Friday, March 5.

FIRST DIVISION.

ARIZONA COPPER COMPANY *v.* LONDON SCOTTISH AMERICAN TRUST.

Company — Security for Debentures — Sinking Fund to be Accumulated in Hands of Trustees—Interest on Accumulations.

A company, for security of the payment of three classes of debentures which it was issuing, agreed to "accumulate as a sinking fund in the hands" of another company, in trust, "25 per cent. of its free annual profits remaining after satisfaction" of certain other interests. The trustees were to apply the moneys thus placed in their hands "for securing and paying to the holders thereof the whole of the debentures" issued by the trustees according to their priority, at the dates when they became due. It was further provided that "the trustees may lend out or invest the trust funds in their hands from time to time, or any part thereof" . . . in certain specified securities. No direction was given as to what was to be done with the interest arising from such investments.

Held that the interest did not form part of "the free annual profits" of the trusters, but must be retained and accumulated by the trustees, and added to the sinking fund, and applied to the purposes of the trust.

By assignation, agreement, and declaration of trust entered into on 1st October 1894, between the Arizona Copper Company, Limited, 74 George Street, Edinburgh, and the London Scottish American Trust, Limited, 75 Lombard Street, London, on the narrative that the first party contemplated borrowing certain sums by means of terminable debentures to be secured as a first charge on property conveyed to the second party, and further sums by the creation of A and B debenture stock to be constituted as postponed charges on the property so to be handed over, it was provided as follows:—"*Fourth.* For the better securing of the debts and obligations hereinafter set out, the first party hereby undertakes, each year after the year ending on 30th September 1894, to accumulate as a sinking fund in the hands of the second party 25 per cent. of its free annual profits remaining, after satisfaction of the interests called for in terms of the several obligations set out in article fifth hereof, but the first party undertakes that the sum to be annually accumulated in terms of this article shall not in any year be less than £5000, unless the total free annual profit of the first party shall for that year be less than that sum, in which case the sum falling to be paid to the second party for that year shall be the amount of such total free profit. The first party further undertakes that it will redeem the whole of its terminable debentures secured in terms hereof within ten years from Whitsunday 1894. And it is hereby provided and declared that the first party may either pay the said accumulations in cash or by delivery to the second party of its terminable debentures of the class hereby secured, which, having been issued by the first party for cash, have been duly paid to and discharged by the holders thereof, accompanied by a certificate and affidavit by the first party's secretary that the same have been *bona fide* met and paid by the company, and that no others have been issued in lieu and place thereof. The second party shall be bound to apply any sums of cash coming into its hands in terms of this article, in redeeming any terminable debentures of the first party which may for the time being be past due (it being in contemplation to issue debentures payable at different dates), but it shall not be competent to the second party to apply the funds coming into its hands in terms of this section in payment of interest on debentures, but only in payment of the principal sum thereof. And after the said £100,000 have been accumulated, as hereinbefore provided, the first party shall thereupon only be bound to accumulate in the hands of the second party, in terms of this article as above, at the rate of £5000 per annum, or such lesser sum as its whole free annual profit shall in any year amount to, as aforesaid, to be held by the second party for the better securing of the several other obligations hereby secured. The amount payable to the second party in terms of this article for any one year shall be sufficiently ascertained by a requisition addressed in writing by the second party to the first party, and failing such requisition being complied with within one month after the same is addressed to the first party, the second party shall then be entitled but not bound to sue the first party, and also to exercise the rights of enforcement hereinafter set out . . . *Fifth*, It is hereby declared that the second party holds the said securities and sinking fund, subject to the trusts at present affecting the same, until such trusts are validly discharged, in trust for the following purposes: *Primo loco*, for securing and paying all debts, claims, and expenses which may be incurred by it in executing the office of trustee, including its own remuneration and all legal expenses incurred by it; *secundo loco*, and after full satisfaction of the said debts, claims, expenses, and remuneration, for securing and paying to the holders thereof the whole of the terminable debentures of the first party, duly executed by it in terms of the form set out in Schedule No. II. hereto appended, with the interest from time to time due thereon at dates when the same becomes due, provided always that the said terminable debentures hereby secured, including those delivered to the second party as paid-up and discharged in terms of the immediately preceding article shall not at any one time exceed the sum of £100,000, and the rate of interest payable

thereon shall not exceed five per cent.; *tertio loco*, and after full and complete satisfaction of the purposes *primo loco* and *secundo loco* above specified, for securing and paying to the parties for the time being in right of the obligations of the first party undertaken in respect of the A debenture stock of the first party, as said obligations are hereinafter defined and set out, not exceeding in all the sum of £135,000, with interest thereon as the same from time to time falls due; *quarto loco*, and after full and complete satisfaction of the purposes *primo loco*, *secundo loco*, and *tertio loco* above specified, in their respective orders, for securing and paying to the parties for the time being in right of the obligations of the first party undertaken in respect of the B debenture stock, as said obligations are hereinafter defined and set out, not exceeding in all the sum of £181,300, with the interest thereon as the same from time to time falls due; and *quinto loco*, after satisfying the whole of said purposes in their respective orders, the second party shall hold the said securities for the first party or their assignees, and the said sinking fund shall thereupon cease to be accumulated; declaring that, as regards the bonds of the said Railway Company, the second party shall only be bound to redeliver the same after a complete discharge, endorsed thereon by the holders, of the rights conferred on them under an agreement and declaration of trust dated 1st May 1889, between the Arizona Trust and Mortgage Company, Limited, and the parties hereto. . . . *Thirty-fourth*. The trustees may lend out or invest the trust funds in their hands from time to time, or any part thereof, on heritable security, or in or upon the stocks, shares, debentures, or deposit-receipts, or other securities of any bank, insurance company, railway company, investment company, or joint-stock company of any other kind, and generally in or upon such securities at home or abroad as they in their sole discretion may think proper, and may from time to time at their discretion vary any such investment or security. Further, it is hereby provided and declared that while any of the said terminable debentures remain unpaid, the second party may invest any of the funds in its hands other than the sums paid in advance of calls on the A preference shares of the first party in the purchase or redemption at or below par of the said terminable debentures, or any portion thereof. After the whole of the said terminable debentures have been redeemed the second party may invest the whole or any portion of the funds in its hands, other than as aforesaid, in the purchase or redemption at or below ten per cent. premium of the whole or any portion of the A debenture stock. After the said debentures and A debenture stock have been paid off, the second party may invest the whole or any portion of the funds in its hands, other than as aforesaid, in the purchase or redemption at or below par of the B debenture stock, or any portion thereof."

Payment was made by the Arizona Company from time to time of various sums to account of the sinking fund, which were invested by the trust company in sundry stocks and shares, in respect of which they received considerable sums of interest.

A special case was presented by, 1st, the Arizona Copper Company, and 2nd, the London Scottish American Trust, for the purpose of determining how this interest was to be treated. The first party contended that the interest was part of their income, and that they were bound to take it into account in determining the free annual profits, 25 per cent. of which was payable to the second party, who were bound to allow the amount of this interest in the settlement of such 25 per cent.

The second party contended that the income of the funds forming the sinking fund for the time fell to be accumulated with and added to the sinking fund, and applied to the purposes set forth in the trust-deed.

The question submitted for the opinion of the Court was—"Is the first party, in ascertaining and settling the proportion of their free annual profits payable to the second party in terms of the fourth article of the said assignation, agreement, and declaration of trust, entitled to credit for the amount of the income collected by the second party, and arising on sums previously paid to the second party by the first party in terms of the said fourth article, and forming the sinking fund for the time? or Is the second party bound to retain such income and accumulate it with the other funds forming the sinking fund for the time, to be applied as provided in the said assignation, agreement, and declaration of trust?"

Argued for first party—The view contended for by them would sufficiently fulfil the obligation contained in the agreement, viz., to appropriate certain parts of their annual profits to make a fund which would meet the debts due to the company. The alternative mode of satisfying the stipulated payment by giving over terminable debentures, duly paid and discharged by the holders, would have resulted in a gain to the first party of the interest that they were paying on such debentures, and thus would have produced the same result as that for which they were contending. Accordingly, the presumption was that the two modes were intended to produce the same results and in favour of their view. The section of the general Act upon which the second party relied did not apply, because the words "to be increased by compound interest" did not appear in this agreement, as they should have appeared if that were the intention.

Argued for the second party—By the trust-deed the funds were entirely alienated from the first party, and were dedicated to the purposes of the trust. There was nothing in the deed to indicate that the interest was to be repaid to them. There was, on the other hand, in clause 34, a direction to the second party covering both principal and interest, to the effect that

they were to invest the trust funds for the purposes of the trust. Clause 4 showed that there was to be a "sinking fund," and section 84 of the Gas-Works Clauses Act 1847 (10 and 11 Vict. c. 16) indicated that the meaning of "sinking fund" was that money should be accumulated by way of compound interest. See also Education Act 1872 (35 and 36 Vict. c. 62), sec. 45. The first party fell into the error of confusing a "reserve" fund held by the company itself with a fund such as this held by another in trust for them.

At advising—

LORD PRESIDENT—The question in this special case relates to the interest of moneys which have already been impressed into the hands of the second party, and the contention on behalf of the company is that although those interests are received by, and are in the hands of the second party, yet the company is entitled to treat those interests as forming part of their free annual profits. I do not think that a complete statement of the question, because the words which are operative as regards the obligation of the company do not merely say that certain things shall be done about the annual profits, or rather I should say, about a proportion of the annual profits, but they say that the company shall accumulate as a sinking fund, year by year. 25 per cent. of its free annual profits. I think those words clearly show that the moneys which are being dealt with are moneys which, apart from stipulation, the company might accumulate or might do something else with—in fact, that they are moneys which are in the hands of the company.

But the moneys now in question are not in the hands of the company. They are interests which, according to the scheme of this deed, are received and drawn by the second parties. That is the necessary consequence of the provision that the capital sum constituted by 25 per cent. of each year's annual profits is impressed in the hands of the second party. But the contract is more clear and careful than that, because it prescribes the duties of the second party. They are to lend out and invest what is in their hands, and they, of course, are to draw in and retain the proceeds of those investments. Now, the 5th clause of the contract tells what is to be done with those moneys which are, under the contract, in the hands of the second party; and among the moneys which, according to the scheme of the contract, are in the hands of the second party, are those very interests which we are dealing with. Now, if the intention of the agreement were that those interests, which, as I have pointed out, are lawfully drawn in by, and taken into the hands of the second party, were to find their way back for the purposes of the agreement into the profits of the first party, I think that would have been said. It is not said, and accordingly I think it must be held, that the interests remain separated, by the working out of the agreement, from the profits, and are still in the hands of the second party, and necessarily applicable solely to the trust purposes specified in the fifth article. That being so, I confess I do not think it possible that the first party can accumulate moneys which are not in their hands to accumulate or not to accumulate. Accordingly, on that ground I think the contention of the second party is to be preferred.

LORD M'LAREN—It must be admitted that in this contract there is no direction to the trustees to accumulate the money which is paid into their hands. The word "accumulate" is used only in a secondary sense to express the payment of annual contributions by the first party, the Arizona Copper Company, into a sinking fund which is placed under the control of trustees. That can mean nothing more than an addition every year to the heap already in their hands. But this does not go very far to solve the question before us, for when we come to the clauses which express the conditions on which the trustees are to hold the fund, there is in clause 34, if not an express direction, a plain implication that the trustees are as a matter of duty to invest the money received by them under the agreement. The securities on which they may invest the trust-funds are specified, and it is obvious that it would not be good trust management to take money, and then to let it lie in bank until an opportunity arose of paying off debentures. Therefore I take it that after investment, and when the money has become an income-producing fund, the income is as truly trust-estate as the capital. On a sound construction of clause 5, which specifies the purposes of the trust, this must be held to cover such money derived from income, as well as the capital received by direct contribution from the shareholders. Now, these trust purposes are quite explicit, and amount to this, that the whole money is to be applied to the payment of the creditors' claims according to the order of their securities—first, the holders of terminable debentures, then of A debentures, and thirdly, of B debentures. The money being thus appropriated, it is impossible that it can also be considered as profits of the company out of which further contributions are to be paid to the sinking fund. Profits are limited on construction to profits directly made by the company, and do not include money which in a sense is the company's, but which is in the hands of trustees appropriated to specific purposes.

LORD ADAM—I am of the same opinion. The first parties are bound to accumulate as a sinking fund in the hands of the second parties 25 per cent. of their free annual profits, or the whole if less than £5000, by paying over that amount to them as trustees. The money so accumulated is to be disposed of in accordance with the directions in the trust-deed. Now, nothing is said specially in the deed as to what the trustees are to do with the interest of the money thus paid. Accordingly, the ordinary rule being that interest follows the principal, if the principal is dedicated to some special pur-

pose, it follows that the interest must go with it, and on this brief ground I agree with your Lordship.

LORD KINNEAR concurred.

The Court affirmed the second alternative of the question.

Counsel for First Party — D.-F. Asher, Q.C.—Clyde. Agents—Davidson & Syme, W.S.
Counsel for Second Party—J. Wilson. Agents—Menzies, Black, & Menzies, W.S.

HOUSE OF LORDS.

Thursday, February 18.

(Before the Lord Chancellor (Halsbury), and Lords Herschell, Macnaghten, Morris, and Shand.)

LORD ADVOCATE *v.* ROBERTSON.

(*Ante*, March 20, 1895, vol. xxxii., p. 444, and 22 R. p. 568.)

Revenue — Account-Duty — Life Policy — Customs and Inland Revenue Act 1889 (52 *Vict. c.* 7), *sec.* 11.

The Customs and Inland Revenue Act 1889 enacts by section 11 that account-duty shall be chargeable upon money received "under a policy of assurance effected by any person dying on or after 1st June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money, in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

A father assigned certain policies of insurance upon his own life, upon which he had paid the premiums for many years, to his daughter. During the seven remaining years of her father's life the premiums were paid by the daughter. Upon the father's death the Crown claimed account-duty from the daughter upon the proceeds of the policies.

Held (*aff.* the judgment of the First Division) that account-duty was not payable, in respect that the daughter had not been designated or intended as donee during the period when the policies were kept up by the father.

Revenue — Succession-Duty — Life Policy — Succession-Duty Act 1853 (16 *and* 17 *Vict. c.* 51), *sec.* 2 — *Premiums Paid Partly by Predecessor and Partly by Successor.*

The Succession-Duty Act 1853 enacts by section 2 that every disposition of property by reason whereof any person shall "become beneficially entitled to any property or the income thereof upon the death of any person" shall be deemed to confer a "succession."

Held (*aff.* the judgment of the First Division) that this section did not apply to the proceeds of a policy of life insurance, the premiums on which had for seven years prior to the death of the assured been paid by the assignee, who was entitled under a gratuitous assignation to the proceeds of the policy on the death of the assured.

This case is reported *ut supra.*

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—It appears to me in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again in dealing with Taxing Acts when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted.

This claim has been put in two ways. It appears to me it is susceptible of a very simple answer in respect of either of them.

The first question is, whether it comes under the second section of the Succession-Duty Act 1853—"Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval." This policy of insurance has been in existence a considerable number of years—I think seven. The person entitled ultimately to this money herself in one sense created the property, that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable upon the death. She continued that for a period of seven years, and therefore, reading simply the words as they stand, I do not think she has "become beneficially entitled" "upon the death of any person," because she has become entitled by reason, among other things, of her own payments during the period of seven years; and it appears to me under that section, in order to make this a "succession," we must introduce some words of this kind—"disposition of property by reason whereof, either partly or wholly, a person has become entitled." If those words were introduced, in a certain sense it is true that she did partly become entitled by reason of premiums previously paid, the policy effected, and the assignment then made supposing she continued to pay the premiums. But I find no such words in the statute, and I decline to do anything else than construe the words which I find there. I therefore am of opinion that under that part of the statute it is impossible to maintain the claim of the Crown on the first ground.

I then turn to the alternative claim, which is for account-duty; and it appears to me that it is susceptible of an equally plain answer. I do not know that I can state it more plainly than Lord Adam has done.