DAVID DONALD of Conbeath, - *Appellant;*
ANNE KIRKALDY, Widow of JAMES DONALD, Druggist in Edinburgh, deceased, } *Respondent.*

1788.

DONALD *v.* KIRKALDY.

House of Lords, 8th April 1788.

PROVING THE TENOR—SPECIAL CASUS AMISSIONIS, WHEN NECESSARY.—ANTENUPTIAL CONTRACT OF MARRIAGE.—Whether the parties can agree to retire and discharge it after marriage?

The respondent's husband died without issue, possessed of heritable estates worth £2000, and moveable estate amounting to £5000, to which the appellant, her husband's brother, succeeded, as heir and next of kin to him, subject to whatever provisions, legal or conventional, she might be entitled to. By law she was entitled to the liferent of one-third of the heritable estate as her terce, and to one-third of the moveable estate as *jus relictæ*. But the appellant alleged, and the respondent admitted, that an antenuptial contract had been executed between the parties, settling a jointure on her of £50 per annum; and although it had now disappeared from the deceased's repositories, and was lost, there were strong grounds that it was either concealed by the respondent, or destroyed by her. He first raised an exhibition against her, to recover the deed, and failing in this, he raised an action of proving the tenor, in which a proof being allowed, and the respondent examined, she admitted the execution of the deed, and that it lay in his repositories,—and that she had seen it last about eighteen months previous to her husband's death. In point of fact, the respondent deponed that the deceased, together with her father, who held *her* copy of the contract, mutually agreed, sometime before his death, to cancel and destroy both copies of the contract, which was done accordingly, that she, as his widow, might enjoy her legal rights. In point of law, therefore, it was pleaded, 1. That it was incumbent on the appellant to prove that the writing was of a certain tenor. 2. To make out a special *casus amissionis*, such as accidental fire, in order to satisfy the Court that the writing was not legally cancelled.

The Court assoilzied the defender (respondent), after considering the proof, and memorials thereon, and refused a reclaiming petition.

July 24, 1787.
Dec. 11, ——

1788.

DONALD
v.
KIRKCALDY.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—A contract of marriage is not a retireable instrument in the sense of law, but one of a permanent nature, the obligations arising from which cannot be cancelled or injured, after marriage has followed on the faith of it, even by the mutual consent of the arbritating parties thereto; because the moment marriage follows, other interests arise and are settled than those of the contracting individuals. It is said, that the cancelling the contract was just a mode resorted to in effect to enlarge the provisions thereby stipulated; but this is a very unusual mode, and a mode not recognized by law. Assuming, therefore, that an antenuptial contract of marriage is not a retireable instrument, it follows, when lost, its tenor may be proved without any special *casus amissionis*; and the *onus* lies on the defender to show that the contract was lawfully discharged or cancelled. The evidence adduced to show that her husband, along with her father, had actually destroyed the contract during Mr. Donald's life, is very far from being sufficient or satisfactory. It is attended with circumstances which render the evidence suspicious, and mainly rests on the testimony of near relations.

Pleaded for the Respondents.—The office and object of a proving of the tenor, is to prevent persons rights suffering by the loss of deeds; but as this is an extraordinary remedy, the utmost strictness is required in proof, otherwise such deeds might be reared up, after they were extinguished or discharged by the parties; and, accordingly, the deed must be proved to have been destroyed in such a way as to exclude the possibility of its having been laid aside or destroyed, as retired or discharged. The contract in question being a mere personal deed, in which none but the respondent and her deceased husband were concerned, having been followed by no infeftment or registration, was as much capable of being retired as any other obligation, such as a personal bond, &c., and being so capable, it required a special *casus amissionis* to be established, in order to warrant a proving of the tenor; but as no such proof has been offered, and as it has been proved that the deceased had destroyed the contract, with the view of giving to his wife more enlarged provisions, the present appeal ought to be dismissed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed. 1788.

BRUCE v. ROSS.

For Appellant, *Ilay Campbell, R. Dundas, Geo. Ferguson.*

For Respondent, *J. Anstruther, Wm. Adam, Will. Honeyman.*

[Fac. Coll. 465.]

EDWARD BRUCE, Clerk to the Signet, *Appellant;*
WALTER ROSS, Clerk to the Signet, *Respondent.*

House of Lords, 14th April 1788.

WAGERS—SPONSIONES LUDICRÆ.—Whether debts incurred by wagering are good in law?—Held, that no action lay on such claims, upon the principle of *sponsiones ludicræ.*

The present question arises out of an action brought for payment of £50, being a sum gained on a wager or bet, taken on the result of an impending election for the burghs of Anstruther Easter, Anstruther Wester, Kilrenny, Crail, and Pittenweem.

The competing candidates for these burghs were John Anstruther, Esq. and Colonel Moncrief; and while the canvass was going on, the election of a knight of the shire of the county of Fife came on at Cupar, where the appellant attended as a freeholder. The respondent, who was agent for Colonel Moncrief, was also at Cupar on that occasion, and met the appellant there. The respondent having, in the course of conversation, boasted much that his constituent, Colonel Moncrief, would prevail and carry the burghs, and having offered, in the presence of a number of freeholders of the county, to back his opinion with a bet to any extent, the appellant took him up, and wagered £50 that Mr. Anstruther would gain the election—the respondent on his part wagering £50 that he would not, but that Colonel Moncrief would ultimately be the sitting member.

The election for these burghs, when it came on, terminated in Mr. Anstruther being returned member to sit in Parliament.

It appeared that the respondent knew, from calculations made, that Mr. Anstruther would gain his election, but his