who had only a collateral interest. But the chief ground of the decision seemed to be the peculiar nature of the proof requisite in the action of proving the tenor; with regard to which it was No. 66.

Observed on the Bench: A proving of the tenor is a useful, but at the same time a dangerous remedy; since without due attention, it may give an opportunity of raising up valid and effectual documents, in the place of informal or of forged deeds. It has therefore been wisely provided, that the evidence to be adduced by the pursuer shall not be confined to the *tenor* of the writings, but shall at the same time establish their *authenticity*; Stair, B. 4. T. 32. § 5, 9. Thus, with regard to holograph deeds, it is not enough for the pursuer to prove, that writings of the purport libelled had once existed. Had they been extant, it would have been incumbent on him to have likewise shewn, that they were the genuine hand-writing of the party, and subscribed of the dates which they are said to have borne. Erskine, Book 3. Tit. 2. § 22.; PROOF, Div. 4. § 4. Here then the present action must be for ever ineffectual, because from the disappearance of the writings themselves, such a proof cannot now be obtained.

The judgment of the Court was in these words:

"The Lords, having considered the whole circumstances of the case, dismiss the action."

Lord Ordinary, *Eskgrove.* Act. *Maclaurin, A. Ferguson. Geo. Ferguson.* Alt. *Henry Erskine.* Clerk, *Robertson.*

J. *Fac. Coll. No. 157. p. 245.*

*** Notwithstanding this decision, the Judges who spoke expressed their opinion, that even after decree obtained in the action of reduction-improbation, Mr. Fraser would be intitled to found on the letters in question, though not as holograph deeds, yet as a circumstance of evidence.

1787. *July* 21. DAVID DONALD *against* ANNE KIRKALDY.

No. 67.
Special *casu-amissionis* required, of a marriage-contract.

James Donald, apothecary in Edinburgh, by his marriage-contract, settled on Anne Kirkaldy, his wife, a jointure of £.50. One duplicate of the contract was retained by himself, another was delivered to her father.

During the marriage, Mr. Donald's funds greatly increased; and, when he died, he left heritage to the amount of £.2000, and moveables equal to £.5000 more. At this period, neither of the duplicates of the contract of marriage could be found. The one delivered to his wife's father had been destroyed by him, at the desire, as he said, of Mr. Donald; and of the other no account was given.

As there was no issue of the marriage, Mrs. Donald, on the disappearance of the contract, became entitled to a half of the moveable estate, besides her in-

No. 67. terest in the heritage. David Donald, the brother and heir of James, was therefore induced to institute against her a process of proving the tenor of that deed.

Pleaded for the defender: As there are some obligations that are understood to be done away by the retiring of the deeds by which they were constituted, as bills or bonds for borrowed money, the law, of course, whenever such deeds disappear, will presume discharge. Before proving the tenor of them, therefore, this legal presumption must be overcome by contrary evidence, shewing that the *casus amissionis* is not incompatible with the subsistence of the obligation; or, in other words, "a special *casus amissionis* must be proved;" Stair, B. 4. Tit. 32. § 3. The contract in question is an obligation of this kind, being in effect nothing more than a moveable bond of annuity, granted by one person to another; for as there were no children of the marriage, the interest of no other party was concerned.

There is, it is true, a different class of writings, which are not usually understood to be extinguished by simple retiring or cancelling, such as in themselves are incomplete, and subsist along with some collateral deed or right: For example, a writing on which infeftment has followed, or an assignation that has been intimated. In such cases, people do not rely on cancellation alone; and to extinguish an infeftment, indeed, a specific renunciation is required.

Answered: Writings of a permanent nature, or which, in the words of Lord Stair, "are designed to remain constantly, and not to be paid and retired," do not, like heritable documents, require the proof of a special *casus amissionis;* Stair, B. 4. Tit. 32. § 3.; Bankton, B. 4. Tit. 29. § 3.; Erskine, B. 4. Tit. 1. § 54. "Of all transactions, a marriage-settlement is perhaps the most solemn in its nature, and the 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." Accordingly, the idea of undoing a contract of marriage, by simple retiring, has never been entertained in practice; and the Court, in judging of cases of this kind, have been influenced by what it was usual, rather than what it was possible, to do; 9th June, 1674, Cuningham, No. 24. p. 15794.; 2d January, 1680, Lithgow against Murray, No. 29. p. 15799.

In the present case, though no children happened to exist, the age of both husband and wife was such as to render that a possible event; and therefore, before the death of one of them, they evidently had not even the power of annulling a contract in which other parties might have been so materially concerned. On that footing the matter ought to be judged of, and not as it stood after the husband's death.

As the evidence adduced in the cause was such as to corroborate the presumption, arising from the non-appearance, that the husband had purposed to undo it, the following interlocutor was pronounced:

" The Lords having advised the state of the process, writs produced, testimonies of the witnesses adduced, with the mutual memorials of the parties; and having heard their procurators thereupon; in respect of the special circumstances appearing in evidence in this cause, they assoilzie the defender; and decern." No. 67.

Act. *Lord Advocate, Geo.* Alt. *Dean of Faculty, Honyman, Corbet.*

S. *Fac. Coll. No. 342. p. 539.*

*** This case was appealed, (April 8, 1788.) The House of Lords " ORDERED, That the appeal be dismissed, and the interlocutors therein complained of be affirmed.

1790. *June* 8. BAILLIES *against* JOHNSTON.

No. 68.

It was objected to a proving of the tenor, that although the deed was existing, it could be of no use, being *in fraudem* of a former deed. The Lords repelled the objection.—See APPENDIX.

Fol. Dic. v. 4. p. 360. D. MS.

See Fumarton against Lutefoot, No. 37. p. 1755.

See APPENDIX.