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

of payment thereof during the non-payment of the same: And I consent to the registration hereof for preservation and execution," &c.

The pursuer averred that he had formerly carried on business as a baker in North Berwick, from which he retired in 1887; that he had assisted the defender, who was his son, to purchase a bakery business in Stirling, and had since given him further financial assistance; that the defender having subsequently prospered in business, had, in acknowledgment of his father's kindness, executed in his favour the bond of annuity recited in the summons; that the defender had paid the half-yearly instalment due thereunder down to 6th January 1893, when, the pursuer's wife having died, differences arose between him and his sons in consequence of their opposition to his proposal to enter into a second marriage with his housekeeper, whom he subsequently married on 29th June 1893.

He averred further—"(Cond. 6) . . . . About the New Year of 1893 the defender visited his father at North Berwick, and stayed for some days in his house. In the end of March or beginning of April 1893, James Brodie, Peter Brodie, and Hamilton Brodie, the pursuer's sons, met in his house at North Berwick, and sought to prevail on him to comply with their request to part with his said housekeeper. This the pursuer refused to do. . . . (Cond. 7) In the room which had been occupied by Hamilton Brodie in the pursuer's house there was a chest of drawers, in one of which drawers the pursuer kept his business documents and papers, and among them he had deposited the foresaid bond. The defender had access to this room and to the said drawer on the occasion of his foresaid visits about the New Year time and in the end of March or beginning of April 1893, and the pursuer believes and avers that the bond was in the foresaid drawer on the night on which the defender slept in his house. The defender knew that the bond was kept in this drawer. (Cond. 9.) The foresaid bond of annuity, which was duly delivered by the defender to the pursuer, was placed by him in the foresaid drawer in his house at North Berwick, and it lay there as above set forth until, the pursuer believes and avers, the occasion of defender's visit to his father's house in the New Year, or the end of March or beginning of April 1893. It was, the pursuer believes and avers, then abstracted from the foresaid drawer and taken from the pursuer's house. At all events it has gone amissing and is irrecoverably lost."

The defender, in answer, averred that when payment was made of the instalment of the annuity due on 6th January 1893 "the pursuer intimated to the defender that he did not desire any further payments to be made, and that he would destroy the said bond." "Explained and averred that the said bond has not gone amissing, but was, the defender believes, destroyed by the pursuer in conformity with his intention so expressed to the defender on or about 9th January 1893."

The pursuer pleaded—"(2) The foresaid bond of annuity having been duly delivered to the pursuer, and having been irrecoverably lost, decree of its tenor should be pronounced in terms of the conclusions of the summons."

The defender pleaded—"(1) No relevant case. (3) The pursuer having intentionally destroyed the bond in question, decree as concluded for ought not to be pronounced, and the defender ought to be assoilzied, with expenses."

On 23rd February 1901 the Lord Ordinary (KYLLACHY) made great avizandum with the cause to the Court.

Thereafter, the parties having lodged a minute admitting the sufficiency of the adminicles produced and the tenor of the bond of annuity libelled in the summons, the Court, on 21st June 1901, pronounced an interlocutor sustaining the adminicles produced as sufficient for allowing a proof of the *casus amissionis*, and allowing a proof thereof.

Proof was led before Lord Trayner on 5th July 1901.

The pursuer deponed—" . . . Upon the 23rd December 1885 my son Peter executed a bond of annuity in my favour. . . . After my wife's death I kept the bond in a drawer in a bedroom upstairs. My son Hamilton occupied the bedroom in which was the chest of drawers in which I put the bond. There were two chests of drawers. The bond was put into the chest of drawers which I kept for house purposes. I kept the drawer locked. . . . My son Peter visited me on the 9th of January 1893. . . . The night he stayed with me Peter occupied the room in which Hamilton slept. I said nothing to Peter about the bond on that occasion. My sons desired that I should not marry again, and they met in my house in the end of March or beginning of April 1893 to try and induce me not to marry again. Peter stopped in the house that night, and left next day without my seeing him. *By the Court.*—As far as I know, the bond was still in the drawer when Peter was there in March or April. *Examination continued.*—I had not seen the bond for a considerable time previous to that. When the next instalment fell due on the 1st of July 1893 it was not paid. I wrote to Peter in that month. He did not reply to my first letter, and I wrote a second letter to him. He wrote me back, and I was astounded at his letter. It said that he was not going to pay me any more because I had written him that I had burned the deed and did not require it any longer. . . . When I received that letter from Peter I went to an agent, Mr Hill Murray, and he took the question up, but before going to him I looked for the bond along with my wife. I went to Hamilton's bedroom. The key of the drawer had disappeared, and I had to send for a blacksmith to get the lock picked. My wife and I examined the contents of the drawer, but we did not find the bond in it. We looked in every press and drawer in the house, but we were not able to find it. When I could not find the bond I wrote to Peter stating that he was mak-

ing a mistake, and that his statement was not true. I got no answer from him. . . . I never burned the bond, and I never said to anybody that I had burned it. . . . I remember visiting Peter at Stirling after my wife's death. At that time I never mentioned annuity to him. I did not at that time state that I did not need the money. I did not say anything like 'Well, my lad, I will take it this time, and there will be all the more for you at the end.' (Q) When your son wrote to you stating that you had told him you were going to destroy the bond or burn it, did you ever say to him that you had never said anything of that kind, or that you had not destroyed the bond?—(A) I never spoke to him about destroying the bond."

Mrs Brodie, wife of the pursuer, examined for him, deponed—"I recollect my husband receiving a letter from his son Peter in July 1893. It was read to me by my husband. In that letter Peter Brodie said that his father had written to him that he had burned the bond of annuity. After getting that letter my husband and I went to search for the bond in Hamilton's bedroom. We went to the chest of drawers there. It was locked, and as we had not the key we sent for a blacksmith. I was present when the blacksmith opened the drawer. Both my husband and I searched for the bond, but we did not find it. I never heard my husband say that he had burned it or destroyed it."

The defender deponed—"Upon the occasion of my visit to my father in January 1893 I was then in pecuniary difficulties and requiring to borrow money. My father said that as he did not require the money he would relieve me of the bond and would destroy it. At that interview he spoke generally of the resources that he had, and showed me that he did not need it. . . . After January 1893 I certainly assumed that my father had destroyed the bond. *By the Court.*—My father wrote in the month of July for the payment that he said was then due. I wrote back that I was astonished to get the letter from him because he had told me that he meant to discharge me of the bond, and meant to destroy the bond. In reply to that he sent another letter to the effect that he had not destroyed the bond, and wanting his payment."

Charles R. Brodie, a brother of the defender, examined for him, deponed—"In the autumn of 1892 I was in North Berwick on a holiday staying with my father, who was then a widower. Upon that occasion I had a conversation with my father about Peter's business in Stirling. Reference was made to Miller's business, and to my complaint that my salary was not enough. My brother could not give me more. My father then said he would relieve my brother of the bond, which would enable him to give me a better salary. I did not mention this to my brother."

Hamilton Brodie, a brother of the defender, examined for him, deponed—"About March 1893 I had a conversation with my father. He said that he had relieved Peter of the annuity and destroyed the bond. This was in answer to observations I made to him as to the propriety of his proposed marriage."

Certain other portions of the evidence will be found referred to in the opinions of Lord Trayner and Lord Moncreiff.

Argued for the pursuer — Admitting that it had not been proved that the defender had abstracted the bond, the pursuer's averment that it had gone amissing from his repositories was a sufficient averment of the *casus amissionis*. It was not an invariable rule that in the case of deeds importing obligation a special *casus* must be averred and proved — *Forbes' Trustees* v. *Welsh*, March 1, 1827, 5 S. 468; *Mackenzie* v. *Dundas*, December 12, 1835, 14 S. 145; Shand's Practice, 882; Dickson on Evidence, sec. 1344. All that the pursuer was bound to prove was that the loss of the deed "took place in such a manner as implied no extinction of the right of which it was the evident"—*Winchester* v. *Smith*, March 20, 1863, 1 Macph. 685, at p. 689. In the circumstances disclosed by the evidence the pursuer had established that proposition.

Argued for the defender—The pursuer had failed to prove the special *casus amissionis* alleged by him, viz., that the bond had been abstracted by the defender, and he could not be allowed to prove any other. At all events, his averment that the deed had gone amissing from his repositories was not such an averment of a special *casus* as the law required in the case of a deed importing obligation which would be discharged by being destroyed. In such a case the pursuer must prove a special *casus* in order to rebut the presumption that he had himself destroyed it—*Donald* v. *Kirkcaldy*, 1787, M. 15,831; *Winchester*, *supra*; *Smith* v. *Ferguson*, May 31, 1882, 9 R. 866, 19 S.L.R. 331; Stair, iv. 32, 3. The defender further maintained that the evidence supported the presumption that the pursuer himself had destroyed the deed.

At advising—

LORD TRAYNER—In this case the pursuer seeks a decree proving the tenor of a bond of annuity, dated in December 1885, granted in his favour by his son the defender. By that bond, according to the statement of its contents given in the conclusions of the summons, the defender obliged himself to make payment to the pursuer and Mrs Mary Eeles or Brodie his wife, 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 1st day of July, by equal portions, beginning the first term's payment in January 1886. That bond was delivered to the pursuer, and in terms of it the defender paid to the pursuer and Mrs Brodie the amount of said annuity during their joint lives. Mrs Brodie, the defender's mother, died in November 1891, and thereafter the annuity was paid by the

defender to the pursuer until and including the termly payment due on 6th January 1893. In or about the month of March 1893 the defender and other members of the pursuer's family became aware that the pursuer contemplated entering into a second marriage. To this they were very much opposed, and endeavoured to dissuade the pursuer from entering into such marriage. He did, however, marry his present wife in June 1893, and from that date there has been no friendly intercourse between the pursuer and the defender, or any of his (the pursuer's) sons.

In July 1893 the pursuer not having received the half-year's annuity due on the 1st of that month wrote to the defender asking payment, and received from the defender a reply to the effect (I quote from the pursuer's evidence) "that he was not going to pay me any more because I had written him that I had burned the deed, and did not require it any longer." The pursuer replied that he had not made or written such statement, and repeated his request for payment of the half-year's annuity. The defender's letter, however, induced the pursuer to look for the bond in the drawer where he had last placed it, but it was not there, and the most complete search which the pursuer could make has been fruitless. The bond cannot be found, and therefore the pursuer has raised this action to have the tenor of the bond declared.

In a case of this kind a pursuer has to do two things—he must produce adminicles tending to prove the contents and tenor of the lost writ, and he must aver and prove the *casus amissionis*. In the present case there is no dispute that the pursuer has satisfied the first of these conditions. The defender has (not in his record but in the joint-minute) admitted "the sufficiency of the adminicles produced in process and the tenor of the bond of annuity libelled in the summons." Accordingly, the only question in the case is, whether the pursuer has averred and proved a sufficient *casus amissionis?*

It was maintained by the defender that in a case of this kind, where the deed or writ sought to be set up was one importing obligation, it was incumbent on the pursuer to aver and prove a special *casus amissionis*. In my view that proposition is too broadly stated. No doubt, in cases where an obligation is to be set up, the Court requires from the pursuer such a statement and such a proof as will satisfy the Court that the loss or destruction of the writ was such as did not infer an extinction of the obligation. That was the view expressed by the Lord President (M'Neill) in the case of *Winchester* (1 Macph. 689), who said (in reference to deeds importing obligation) that there must be "sufficient proof of what is technically called the *casus amissionis*, and which, as we understand the phrase, means not only that the writing has been actually destroyed or lost, but that its destruction or loss took place in such a manner as implied no extinction of the right of which it was the evident." Now, I think it is by that standard that this case must be determined, and I shall consider immediately whether the pursuer's case, judged by that standard, has been made out. That a special *casus* is not necessary in all cases of proving the tenor of a deed importing obligation is stated by Stair (iv. 32, 6), and of this there are examples in the cases of *Forbes* v. *Welsh* (5 Sh. 468), and *Mackenzie* v. *Dundas* (14 Sh. 145), where, in the former case, in regard to a cautionary obligation, and in the latter to a personal bond, it was held sufficient to aver and prove the loss of the writ. I do not regard the cases of *Donald* and *Smith* referred to by the defender as militating against or affecting the decisions in *Forbes* and *Mackenzie*, or as laying down any general or absolute rule inconsistent with these decisions. The cases referred to by the defender were very special, and neither the averments nor the proof were such as to exclude the inference that the destruction of the writ was for any other purpose than to extinguish the obligation thereby imposed. Indeed, there were circumstances in each case raising the presumption that the deeds in question had been destroyed for the purpose of extinguishing the obligation.

The defender, however, further maintained that the pursuer had averred a special *casus* but had failed to prove it, and that he could not support his case by proving any other *casus* than the special one averred. I agree with the view that if a special *casus* is alleged none other can be proved. But that is only saying that the pursuer cannot prove anything other than he has averred. No pursuer can or may do so in any action, no matter what its nature or character may be. But the defender's argument appears to me to be based upon a reading of the record which is inadmissible. The pursuer's averment is that the deed was in his possession at a certain time, and that sometime thereafter it could not be found. The *casus* averred is simply the loss of the writ. The pursuer no doubt adds that the deed was abstracted from the drawer in which it had been deposited. But that plainly is not an averment of a fact within the pursuer's knowledge. It is an inference drawn by him, and not an unreasonable inference. The deed was in the drawer, it is not now in the drawer, it could not go away of itself; it must therefore have been abstracted.

The pursuer's case, therefore, as I read it, is that the deed has been lost; he cannot say how or when, although he believes it must have been abstracted. That is, in my opinion, a sufficient averment of *casus*, and if so I am of opinion that it has been proved. The pursuer's evidence is quite distinct that he did not destroy the deed, and his conduct as well as his evidence shows that he has not only regarded the obligation of his son as still subsisting, but has from the moment when the defender denied liability under it maintained that he was liable and insisted on fulfilment. I entertain no doubt of the truthfulness of the pursuer and his wife, and it is of some sig-

nificance that they instituted their search for the bond in question immediately on the receipt of the defender's letter denying liability on the ground that the deed had been destroyed.

In support of his defence that the pursuer destroyed the deed with the intention and effect of discharging the defender of his obligation, the defender has adduced some evidence which it is necessary to notice.

The defender himself does not say that the pursuer ever told him that the deed had been destroyed. He says the pursuer said "he *meant* to discharge me of the bond and *meant* to destroy the bond." In like manner, Charles Brodie says that the pursuer on one occasion said "he *would* relieve my brother of the bond." The pursuer denies that he used such expressions. But if he did use them, at the most they expressed intention only to do something, not a statement that that something had been done. I doubt, however, if the pursuer ever used the language attributed to him, and I cannot regard such expressions, if used, as of any weight or importance when placed against the pursuer's oath that he did not destroy the bond. I take no account of the evidence of Mrs Lawrie. It proves nothing whatever with reference to the alleged destruction of the bond. The conversation which she professes to repeat took place (if ever) several years ago, and the value of her recollection may be gauged by the fact that she speaks in the same breath of that conversation having taken place "after January 1893" and "in the beginning of 1892." She is a niece of the first Mrs Brodie, and is admittedly not on friendly terms with the pursuer since his second marriage.

The evidence given by the defender's brother Hamilton is the only evidence directly in support of the view that the bond in question was destroyed by the pursuer. He says that in a conversation he had with his father, the pursuer, in or about March 1893, "he said that he had relieved Peter of the annuity and destroyed the bond." That Hamilton Brodie believed what he said I am not prepared to dispute, but I think his statement is inaccurate. It is singular that the pursuer should have stated to Hamilton that the bond had been destroyed and did not tell this to the defender (who was most directly interested) or to any other person. The pursuer denies having made such a statement to Hamilton, and between the evidence of the pursuer and Hamilton I prefer the former without hesitation. It is not difficult to conceive how Hamilton came to believe that he had been informed of the destruction of the bond. He thought that the pursuer should relieve the defender — that it was unreasonable that the defender should be called on to pay an annuity, the benefit of which to some extent would be enjoyed by the pursuer's second wife; he had heard the defender's account of what the pursuer had said, that he would destroy the bond; he was willing to believe that the bond had been destroyed, and convinced himself, in time, that he had been told of its destruction. The subject of the bond and the pursuer's right under it has largely occupied the minds of the defender and his brother. Their hostility to the pursuer on account of his second marriage is as great now as in 1893 — so great that the defender does not hesitate through his counsel to maintain that the pursuer when he denies having destroyed the bond is guilty of deliberate perjury. This hostility has biassed their minds so as to affect their evidence, which I cannot accept as accurately representing facts. But if the evidence adduced by the defender is accepted, it only raises a presumption that the bond was destroyed by the pursuer. I think any such presumption redargued by the positive statement on oath by the pursuer that he never did destroy it. I need scarcely add that in my opinion the view that the pursuer has perjured himself is altogether without warrant or foundation.

On the whole matter I am of opinion that the pursuer has averred and established a sufficient *casus amissionis*, and that the tenor of the bond being admitted the pursuer is entitled to decree as concluded for.

LORD MONCREIFF—I much regret that I cannot concur in the judgment proposed. As your Lordships are both agreed that the pursuer is entitled to decree, the view which I take is immaterial, but I think it is only fair to state the grounds of my dissent.

The pursuer on record states, or at least suggests, a *casus amissionis* which, if it had been proved, would have been amply sufficient, viz., that the bond of annuity was abstracted from the pursuer's house by the defender. It is admitted that this grave charge has not been substantiated.

The defender, on the other hand, avers on record "that the said bond has not gone amissing, but was, the defender believes, destroyed by the pursuer."

This bond is not forthcoming, and the burden is upon the pursuer to account for its disappearance in some way which will negative the idea that he intentionally destroyed it in order to cancel it, and I am of opinion in the special circumstances of the case that he has failed to do so.

I understand the law applicable to the case to be this. Where an obligation is unilateral, and of a kind which usually is or may be extinguished by giving up the document of debt or destroying or cancelling it without granting a separate discharge, there is a presumption, if the document is not forthcoming, that it has been destroyed by the creditor with the intention of discharging the obligation, in which case the person who founds upon the deed is bound to aver and prove a special *casus amissionis*. The presumption, however, is slight, and may be overcome by proving that the creditor in the deed had no motive and no intention to discharge his right

But it is otherwise if the proof discloses an avowed intention on the part of the holder to destroy the deed. I may refer to Ersk. i. 4, 54; Stair, iv. 32, 3; and the comparatively recent case of *Smith* v. *Fergu-*

son, 9 R. 866, and the opinion of the Lord President at p. 876 (top), and of Lord Shand, pp. 880-81. The case of *Forbes' Trustees* v. *Welsh*, 5 Sh. 497, relied on by the pursuer, is not, I think, in his favour, because, as is concisely stated in the argument, "the whole conduct of parties evidently proceeded on a constant belief in the subsistence of the obligation." Lord Alloway puts it thus (p. 501)—"Is there a case made out in the whole circumstances to show that the deed cannot have been delivered up? For if a case can be shown where it may have been delivered up I would require proof of a special *casus*. But the conduct of the parties here proves it is impossible that the deed could have been given up." He then states the facts of the case which did not indicate any intention on the part of the holder of the cautionary obligation to abandon his right, or any understanding on the part of the cautioner that it had been abandoned, and he adds—"In these circumstances it is impossible to believe that it was cancelled or delivered up, and there is not an allegation to that effect."

Now, in the present case no fewer than four witnesses gave evidence as to the pursuer having expressed an intention not to accept further payments under the bond from the defender, and to destroy or cancel it. The defender says that in the summer of 1892 his father stated to him at Stirling that he was reluctant to take the half-year's annuity which was then due, and again in January 1893 said to him that he would relieve him of the bond and would destroy it.

Mrs Lawrie says that the pursuer speaking to her as to the interview with the defender at Stirling told her that he had said to the defender, "Well, my lad, I will take it this time. Mind, Peter, I won't take it after, because I have enough now when your mother's away to keep me."

The pursuer's son Charles Robert Brodie, who was assistant to the defender at Stirling, says that in the autumn of 1892 the pursuer said to him that he would relieve the defender of the bond, which would enable him to give the witness a better salary.

And lastly, another son, Walter Hamilton Brodie, says that in March 1893, when the subject under discussion was the proposed second marriage of the pursuer, the pursuer said to him "that he had relieved Peter of the annuity and destroyed the bond." Neither this witness nor Charles Brodie was cross-examined.

The pursuer denies absolutely that any such conversation took place between himself and any one of these four witnesses. I confess that I am unable to ignore that body of evidence which does not present traces of concoction and at the same time is coherent. Nothing is said to impeach their veracity except that they are not now on good terms with the pursuer. It is a less violent and a less discreditable supposition that, circumstances having changed and family relations having become embittered, the pursuer too late repented of his generous resolution and denied it, than that these three sons conspired to give false evidence against their father and suborned another witness to bear out their story. The discrepancy cannot be explained away—the pursuer's absolute denial of the conversations makes this impossible. Being compelled to choose between the two stories I prefer the defender's evidence on this point. After making every allowance for the lapse of time and possible exaggeration I cannot doubt that the pursuer at the time made such statements to these witnesses. The proposal did him credit, and in the circumstances was not unnatural, because his first wife, the defender's mother, for whose benefit chiefly the bond was granted, was dead, and the defender being in money difficulties the payment of £100 a-year was a serious burden.

Those statements by the pursuer, if he made them, greatly strengthen the slight legal presumption that the bond which he is unable to produce was intentionally destroyed by himself; and to overcome the presumption thus raised in my opinion a special *casus amissionis* was required.

Now the special *casus* averred has failed; and nothing is proved except that the deed which the pursuer says he placed in a certain drawer in 1892 could not be found in 1893. That is the sum and substance of the proof. There is no averment of a fire or flitting or even of a movement of papers, because the pursuer says that he himself some time previously moved the papers including the bond and placed them in a drawer in Hamilton Brodie's room.

I have not lost sight of the pursuer's contention that apart from his denial (which is entitled to consideration) there are some circumstances which corroborate his story. Notwithstanding his alleged determination not to accept any further payments, he was paid and accepted a half-yearly payment in January 1893; and in July 1893 when the next payment fell due and was not made he wrote demanding payment just as if nothing had happened.

But after all is said the broad fact remains that about the time when he is said to have announced his intention to destroy the bond and liberate the defender the bond which had been previously carefully kept in a locked drawer disappeared and has never since been seen, and no intelligible explanation of its disappearance is offered unless it be that the pursuer destroyed it himself.

I attach little importance to the facts that the defender made a payment in January 1893, and that the pursuer demanded another payment in July 1893. In regard to the first, it amounts to no more than this, that the defender at that time declined to take the pursuer at his word, and I may add that according to the evidence the pursuer did not until January 1893 speak of destroying the bond, and if it was destroyed it was between January and April 1893. In regard to the second fact relied on by the pursuer, it must be remembered that by July 1893 he had entered into a second marriage and an unfortunate family quarrel had arisen. It is further to be noted that on being asked for a payment

in July 1893 the defender at once reminded his father that he had promised to destroy the bond, which was a very improbable answer to give unless the defender had some warrant for such a statement.

On the whole matter I am of opinion that the *onus* was upon the pursuer, and that in the circumstances he was bound to establish and has not established a sufficient *casus amissionis*.

LORD JUSTICE-CLERK—This is certainly a distressing case in its circumstances and much to be regretted. There is no doubt that a family quarrel of long standing had existed, and doubtless has led to a good deal of personal feeling between the parties. As regards the case of the pursuer Mr Brodie, it is quite certain that he is committing wilful perjury if it be the fact that that bond was destroyed by him. But it is perfectly open to consideration whether certain statements by him in regard to his intention of no longer exacting the sum in the bond from year to year have not been exaggerated in the midst of these family quarrels into an assertion that he had destroyed it. Giving the best consideration I can to the case of the pursuer, and having read Lord Trayner's opinion on the case, I concur in it, and therefore am in favour of holding the *casus amissionis* proved.

LORD YOUNG was absent.

The Court pronounced an interlocutor in which they found the *casus amissionis* of the bond of annuity libelled proven, and decerned and declared accordingly in terms of the conclusions of the summons, and found the pursuer entitled to expenses since the closing of the record.

Counsel for the Pursuer—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender — Jameson, K.C.—Guy. Agent—A. C. D. Vert, S.S.C.

Wednesday, November 13.

FIRST DIVISION.

[Lord Low, Ordinary.

ANDERSON *v.* ANDERSON'S TRUSTEE.

Expenses — Trustee — Personal Liability — Decree against Trustee without Qualification in Interlocutor — Trust Estate — Action by Widow against Husband's Testamentary Trustee—Jus relictæ to be Computed before Deducting Expenses incurred by Trustee—Trust.

A trustee who carries on a litigation is personally liable for expenses found due to the opposite party.

Where in an action against a trustee the conclusion for expenses was against the defender "as trustee and executor foresaid," and the Court found "the defender liable to the pursuer in expenses," *held*, that this interlocutor imported personal liability against the trustee.

A widow brought an action against the sole surviving trustee under her husband's settlement, concluding for the delivery of certain stocks and shares standing in his name and alleged to belong to her, and for *jus relictæ*. The trustee, while admitting the claim for *jus relictæ*, defended the action in so far as relating to the other claim. The widow obtained decree, and was found entitled to expenses. *Held* (*reversing* judgment of Lord Low, Ordinary) that in computing the amount of the estate available for *jus relictæ* the trustee was not entitled to deduct either the expenses in which he had been found liable or his own expenses in defending the action; reserving all questions of his right of relief in a question with the beneficiaries under the settlement.

Mrs M. R. Moon or Anderson, widow of the late Dr Alexander Anderson, brought an action against Donald Anderson, marine engineer, Birkenhead, sole remaining trustee acting under the trust-disposition and settlement of the said Dr Anderson.

The conclusions of the action, in so far as it is necessary to refer to them for the purposes of the present report, were for declarator (1) that certain specified stocks or shares vested in the name of the late Dr Anderson were held by him in trust for the pursuer; (2) that the defender, as trustee foresaid, should be ordained to deliver these stocks to the pursuer, and failing his doing so should make payment to her of the sum of £4500; and (3) that the defender should be ordained to produce a full account of his intromissions with the trust funds in order that the amount due to the pursuer as *jus relictæ* might be ascertained, or failing such an account to pay the sum of £2500.

There was also a conclusion for expenses against the defender "as trustee and executor foresaid."

The circumstances under which this action was raised may be summarised as follows:—

Dr Anderson and the pursuer were married in 1886. There were no children of the marriage. At the date of the marriage the pursuer was possessed of separate estate, and during the marriage at various times she handed over certain sums of money to her husband, including two sums of £526 and £1247. These sums were invested by him in certain securities which at the time of his death had greatly increased in value. Dr Anderson died in 1896, while still vested in these securities. He left a trust-disposition and settlement by which, subject to certain legacies and provisions, including certain provisions in favour of the pursuer and of his brothers and the survivor of them, he directed his trustees to pay two-thirds of his estate to the children of the defender and one-third to the children of a niece. The pursuer repudiated the provisions made for her and claimed her legal rights. The estate left by Dr Anderson, including the shares claimed by Mrs Anderson, was estimated to be worth about £4500.