the only witness examined, had for the qualifying period under contract with his mother, the said Mrs Jessie Ireland, the right to occupy as a lodger the said bedroom, with board and use of public room, that for this the claimant paid 20s. per week, that there are three rooms in the house and five of a family, that other members of the family use the public room. No evidence was led as to the rental of the house, or as to the value of the bedroom and the use of public room separately, nor was there any evidence adduced that any one but the claimant used the bedroom."

The question of law was—"Whether under the said contract, in the circumstances of the case, the claimant could be held to have occupied separately and as sole tenant, within the meaning of the statute, lodgings of sufficient value?"

Argued for the appellant—The claim was made for bedroom and use of public room, and there was no evidence as to the value of the bedroom, and no finding had been made by the Sheriff as to its value. The sum paid by the claimant was for three things, bedroom, use of public room, and board. The case of *Green* v. *Donaldson*, November 29, 1901, 4 F. 245, 39 S.L.R. 186, was conclusive, and the claim should have been disallowed.

No appearance was made for the claimant and respondent.

LORD KINNEAR—I think this case is governed by the decision in the case of *Green* v. *Donaldson*, in the reasoning of which I entirely concur.

The question must therefore be answered in the negative and the claimant's name struck out of the list of voters.

LORD TRAYNER and LORD KINCAIRNEY concurred.

The Court sustained the appeal.

Council for the Objector and Appellant—A. M. Anderson. Agent—Norman M. Macpherson, S.S.C.

COURT OF SESSION.

Wednesday, November 23.

FIRST DIVISION.

YOUNG *v.* ANDERSON.

Process—Proving of the Tenor—Adminicle.

In an action, brought in 1903, of proving of the tenor of an unrecorded *mortis causa* disposition executed in 1848, no witness was adduced who could speak to having seen the deed itself but there was produced what purported to be a compared copy, after execution, written in the handwriting of a clerk who was known to have been in the office of the testator's law-agent. It was proved that the law-agent and the other instrumentary witness to the deed were dead. The testator's daughter gave evidence that the law-agent and the other witness had called on her father on the date of the deed, which was also the date of the testator's death, and the account of the law-agent was produced, which, besides containing items as to the preparation of a trust-disposition, included under the said date a charge for attendance getting the deed executed. It was also proved that after the testator's death the actings of all parties concerned had been in accordance with the provisions contained in the copy produced.

Held that the copy produced was an adminicle which, supported by the proof, established the terms of the deed.

Process—Proving of the Tenor—Casus amissionis.

In an action, brought in 1903, of proving of the tenor of an unrecorded *mortis causa* disposition executed in 1848, and held to have been in existence after the testator's death, it was proved that the law-agent who had prepared the deed had died in 1872, when his clerks had for some time been left in the office, his clients being allowed to remove documents belonging to them, and that the law-agent to whom the remaining papers had afterwards been taken had on more than one occasion changed his chambers.

Held that the *casus amissionis* had been sufficiently proved.

On 9th November 1903 Mrs Joan Anderson or Young, and Mrs Margaret Anderson or Nutter, two of the four surviving children of Thomas Anderson, lathsplitter in Greenock, who had died about 13th November 1848, brought an action of proving of the tenor against Thomas Anderson, engineer, and Grace Anderson, both residing in Glasgow, the two other surviving children. In it the pursuers sought to have it found and declared that their father, the said Thomas Anderson, lathsplitter in Greenock, had executed a trust-disposition and deed of settlement in favour of Ann Gillies or Anderson, his spouse, and others, of date 13th November 1848, and that said trust-disposition and deed of settlement was of the tenor given. The son, Thomas Anderson, engineer, residing in Glasgow, lodged answers as defender.

The estate left by the said Thomas Anderson, the father, had consisted almost entirely of heritage—viz., of certain property in Greenock. By the trust-disposition sought to be established he had disponed this property, together with his whole means and estate, to his spouse in liferent during her widowhood, and to his children equally, share and share alike. It contained a direction to his spouse, who was appointed executrix, to maintain and educate the children till they could provide for themselves, and a declaration that, should she enter into a second marriage, she should lose all right and benefit enjoyed under it.

The pursuers averred that, pursuant to the provisions of this trust-disposition, the

widow had, from the testator's death in 1848 to her own death in 1865, enjoyed the liferent of the property. Although in 1850 she had contracted a second marriage with a Mr James Middleton, she had still continued to draw the rents, but had maintained and educated the children therewith. Since her death the rents had been equally divided among the four surviving children. In 1867 a bond for £400 had been paid off in equal shares, and in 1878 a casualty had been paid to the superior, the daughters paying as singular successors for three-fourths of the property, and the son paying as heir for his one-fourth. It was only on placing the titles in a lawyer's hands for the purpose of selling the property that it was discovered the title had never been completed, and that only a copy of the trust-disposition had been put up with the titles, the original being amissing. Mr Dempster, the law-agent who had prepared the trust-disposition, had died in 1869-1870, but his account for preparing and executing the deed was produced. Mr James Glen, writer in Greenock, had taken over Mr Dempster's papers, but could not find the trust-disposition itself.

The defender denied that his father had left any trust-disposition and settlement, and explained that, having been abroad from 1864 to 1897 he had not looked into the matter, but had left everything to be managed by those at home. He could not be prejudiced by anything which had been done in his absence.

On 8th December 1903 the Lord Ordinary (KINCAIRNEY) made great avizandum, and granted warrant to enrol the cause in the rolls of the Inner House. The case came before the First Division, and on July 1, 1904, a proof was taken before Lord Adam. The facts of the case, as brought out, are given in his Lordship's opinion and that of Lord M'Laren.

Argued for the pursuers—(1) It was clearly established that a testamentary deed was executed on 13th November 1848, and that the testator survived its execution for at least a few hours. There was nothing to show that it had been revoked, and the presumption was to the contrary. Further, the parties, who must have known, viz., the deceased's solicitor, his widow and her second husband, who was also the confidential friend of the testator, had all along acted on the footing that there was a valid settlement, and that it was in the terms of the adminicle founded on. The deduction to be drawn was either that there was a valid settlement of this tenor, or that these persons were acting in a fraudulent conspiracy; but the latter alternative was repudiated by the defender himself, and the whole circumstances pronounced for the first. The copy had been made and compared in the office of the solicitor who prepared the disposition. Had it been made from a draft it would have been differently backed, viz., "copy draft." (2) As to *casus amissionis*. In the case of testamentary documents, no doubt the Court required proof of *amissio* because of their revocable nature, but what amount of proof was required was entirely a question of circumstances—*Smith* v. *Ferguson*, May 31, 1882, 9 R. 868, 19 S.L.R. 631, Lord President Inglis at p. 876 and 635; *Winchester* v. *Smith*, March 20, 1863, 1 Macph. 685. A change of chambers by a law-agent, or even a dissolution of partnership by one member of the firm going out, had been held sufficient to prove *casus amissionis*—*Walker* v. *Brock and Bleaymire*, January 24, 1852, 14 D. 362; *M'Kean*, February 14, 1857, 19 D. 448. This case was *a fortiori*. Further, the rule as to proof of *casus amissionis* was frequently much relaxed—*Incorporation of Skinners and Furriers* v. *Baxter's Heir*, March 17, 1897, 24 R. 744, 34 S.L.R. 545, opinion of Lord Adam, where his Lordship emphasised the effect of the actings of parties on a deed proved to have existed, as was the case here. A still stronger case was that of *Forbes' Trustees* v. *Welsh*, March 1, 1827, 5 S. 468, 497, where there was no proof of any special *casus amissionis*.

Argued for the defender—(1) There was no reliable evidence as to execution of the alleged deed, or to connect the adminicle with it. The deed was not recorded, nor were the actings of parties entirely in conformity with its terms, *e.g.*, no tutors had acted. (2) The pursuers had entirely failed to state a relevant *casus amissionis*, and consequently the usual legal presumption took effect—*i.e.*, that a *mortis causa* deed which was in the testator's possession, and was not to be found on his death, had been revoked—*Bonthrone* v. *Ireland*, March 15, 1883, 10 R. 779, 20 S.L.R. 516; *Winchester* v. *Smith*, *supra*. The onus of proving *casus* was on the pursuer, and had never been discharged—*Forrester* v. *Forrester*, 30th May 1838, 16 S. 1064; *Kerr* v. *Kerr*, 16th December 1830, 9 S. 204; *Smith* v. *Ferguson*, *supra*, opinion of Lord Shand, that special *casus* must be proved.—*Brodie* v. *Brodie*, 16th November 1901, 4 F. 132, 39 S.L.R. 88, opinion of Lord Trayner.

LORD ADAM—This is an action of proving of the tenor of a trust-disposition and settlement said to have been executed by the late Mr Thomas Anderson, by which he is alleged to have disposed of his whole estate consisting of certain houses in Greenock—for there was little or no personal property—in favour of his wife in liferent so long as she remained his widow, and of his children in fee. Four of his children still survive. Two of them appear as pursuers in this action and two of them are called as defenders. By this alleged settlement the truster nominated his wife as his executrix, but during her widowhood only. After directing payment of debts he provides that the widow shall be bound to maintain and educate his children, and he declares that in the event of her second marriage all right and benefit enjoyed by her under the settlement shall cease and determine. These are the main provisions of this will. It is said to have been signed by the testator himself and by his wife—by her no doubt in token of her acceptance of its provisions in full of her legal claims. *Ex facie* as it is set forth in the summons it is quite regular

and formal in every respect if it ever existed. That document has gone amissing, and two of the daughters have brought this action to have it set up, and their reason for doing so is very plain, because by the settlement they are each entitled to a fourth of the property, but if their father left no settlement the defender, his son Thomas, gets the whole of it.

In the evidence the defender Thomas Anderson says, and quite rightly, that his case is not that his father did not make a will, but that he did not leave a will. That is a very proper statement of the case, for I think there can be no reasonable doubt that a settlement in the terms set forth was executed by the deceased. We know that a copy of it was made in the office of Mr Dempster, who was the testator's law-agent, by one of his clerks, and this copy bears on its back that it was compared. It must have been compared with some original. It is impossible to believe that this copy was simply concocted. Then it appears from the evidence of the testator's daughter, who was present when he was on his deathbed, that Mr Haddow, a friend of the testator, and the law-agent Mr Dempster came to her father on the night of the 13th November 1848, which is the date of the will. Then there is the law-agent's account for the preparation of the will, in which it is stated that on 9th November Mr Dempster was instructed to draw out the deed of settlement, and that he called upon Mr Anderson with the draft that night, but there was some difficulty about its terms, in consequence of which he refused to sanction it. It is explained that this difficulty was that he thought his wife would marry again, and in that case he did not want her to have the liferent. But this difficulty was got over by the insertion of the clause declaring that on her second marriage her liferent should cease, and accordingly we find the next entry in the account is "Nov. 13—Calling upon you with Mr Haddow in the forenoon, when you consented to execute the trust-disposition;" and then under the same date—"Attendance with you in the afternoon getting it executed." I have no doubt that this document which is produced is a copy of the settlement which was so executed. So far I think we may hold the case is proved.

But then comes the question, whether the deed so executed was still in existence at the date of the testator's death, and that is the question which the defender raises in this case. Did Anderson destroy the settlement before his death? The defender says there is no proof that the settlement was in existence after his father's death, and therefore there is a presumption that it was destroyed by the testator for the purpose of cancelling it.

I think the proof is to the effect that the testator died on the same night that the will was executed. The defender says he did not die till the 16th November. His object in prolonging the interval between the date of executing the will and the date of the death is to make the time for cancelling by destroying the will longer. I think the evidence shows that the testator died on the 13th. There is another account produced—a doctor's account—which ceases on the 13th. The reasonable presumption is that the doctor's attendance continued till Anderson's death. Then there is the evidence of the testator's daughter Mrs Young, which is to the effect that she thinks he died on the 13th, though she is not perfectly certain at this distance of time. The only counter evidence is the tombstone. Tombstones are proverbially no great authorities. This tombstone was erected many years after 1848, and I can place no great reliance upon it compared with the other evidence.

Passing from the evidence as to the date of the death, what is the evidence of the existence of the will after the testator's death? There is some slight direct evidence. Mr Middleton asked Mr Agnew (the factor on the testator's heritable property) to go to the superior's agent and settle about a casualty which was claimed, and he went and did so, and after that he wrote to Mr Middleton saying that he "returns the disposition and deed of settlement." He does not call it a copy. I do not put much weight on that, but it is an indication that the principal of the deed was at that date (1878) still in existence.

But then we come to the real and conclusive facts in this case. There were three persons in existence after Anderson's death who must have known whether the will still existed after his death—Mr Dempster, the law-agent, the widow Mrs Anderson, afterwards Mrs Middleton, and Mr Middleton. They must have known whether or not Anderson left a will. What they did after his death was in accordance with the will and nothing else. Until her second marriage the widow was entitled to draw, and did draw, the rents of the houses. On her second marriage what ought properly to have been done under the will was to divide the rents equally among the children. But the children were young, and as was only natural the mother received the rents and maintained the children out of them. This was not strictly in accordance with the will, but it was very natural. But still the transmission of the right from the mother to the children was marked in the accounts, for after the mother married again the heading of the house factor's statement was different. Before 1850 the rental statements are made to Mrs Anderson, as she was the person to whom the rents were to go. But after her second marriage the heading became, "Rental statement, Mr Thomas Anderson's heirs in account with Alexander Agnew," showing that although the money was sent to the mother, it was sent to her, whether rightly or wrongly, for behoof of the heirs, her children, who were entitled to it equally under the will, to be expended by her upon their maintenance. Mrs Middleton died in 1865. After that the rents were regularly divided into four parts, and one-fourth part was treated as payable to each of the children. That was just in accordance with the will. But that was not all. There was a bond on the property for £400, and who paid it? Not the defender, who

was the heir-at-law. It was paid by the children in equal proportions. Now, it is said that three of them had no right to the property, and yet we find that in 1867 they each paid a fourth of the bond over it. Then there was another thing A casualty fell due. How was it paid? Just in the same way as the bond, by the children and not by the heir alone. Three of them as not being heirs paid composition each for one-fourth of the property, and the defender paid a much smaller sum for his fourth as relief-duty because he was the heir. Was all this a fraud? Are we to say that Mrs Middleton (formerly Mrs Anderson), the mother, Mr Dempster the law-agent, and Mr Middleton entered into a fraudulent conspiracy to defeat the rights of the defender, the heir, then a little boy six years old? If not, how can we account for what was done except upon the supposition that they knew there was a settlement in these terms and acted upon it. I do not say that the defender is barred by what he did from claiming his rights now. But I say it is impossible to account for what was done except by the existence of the will. The defender very honestly says that he does not believe Mr Middleton, for whom he had a great regard, would have been guilty of such a fraud. I do not believe it either, and therefore I think what was done by him and the other two must have been done in accordance with a will which they knew had been left by the father of these children.

But then it is said that the *casus amissionis* is not sufficiently proved. I think it is. Mr Dempster died in 1872. His clerks were left in his office for a time, and such of his clients as wished to do so came and removed their papers just as they liked. After a time what was left was removed to Mr Glen's office. There was a considerable risk of papers going amissing under such circumstances. In such a case as the present if it is clear that a will in the terms libelled was in existence after the testator's death —as I hold it is—no great proof of the *casus amissionis* is required. The question simply comes to be, whether in the whole circumstances the Court is satisfied that a deed in the terms set forth was in existence after the testator's death, and that it cannot now be found although every search has been made. I think the proof upon both these points is sufficient.

LORD M'LAREN—I quite agree with all Lord Adam has said, and my remarks shall be brief. Mr Macmillan in his opening speech sought to establish, first, that the will was executed by Thomas Anderson in 1848, that it was found unaltered at his death, that it was acted upon; second, that the will went amissing and that the *casus amissionis* is proved; and third, that the tenor is proved by the copy produced. If these facts are proved, the pursuer has established his case. Now, I confess I do not entertain any doubt that a will in the terms quoted was executed. It is true the testator is dead and the solicitor who prepared the will died many years ago. I here note that it is a guarantee of good faith in this case that the agency of a solicitor was sought. He is dead; the clerk who was the other instrumentary witness is dead; Mrs Anderson is gone; and no one apparently is now living who had seen that deed. Consequently it has to be set up by secondary evidence. Now, the secondary evidence, which is really as good as could be expected after such a lapse of time, is, first, the agent's account which sets out the whole facts connected with the preparation and execution of the settlement; next, one of the daughters, Mrs Joan Young, who was then twelve years of age, distinctly remembers that Mr Dempster, the solicitor, and the friends who were advising, were going about the house immediately before her father's death, and she said she knew it was about a will, that Mr Dempster, the solicitor, was preparing a will, and she had no doubt at all that the will was executed. Then it is important to notice that Mrs Anderson, the mother of these children, who drew the rents for herself and her family, acting upon the authority of this will, could not possibly have been mistaken about the will, because she signed it to show that she accepted its provisions. Mr Dempster, who had the custody of the document, and from whose office a copy was sent for the family, could not be mistaken about it, because he was himself one of the instrumentary witnesses, and he must have known as a professional man that if a will was found in a mutilated state that he could not act upon it. If it is established that the settlement was executed, then I agree with what Lord Adam said, that with the evidence we have before us, if the will was cancelled before Anderson's death we must assume that all the parties who have been named were in a conspiracy to commit a fraud against the interests of Thomas Anderson, who then was a boy of six years of age. I do not believe it. I should not be inclined to assume fraud against anyone, and I think everything must be presumed to have been honestly done in the absence of evidence to the contrary. I do not agree with the argument that was addressed to us—that it must be presumed that the will was revoked unless it is proved that it was not revoked. That is a very extraordinary negative to be called upon to prove, and I should doubt if it were possible to establish such a negative by proof. But the law does not impose such an onus on anyone. I think that to assume that the will is revoked unless you can show that it was not revoked would be a dangerous doctrine if anybody could be got to believe in it. I do not think that is likely to be the case. The will being thus proved to be regularly executed, I agree with Lord Adam that the circumstances are sufficient to account for its disappearance, and especially this—that not only were there several changes of domicile on the part of the agent who succeeded Mr Dempster, but that Mr Dempster himself seems to have been a little careless in the way he kept his papers. Perhaps he had not a very large business, and if he kept

papers relating to properties not of very great value loose, such papers are very liable to be mislaid. I think the case is quite as strong as many in which we have held that changes of residence on the part of the agents who had charge of a paper might account for its disappearance. As to the tenor of the deed there can be no doubt if you assume there was a valid will, because the copy in process has been identified as being in the handwriting of one of Mr Dempster's clerks—not the writer of the deed but a different clerk—and that is spoken to by Mr Glen, who knew his handwriting. Well, then, unless we were to suppose that they also were parties to the hypothetical fraud, the copyist must have had either the original will or the draft from which it was extended before him when he made the copy. It is important to observe that this copy (whether made from the draft or not) is not a copy of an uncompleted deed; it contains a testing clause, and bears to have been signed by the testator.

I therefore hold that all the points necessary to be made out in an action of this kind are satisfactorily proved. Indeed, I cannot help being surprised that long after the death of all the parties to the preparation and execution of this will so much evidence should have been found as has been adduced to set up this document.

LORD KINNEAR—I think the case proved for the reasons already given, and I have nothing to add.

The LORD PRESIDENT—I am of the same opinion.

The Court pronounced this interlocutor—

"Having considered the cause with the adminicles produced and proof adduced . . . find the *casus amissionis* of the disposition and deed of settlement libelled proven, and the tenor thereof as libelled proven, and decern and declare accordingly in terms of the conclusions of the summons."

Counsel for the Pursuers—Guthrie, K.C. —Macmillan. Agents—Wallace & Begg, W.S.

Counsel for the Defender—Orr—Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 25.

FIRST DIVISION.

FORREST'S TRUSTEES *v.* REID.

Succession—Vesting—Fee or Liferent—Provision of Income of Share to Daughter as Alimentary Provision with Power of Disposal of Capital by Revocable Deed—Direction to Trustees to Hold—Repugnancy.

In a trust-disposition and settlement a testator left and bequeathed the residue of his estate for behoof of all his children equally, and directed his trustees to pay over to each of his sons as soon as convenient after his death the share of the residue falling to him, and to hold the shares of the daughters during their respective lives, and on the death of each to pay her share to such person as she might appoint by any revocable deed executed by her after she attained 21, and failing such appointment to her own nearest heirs. He further directed his trustees to pay half-yearly the free income of the trust-estate to his children in proportion to the capital sum due to each, the shares of income of such as were in minority being applied for their maintenance and education to such extent and in such way as the trustees might see best, and the shares of income of daughters after they attained majority being payable to them as alimentary provisions on their receipts alone, but declaring that in the event of a daughter becoming engaged to be married his trustees should have power to encroach to a certain extent on the share of capital of residue of which she was enjoying the income in order to provide her with an outfit.

Held that the daughters who survived the testator and attained majority were not vested with a full right of fee, but that their rights were limited to a liferent with a power to test on the capital.

Greenlees' Trustees v. *Greenlees*, December 4, 1901, 22 R. 136, 32 S.L.R. 106, *distinguished.*

Charles Laing Forrest, merchant, Leith, died upon the 29th July 1903 leaving a trust-disposition and settlement dated 30th December 1899, with codicils dated 18th March and 25th June 1903. He was survived by a widow, four sons and two daughters of his first marriage, three daughters of his second marriage, and a son of his third and last marriage. Another son of his first marriage had gone abroad and had not been heard of for many years.

By his trust-disposition and settlement the testator, *inter alia*, provided:—"(*Sixth*) I leave and bequeath the residue of my estate, means, and effects, heritable and moveable, for behoof of all my children equally, and direct my trustees to pay over to each of my sons, as soon as conveniently may be after my death, the share of said residue falling to him; declaring that notwithstanding the direction herein contained, full power is hereby given to my said trustees, if they shall think it necessary or expedient, to retain in their hands the whole or any part of the capital falling to any one or more of my said sons, and merely to pay the income thereof to the son or sons whose capital is so retained during their respective lives or so long as my trustees may think fit, and the capital so retained and the income thereof to be paid as aforesaid shall be alimentary, and shall not be affectable by the debts or deeds of the son or sons of whose share or shares it is the income, nor by the diligence of their creditors, nor shall it be assignable except by a revocable deed *mortis causa*: And my trus-