. Agents—Simpson & Marwick, W.S.

Saturday, November 9.

SECOND DIVISION.

BRODIE *v.* BRODIE.

Process—Proving the Tenor—Deed Importing Obligation—Bond of Annuity—Casus Amissionis—Deed Alleged to have Disappeared from Pursuer's Repositories.

In an action for the proving of the tenor of a unilateral deed which imports obligation, and is of such a kind that it usually is or may be extinguished by being destroyed, the pursuer must furnish such proof of the *casus amissionis* as will satisfy the Court that the loss or destruction of the deed took place in such a manner as implied no extinction of the right of which it was the evident.

Evidence in an action for the proving of the tenor of a bond of annuity, which was alleged by the pursuer, the grantee of the deed, to have "gone amissing" from a locked drawer where he had kept it, upon which *held* (*diss.* Lord Moncreiff) that the *casus amissionis* had been sufficiently proved.

This was an action of proving the tenor at the instance of Peter Brodie, North Berwick, against Peter Brodie junior, Stirling, his son, in which the pursuer sought to have it declared "that the bond of annuity granted by the defender in favour of the pursuer and the now deceased Mrs Mary Eeles or Brodie, his wife, and the survivor of them, dated on or about the 23rd day of December 1885, was of the following tenor, *videlicet*:—I, Peter Brodie junior, baker, Stirling, for the love, favour, and affection which I have and bear to Peter Brodie, provost of the royal burgh of North Berwick, and Mrs Mary Eeles or Brodie, his spouse, and for other good causes and considerations, but without any price being paid to me therefor, do hereby bind myself, my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to make payment to the said Peter Brodie and Mrs Mary Eeles or Brodie jointly, during all the days of their joint lives, and to the survivor of them during his or her life after the death of the first deceased, of a free liferent annuity of £100 sterling, and that at two terms in the year, viz., the 6th day of January and the 1st day of July, by equal portions, beginning the first term's payment thereof on the 1st day of January 1886 for the half-year immediately succeeding that date, and the next term's payment thereof on the 1st day of July 1886 for the half-year immediately succeeding that date, and so forth half-yearly, termly, and continually thereafter during the joint lives of the said Peter Brodie and Mrs Mary Eeles or Brodie, and the life of the survivor of them, 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 the term