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

pay the residue of the estate in the event of his leaving no lawful child or children.

The truster died on 29th November 1853 survived by a widow. He had no children. The widow died on 14th June 1896.

The trust estate during the lifetime of the liferentrix was sufficient to pay the legatees and annuitants who were relations of the truster in full, but insufficient to fully meet the legacies and annuities of strangers and charities. The trustees made payments to account of these from time to time as funds became available.

Upon the death of the liferentrix the trustees received from the truster's nephew the sum of £50,000, and ceased to pay him the interest on £40,000, with the result that they found themselves in a position to pay the balance of the legacies and annuities in full with interest from 14th June 1896, and also to make a substantial payment to the residuary legatees.

The legatees and annuitants claimed interest at 5 per cent. per annum on the total amount of their provisions from the last day of the year immediately succeeding the testator's death till the date of the first payment to account, and thereafter on the unpaid balance.

To settle this and other questions the trustees raised an action of multiplepoinding and exoneration. The contentions and arguments of parties appear in the Lord Ordinary's opinion, *infra*.

LORD STORMONTH DARLING—"This case has an appearance of complexity arising from the original insufficiency of the estate to cover the wide range of the testator's bounty, but the questions now raised seem to me comparatively simple.

"Mr James Ewing of Levenside died on 29th November 1853 without issue, but leaving a widow, who survived till 14th June 1896. By his trust-disposition and settlement, which was dated in 1844, he left a large number of legacies both to individuals and to institutions, some in the form of capital sums, some in the form of liferents and annuities. Besides the estate of Levenside (afterwards called Strathleven), of which his widow had the liferent, his property at the time of his death (after deducting debts and Government duties) amounted to £293,627, but even that large sum was insufficient to meet his testamentary purposes in full. This contingency seems to have been present to his own mind when he made his will, for by its tenth purpose he 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 being always preferable to the payment of legacies or annuities to strangers or charities.' The trustees acted upon this direction by paying all the legacies and annuities to relations in full, and by making payments to account to the other legatees and annuitants as funds became available, with the result that the latter class have all received about 14s. in the £. The administration of the trust is challenged by the general legatees in one particular, which I shall notice presently. But apart from this question, which is one of law, it is not said that there was on the part of the trustees any failure to ingather or any unfairness in dividing the estate.

"The estate of Strathleven was destined in fee to Mr Humphrey Crum Ewing, the testator's nephew, and if there had been nothing more in the will than what I have already mentioned, the death of the widow forty-three years after the testator's own death, would have made no difference on the rights of the general legatees, who would have had to remain content with the dividend on their legacies and annuities which they had already received. But there were two provisions in the will which made all the difference. By the first, Mr Ewing directed that, as a condition of getting the estate and the furniture in the mansion-house, his heir should pay to the trustees, on the expiry of the liferent, £50,000; and by the second he directed that the trustees should pay to the heir the interest of £40,000 until the expiry of the liferent, on which event the payment was to cease and determine. The death of the widow in 1896 had thus the effect of rendering the sum of £90,000 immediately available for the purposes of the trust, and the result is that the trustees are now in a position to pay the balance of the legacies and annuities in full, with interest from 14th June 1896, and also to make a substantial payment to the residuary legatees.

"The general legatees and annuitants are, however, not content with this result, and they claim, in addition, interest at 5 per cent. on the total amount of their provisions from the last day of the year immediately succeeding the testator's death. They do so on the ground that by the ninth purpose of the trust-deed the whole legacies, except those that were payable from principal sums on the death of the liferenters thereof, were directed to be paid by the trustees within one year after the testator's death, and that the clause as to abatement (which I have already quoted) has no effect in controlling that direction now that it appears that the estate is sufficient to pay the legacies and annuities in full.

"On this question, which is by far the most important in its pecuniary results (for even if interest were calculated at the lowest possible rate it would leave nothing at all for the residuary legatees), my opinion is against the general legatees and annuitants.

"Interest on a legacy can never be allowed contrary to the directions of the testator, express or implied. I admit the rule that where a legacy is conceived in general terms interest is due from the testator's death. But that rule must yield

to any provision of his which is inconsistent with it. Thus, if he burdens a legacy with a liferent, interest is due only from the expiry of the liferent, or if he fixes a time for payment of the legacy, interest is due, at least in the case of strangers, only from the date which he thus fixes. 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 trustees as an interest-bearing subject. The clearest case for exacting interest arises where there is *morata solutio*. Even where that cannot be said, and of course it can never be said in the interval between death and the realisation of the estate, there must always be the fundamental fact that the money, or its equivalent, forming the capital of the legacy, is extant and yielding income to the executor in one form or another, except in so far as the yielding of income may be temporarily suspended by the process of realisation. The case of *May's Trustees*, 2 F. 657, 37 S.L.R. 470, was decided as it was, only because the trustees had estate which they could have realised at once after the testator's death. But interest, as it seems to me, can never be due so long as by the act of the testator there is nothing in the hands of the trustees wherewith to pay the capital of the legacy.

"Now, that was the state of affairs here. Taking the figures as they stand, it is not alleged that there was *morata solutio*, and therefore if interest were to be allowed from a year after the testator's death, it would have to be paid, partly out of the sum of £40,000, the interest of which he had otherwise disposed of, and partly out of the sum of £50,000, which down to 1896 was the property, not of the trustees, but of his heirs. The general legatees are alive to the difficulty of this part of their case. Accordingly, they suggest that it was the duty of the trustees at the death of the testator to realise the reversionary interest of the trust estate in the sum of £50,000 ultimately payable by the heir, and to retain only the actuarial value of the interest of £40,000 bequeathed to him during the subsistence of the widow's liferent, and also to retain only the actuarial value of the terminal annuities payable to individual beneficiaries. They say that if the trustees had done this the funds in their hands would have been sufficient at the time to yield 18s. 1d. in the £ on the amount of the general legacies and on the capitalised value of the perpetual annuities, and so, that no question of interest would ever have arisen.

"It seems to me that if the trustees had so acted they would have been not fulfilling but violating their trust. They would have made (I am told by those who have worked out the calculation) a very bad bargain for the heir, and the mere possibility of such a result is enough to shew how contrary to their duty it would have been to run the risk of it. The right of an annuitant or a liferenter is to have the security which the testator intended him to have, *i.e.*, the security of the trust estate, and I am not aware that he can ever be compelled to give it up. Apart from the consent of all concerned, the plain duty of trustees is to obey the directions of the truster and not to take short cuts of their own to the objects which they suppose him to have had in view. And it is, of course, vain to suggest that the residuary legatees, without the possibility of benefit to themselves, would ever have consented to a sale of the trustees' eventual right to £50,000 for a sum equal to less than one-fifth of that amount.

"I am therefore of opinion that if the legatees receive payment of the unpaid balance of their legacies, and if the annuitants receive payment of the arrears of their annuities, in each case with interest from 14th June 1896, they will receive all that they are entitled to. . . .

"An attempt was made on behalf of the residuary legatees to draw a distinction between the case of legatees and annuitants, on the ground, as I understand the argument, that arrears of annuities can never be claimed, at all events where the annuities are declared to be alimentary, and then only for alimentary debts. This argument, I think, mistakes the true legal character of an annuity, which is nothing but a legacy payable by annual instalments instead of by a sum down. It is on this principle that annuities are payable out of capital where income is insufficient to meet them. The argument, I think, further mistakes the nature and object of a declaration that an annuity shall be alimentary. It is a declaration intended, not to limit the right of a beneficiary, but to protect him in the enjoyment of that right. It may be that where aliment is claimed as a debt *ex naturali obligatione*, it cannot be claimed for the past, because the necessities of the claimant are presumed to have been met. It may even be that in the exceptional case of an alimentary annuity payable under contract by a husband to his wife arrears cannot be claimed by the wife in a question with creditors except for alimentary debts. That was the nature of the case of *Muirhead*, 4 R. 1139, 14 S.L.R. 670. But decisions about aliment and about the right of a wife to compete with the husband's creditors *stante matrimonio* are by no means decisive of a question arising under a will between beneficiaries, all standing in precisely the same situation as recipients of the testator's bounty. He intended his annuitants to receive the full annual sums he left them, none the less that he declared these sums to be alimentary, and when it turns out that his estate is sufficient to afford payment of arrears, I see no reason either in law or in equity why arrears should not be paid. . . . .

"There was some discussion as to the rate of interest payable on the balance of legacies and annuities, whether running from a year after the testator's death or (as I hold) from 14th June 1896. I think it is the result of recent cases that there is no rule obliging the Court to award interest at the rate of 5 per cent. against trustees

unless there has been something of the nature of fault on their part in holding up the capital. Nothing of that kind is alleged in the present case, and I think it would be fair that the rate of interest should be not more than the average rate earned by the trustees upon the funds in their hands. Possibly the parties may be able to adjust the rate."

On 17th December 1901 the Lord Ordinary pronounced an interlocutor finding, *inter alia*—(1) that the claimants who were legatees were entitled to the unpaid balances of the capital sums of their respective legacies, with interest thereon from 14th June 1896; (2) that the claimants who were annuitants were entitled to the unpaid balances of all termly payments falling due to them respectively prior to 14th June 1896, with interest thereon from said date, and to the unpaid balance of each termly payment falling due after said date, with interest thereon from the date when said payments respectively fell due; (3) that the rate of interest payable was the average rate of interest yielded by the trust estate during the period since 14th June 1896.

This case was subsequently reclaimed and settled by joint-minute of February 4, 1904.

Counsel for James Ewing's Trustees and Others—Craigie. Agents—Webster, Will, & Company, S.S.C.

Counsel for Cameron's Trustees—Neish. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Free Church of Scotland, and Others — Orr. Agents — Cowan & Dalmahoy, W.S.

Counsel for the Trustees of John Crum and Others — Kippen. Agents — Bell & Bannerman, W.S.

Thursday, June 2.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON *v.* S. HENDERSON & SONS, LIMITED.

Minor—Reduction of Contract on Ground of Lesion—Competency—Agreement Discharging Claim under Workmen's Compensation Act 1897—*Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (3), *Second Schedule*, 12 *and* 14 (*d*).

A minor who was in right of compensation under the Workmen's Compensation Act in respect of injuries suffered in the course of his employment, granted a discharge signed by him and his father (who was his curator) acknowledging receipt of a sum of money paid to him by his employers as "in full payment and satisfaction of all claims" at his instance against them in respect of his injuries, and with the consent of his father discharging all such claims. The discharge was granted in pursuance of a settlement arranged by letters between the law-agent of the minor's father and the law-agent of the employers.

In an action by the minor to have the settlement and discharge reduced on the ground of minority and lesion, he averred that he and his father were under the belief induced by the employers that the employers had agreed as part of the settlement to retain him in their employment; that but for this belief they would not have signed the discharge; that nevertheless the employers had dismissed him from their employment without fault on his part, and that he having ascertained that the employers had not by the settlement as concluded undertaken an obligation to retain him in their service, the sum paid under the settlement and discharge was grossly insufficient compensation. *Held* (1) that the settlement and discharge were voidable at common law on the ground of minority and lesion, and (2) that the averments of minority and lesion were relevant to go to proof.

James Robertson, ovensman, Inverleith Mains, Edinburgh, brought this action against S. Henderson & Sons, Limited, biscuit makers, Edinburgh, concluding for the reduction of (1) a letter of offer dated March 23rd 1900, addressed by the agent of the pursuer's father, who as such was the pursuer's curator and administrator-in-law, to the agent of the defenders, and a letter of acceptance of the same date addressed by the agent of the defenders to the agent of the pursuer's father as aforesaid; and (2) a receipt and discharge dated March 30th 1900 granted by the pursuer and his father as his curator and administrator-in-law in favour of the defenders.

Prior to October 2nd 1903 the pursuer was an ovensman in the employment of the defenders at their biscuit works.

On 2nd November 1899, when the pursuer was attending to a dough-breaking machine in the said biscuit-making premises, and in the defenders' employment, his right hand was caught between the rollers of the said machine and seriously injured. It was found necessary to amputate the third and fourth fingers, and although the two remaining fingers were saved they became contorted and fixed in a flexed position, and will remain so permanently. The pursuer has thus to a great extent lost the use of his right hand through said accident, and was otherwise injured. At the time of the accident the pursuer was in receipt of an average weekly wage of 29s. 9d., which nominally included 4s. 9d. as for overtime, which, however, he regularly had in his said employment. The defenders agreed to pay him compensation under the Workmen's Compensation Act at the rate of 12s. 6d. weekly, and they made said weekly payments accordingly from the date of the accident down to the date of the receipt and discharge under reduction in this action. In or about the month of March 1900 the pursuer was so far