COURT OF SESSION.

Saturday, June 4.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SMITH *v.* SMITH'S TRUSTEES.

Process—Proving the Tenor—Presumption—Antenuptial Contract of Marriage Destroyed by Spouses—Casus amissionis—Effect of Finding Casus amissionis Proven.

An action of proving the tenor of an alleged antenuptial contract of marriage between the deceased Mr and Mrs S. was brought by their only child against the testamentary trustees of his parents. By the deed each of the spouses, in contemplation of the marriage, conveyed all the property that should belong to him or her at the time of death to the survivor, declaring, *inter alia*, that it should be in the power of the spouses by joint deed, or of the survivor by a deed under his or her hand, to regulate the distribution of the whole estate of both spouses among the children of the marriage and their heirs, and that in the event of the death of both spouses without any such deed having been executed, the estate should be divisible equally among the children of the marriage on their respectively attaining 21 years, the issue of predeceasing children being entitled to their parents' share. The deed further declared that the provisions in favour of Mrs S. and the children of the marriage should be in full satisfaction of their legal rights.

A proof was led, which showed that an antenuptial contract of marriage in the above-mentioned terms had been executed between Mr and Mrs S., but it had been destroyed after the marriage by mutual consent of the spouses.

The defenders contended that the *casus amissionis* had not been proven, the marriage-contract being in reality a testamentary deed and having been destroyed by the spouses in order to be revoked.

Held that the *casus amissionis* had been proven, but that a decree to that effect did not preclude the defenders from challenging the validity of the deed or from maintaining that the spouses were entitled to destroy it.

James Duncan Smith, S.S.C., Edinburgh, married Miss Janet Black Carmichael on 4th August 1858. Mrs Smith died on 20th May 1902, and Mr Smith on 25th August 1903, survived by one son Hector Wallace Smith. After Mr Smith's death there was accidentally found, on 8th January 1904, in a writing-desk in his dwelling-house, a deed in his handwriting in the form of a draft antenuptial marriage-contract between Mr and Mrs Smith, dated 2nd August 1858.

The deed bore that it was contracted, agreed, and matrimonially ended between Mr Smith and Miss Carmichael in the manner following—that was to say, Mr Smith and Miss Carmichael had accepted and thereby accepted each other for spouses and promised to solemnise the marriage with all speed; in contemplation of which marriage Mr Smith conveyed to Miss Carmichael, in the event of her surviving him, and Miss Carmichael conveyed to Mr Smith in the event of his surviving her, the whole heritable and moveable estate at present belonging to or which should belong to him or her respectively, certain items being named on each side without prejudice to the generality. The deed then proceeded—"Declaring always, as it is by both parties hereto specially provided and declared, that it shall be in the power of both of the said spouses, any time after marriage, by a joint deed, or in the event of the decease of either of the said parties, it shall be in the power of the survivor, by a deed under his or her hand, to regulate the distribution and division of said whole estate, heritable and moveable, generally and particularly above conveyed by both parties hereto, among the children to be procreated of the said marriage and their heirs, and in the event of there being no children of said marriage, or in the event of there being children and they all die without leaving lawful issue, then among any other heirs, relations, or other persons whom the said spouses jointly, or the survivor, may choose to fix upon: And in the event of the decease of both parties hereto without any such deed having been executed, then the whole estate hereby conveyed by both parties shall be divisible equally among the children to be procreated of said marriage upon their respectively attaining the age of twenty-one years complete, and in the event of the decease of any of said children leaving lawful issue, such issue shall be entitled to their parents' share, and in the event of there being no children of said marriage, or in the event of there being children and they all die before attaining majority, and without any deed having been executed as above set forth, then the said whole trust estate above described shall be divided into two equal parts or shares, one of which shall be divided among the next-of-kin of the said James Duncan Smith, and one shall be divided among the next-of-kin of the said Janet Black Carmichael: And it is declared that the provisions hereby conceived in favour of the said Janet Black Carmichael shall be in full satisfaction to her of all her legal claims by and through the decease of the said J. D. Smith, and the provisions conceived in favour of the children of the said intended marriage shall be in full satisfaction to them of all their legal claims by and through the decease of their parents: And for rendering this deed the more effectual, the parties hereto severally nominate and appoint the survivor of them to be executor of such one of them as shall predecease, hereby debarring all others from that office: And both parties consent to

the registration hereof for preservation and publication, and also to registration in the General or Particular Register of Sasines.—In witness whereof these presents, written upon this and the preceding page by James Pike, clerk to Messrs J. B. Douglas & Smith, law-agents, are subscribed by both parties at Edinburgh the second day of August in the year Eighteen hundred and fifty-eight, before these witnesses, the said James Pike and Thomas Hope, clerk in the Inland Revenue Office, Edinburgh."

On 8th February 1904 Hector William Smith raised an action of proving the tenor of the above deed against the trustees under the trust-disposition of Mrs Smith dated 19th May 1902, and also against the trustees under the trust-disposition and settlement of Mr Smith dated 15th July 1903. The action concluded for declarator "that the antenuptial contract of marriage, dated the 2nd day of August 1858, entered into between the said James Duncan Smith and Miss Janet Black Carmichael, afterwards his wife, was of the following tenor, videlicet"—[*here followed the terms of the deed*]; and also for declarator "that the decree to be pronounced by them shall be in all respects as valid and effectual a document to the pursuer in all cases, improbation as well as others, as the original deed, if extant, would be, notwithstanding the same has been abstracted, destroyed, or lost, and cannot now be found."

The pursuer averred—"(Cond. 4) The principal of the said contract of marriage was not found on the death of the said James Duncan Smith, notwithstanding that a most diligent search was made for all documents affecting the succession to and distribution of his estates. . . . The tenor of the said contract of marriage is in conformity with the tenor of the said draft thereof. After the said draft was found a further diligent and exhaustive search was made for the principal contract, but said principal contract has not been found and is amissing. It has been abstracted, destroyed, or lost. The pursuer has received information from Mrs Marion Turner or Smith, wife of Fergus Smith, florist, residing at Torwoodlee, Meols, Hoylake, Cheshire, that she was informed by the late Janet Black Carmichael or Smith, at or about the date of her the said Mrs Fergus Smith's marriage, which took place on or about 8th April 1885, that the said James Duncan Smith and Janet Black Carmichael or Smith had had a marriage-contract, but that it had been superseded, and other provisions had been made after the marriage, and that it had been destroyed. The pursuer accordingly avers that the principal contract was destroyed by the parties thereto under the erroneous belief that they were entitled to do so, and that either in prospect of their executing other settlements or after they had done so. Under the antenuptial contract of marriage in question, the pursuer's right of legitim was discharged, and in lieu thereof certain rights of succession given to him in the estate of his father and mother."

The pursuer pleaded—"(1) The said marriage-contract having been entered into between the said James Duncan Smith and Janet Black Carmichael, and having been abstracted, destroyed, or lost, the pursuer is entitled to decree of proving the tenor as concluded for."

The defenders pleaded—"(1) The pursuer has no title to sue. (2) The action is irrelevant. (3) No marriage-contract between the said James Duncan Smith and his first wife having been in existence on or after the date of the said marriage, the defenders ought to be assoilzied."

On 12th March 1904 the Court (to whom the Lord Ordinary had made great avizandum) pronounced the following interlocutor:—"Sustain the adminicle produced as sufficient for allowing a proof of the tenor of the writ sought to be proven as libelled, and before answer allow the pursuer to prove the tenor and *casus amissionis* thereof, and allow the defenders a conjunct probation," &c.

The evidence led at the proof disclosed that an antenuptial contract of marriage had been entered into by Mr and Mrs Smith, and that some years prior to her death Mrs Smith had referred to it on two different occasions to different witnesses as having been burnt or destroyed by mutual consent of her husband and herself. One of these witnesses further stated that Mrs Smith had spoken of the marriage-contract as having been "superseded by another and more suitable provision made for her by Mr Smith after her marriage." No more particular evidence was led as to the date or circumstances of the destruction of the deed.

On the proof being reported to the Court the defenders argued—The *casus amissionis* of the deed had not been proved. It was incumbent on the pursuer to prove that the cancellation took place in some way that did not affect the validity of the deed. If the terms of the marriage-contract were examined, it was in reality a testamentary deed. The evidence showed that it had been destroyed in order that it might be revoked. Mere proof therefore of the destruction of the deed was not sufficient to set up the *casus amissionis*.—*Winchester* v. *Smith*, March 20. 1863, 1 Macph. 685; *Smith* v. *Ferguson*, May 31, 1882, 9 R. 866, 19 S.L.R. 631.

Counsel for the pursuer were not called upon.

LORD JUSTICE-CLERK—In this case I think that the pursuer has brought sufficient evidence to prove the *casus amissionis* of the deed in question, and that we should give decree in terms of the conclusions of the summons. Our doing so will not in any way foreclose the defenders from challenging the validity of the deed, the existence of which has been set up in this action.

LORD YOUNG concurred.

LORD TRAYNER—In view of what has been said by the counsel for the defender I think it right to state what I understand to be the effect of the judgment which we

propose to pronounce. The pursuer avers that the deed in question was executed and that it has been destroyed by the parties who executed it. It is not disputed that these facts—the execution and the destruction of the deed—and also its tenor, have been proved, and that entitles the pursuer to the decree which he seeks. But that only puts him in the same position as if he produced the original deed. Our decision does not affect any question as to its validity or effect, nor does it preclude the defenders from maintaining that the persons who destroyed the deed were entitled to do so. All such pleas are still open to the defenders.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Having advised the state of the process, adminicles produced, and testimonies of the witnesses adduced, and heard counsel for the parties therein, find the *casus amissionis* of the antenuptial contract of marriage libelled proven, and decern and declare accordingly in terms of the conclusions of the summons."

Counsel for the Pursuer — Younger — Munro. Agent — J. Stewart Gellatly, S.S.C.

Counsel for the Defenders—Salvesen, K.C. —Macmillan. Agent—R. C. Gray, S.S.C.

Thursday, February 4.

OUTER HOUSE.

[Lord Stormonth Darling.

EWING AND ANOTHER *v.* MATHIESON AND OTHERS.

Succession—Legacy—Annuity—Arrears—Interest—Rate.

A testator by his trust-disposition and settlement left to relations and strangers a number of legacies and annuities payable at and from a date shortly after his death, with a provision that in the event of his estate proving insufficient to meet the purposes of his settlement, the legacies and annuities should suffer proportional abatement, those to strangers before those to relations. He left heritable estate to his wife in liferent and nephew in fee, with a provision that during the life of the liferentrix her trustees were to pay the interest on £40,000 to his nephew, and that upon her death his nephew was to pay to them, as a condition of taking the fee, a sum of £50,000.

After the death of the truster, and during the life of the liferentrix, the estate was insufficient to pay the legacies and annuities of strangers in full, and payments were made to account. Upon the death of the liferentrix the trustees were in a position to pay the balance due upon the legacies and annuities in full, with interest from the date of the death of the liferentrix. The legatees and annuitants claimed interest at 5 per cent. on the total amount of their legacies and annuities from the date when they became payable till the date of the first payment to account, and thereafter on the unpaid balance.

Held that no interest was due for the period prior to the liferentrix's death, and that the rate payable thereafter was the average rate yielded by the trust estate since that date.

Opinion that the principle underlying all rules for payment of interest on legacies is, that the capital is, or ought to be, in the hands of the executor or trustee as an interest-bearing subject, and consequently that interest can never be due so long as by the act of the testator there is nothing in the hands of the trustee or executor wherewith to pay the capital of the legacy.

James Ewing of Levenside, merchant in Glasgow, left a trust-disposition and settlement dated 9th September 1844, and registered in the Books of Council and Session 9th December 1853, by which he conveyed his whole means and estate, with certain trifling exceptions, to trustees, with directions to them to convey the liferent of his estate of Levenside to his widow, and the fee to the heir-male of his body and his heirs and assignees, whom failing the heir female of his body and her heirs and assigns, whom failing to his nephew Humphrey Crum Ewing. He further directed that until the expiry of the liferent his trustees should pay to the heir the interest of a sum of £40,000, and that as a condition of getting the estate the heir should pay to the trustees on the expiry of the liferent a sum of £50,000.

The truster further left a very large number of legacies and annuities. The legacies, with the exception of those that were payable from principal sums on the death of liferenters, were to be paid by the trustees within one year after the truster's death; the annuities, which were declared to be alimentary, were to be paid from the first term of Whitsunday or Martinmas after that event. The following provision followed:—"Declaring always, as it is hereby expressly provided and declared, that in the event of any deficiency of funds after paying and liquidating the foresaid provisions in favour of my wife, children if there any be, and relations, and carrying into effect the other purposes of the trust, and paying the expenses thereof, then and in such event each of the different legacies and annuities before specified shall suffer a proportional abatement, according to the amount thereof respectively, the legacies and annuities to my relations before named always being preferable to the payment of legacies or annuities to strangers or charities." The truster further appointed residuary legatees, to whom the trustees were to