Tuesday, November 5.

EXTRA DIVISION.

SINCLAIR'S TRUSTEES *v.* SINCLAIR.

Trust — Administration — Termination of Trust — Denuding of Trust Funds — Failure of Truster's Ultimate Object of Freeing the Estate of Debt—Annuities.

A left his estate to trustees, directing, *inter alia*, that "the trust shall subsist for ten years after my death, and such further period as having in view my ultimate object," viz., freeing the estate of debt, "in so far as this may reasonably be attained, my trustees may consider it necessary and expedient to keep up the same." On the termination of the trust the estates were to be conveyed "under burden of . . . such annuities as I have provided to my children." Thirty-five years after his death his trustees admitted that they saw no prospect of clearing the estate of debt.

Held (1) that the "ultimate object" could not now be reasonably attained, and the trust must end; (2) that the trustees were not entitled to make the unsound financial position of the person in whose favour they were denuding a ground for continuing the trust; and (3) that in view of the terms of the settlement the trustees could not refuse to denude, even though by doing so they might endanger the annuities.

James Smith of Olrig and another, testamentary trustees of the deceased James Sinclair of Forss (*first parties*), and George Wemyss Sinclair, the testator's grandson and heir-at-law (*second party*), brought a Special Case dealing with the testator's trust estate.

By trust-disposition and settlement, dated 6th March 1874, the testator, who died on 1st March 1876, conveyed his whole estate, heritable and moveable, to trustees for, *inter alia*, the following purposes—"(*Second*) That they shall make payment to my son George William Sinclair, or failing him to the heirs of his body, during the subsistence of this trust, of the annual sum of five hundred pounds, or such smaller sum as my trustees consider the rental of my estate, after payment of the interests of the debts thereon and the provisions and annuities provided or to be provided by any deed granted by me, will, having regard to my ultimate object of freeing the estate of debt, afford and admit of, and that quarterly during the subsistence of this trust. . . . (*Sixth*) I declare that it is my wish and intention that this trust shall subsist for ten years after my death, and such further period as, having in view my ultimate object before mentioned, in so far as this may reasonably be attained, my trustees may consider it necessary and expedient to keep up the same, but in the event of the death of my said heir leaving a child before the expiry of the said ten years, or such further period as aforesaid, then this trust shall subsist until the said child succeeding shall attain majority. (*Lastly*) On the purposes of this trust being fulfilled, and my trustees judging it expedient for them to denude thereof, I hereby direct and appoint them to dispone, convey, and make over my whole heritable and moveable estate above mentioned and described, except such portions thereof as may have been sold as above directed, to and in favour of my eldest surviving son George William Sinclair, a settler in Australia, and the heirs of his body. . . .; but under burden always of the heritable debts affecting my said estates and such provisions and annuities as I may have provided to my children."

By deed of apportionment and provision, also dated 6th March 1874, the testator divided and apportioned four thousand pounds among his younger children, and directed certain liferent annuities to be paid to six of his children. These annuities were not created real burdens by the testator, but by the last purpose of his settlement he directed his trustees, on the termination of the trust, to convey his estates to his heir under burden of these annuities. At the time this case was brought three of these annuities, amounting to £190 a-year, were still payable.

The Case stated, *inter alia*—"When the said James Sinclair, the testator, died on 1st March 1876, his heritable estates were burdened with heritably secured debt to the extent of £62,600, with terminable rent charges amounting to £420 per annum, and with annuities created by his predecessor in the estate amounting to £200 per annum. The annual rental of the heritable estate amounted in 1876 to about £6100, and the annual income from the moveable estate to about £100, together £6200 0 0

From this there fell to be deducted approximately:—

1. Interest on heritable debt, &c. .	£2532 0 0	
2. Terminable rent charges . .	420 0 0	
3. Public and parochial burdens, feu-duties, and fire insurance .	935 0 0	
4. Annuities . .	888 0 0	
5. Improvement and repairs . .	721 0 0	
6. Factor's salary, &c.	166 0 0	
		5662 0 0
Leaving a balance of		£538 0 0

available to meet the expense of carrying on the trust and providing an allowance to the heir.

"As the moveable estate of the testator was insufficient to pay his moveable debts, funeral expenses, and provisions to younger children and others, his trustees, to meet these obligations, borrowed on the security of the heritable estates in 1877 £3760, and in 1879 £2500. Further, on the expiry of the lease to the Forss Caithness Pavement Company of Achscrabster Quarries in 1883, the trustees in terms of the lease took over the tenants' plant and machinery at valua-

tion, and to meet the price thereof borrowed a further sum of £3000 on the security of the estates. Further, in order to meet expenditure for improvements on the estates and claims by tenants for meliorations, &c., the trustees in 1886 borrowed a further sum of £4300. The trustees thus borrowed a total sum of £13,560 during the first ten years of the trust, and this added to £62,600 of debt affecting the estates at the time of the testator's death, brought the amount of heritable debt in 1886 up to £76,160, apart from rent charges and annuities. The trustees have since repaid out of income heritable debt to the amount of £7300, and the amount now affecting the estates is therefore £68,860. All the before-mentioned rent charges had expired by 1st October 1892, and the annuities now payable are only £190.

"Owing to the agricultural depression which set in soon after the commencement of the trust the rents of agricultural subjects have been considerably reduced, and there has also been a considerable diminution of rental through the decay of the pavement industry which has led to the Achscrabster Quarries on the estate of Forss being unlet since the year 1907. On the other hand the rents of shootings and fishings have increased to some extent. The average gross rental of the estates for the five years ending 31st December 1910 amounted to approximately £4903, and the average gross income of the trust estate from combined sources for the same period was £5018

The average outgoings for the same period were:—

1. Interest on heritable debt, &c.	£2342	
2. Public and parochial burdens, feu-duties, and fire insurance . . .	973	
3. Annuities	218	
4. Improvements and repairs and upkeep of mansion houses	751	
5. Land Steward's salary and expenses of estate management . . .	300	
	——	4584
Leaving a balance of		£434

available to meet payments during the period in question for compensation to farm tenants, &c., and for carrying on the trust. It is not anticipated that for some time to come the revenue will appreciably exceed the average sums above stated, but the free revenue will be increased as the annuities (which now amount to £190 per annum) lapse on the death of the annuitants.

"As authorised by the second purpose of said trust-disposition and settlement, the trustees made payment to the second party after his father's death on 23rd July 1876 of the sum of £500 per annum, being the maximum sum authorised, but on 13th July 1885 a notarial intimation was served on the trustees of a bond and disposition and assignation in security granted by the second party in favour of Aaron Waxman of Melbourne in the Colony of Victoria in Australia, financier, for the principal sum of £14,595. Said bond purports to convey to the said Aaron Waxman the whole heritable estates in security of said sum, in terms usual in heritable bonds, and in addition it contains a special assignation of the second party's rights under the trust settlement, also in security of said sum.

[In view of the notarial intimation of the assignation of the second party's interest in the trust estate above set forth, the trustees ceased to make any further payments to the second party. The second party had, however, granted certain bonds and dispositions in security over the estate of Forss, and assignations of his whole interest in the trust estate, which had been recorded in the Register of Sasines and had been intimated to the trustees.]

"In view of the amount of heritable debt affecting the trust estates, and of the fall of the rental of the said estates since the testator's death, combined with increased taxation, the trustees do not see any prospect of clearing the estate of the debt existing at the testator's death within any period that they can specify."

The first parties *maintained* that they were not bound or vested with any discretion entitling them to denude themselves of the trust estate, for the following reasons—1. That the whole trust purposes, and especially the primary purpose of the trust, to free the estate of debt had not been fulfilled. 2. That if the trust was brought to an end by their denuding, the payment of the annuities created by the trust-disposition and settlement, and still subsisting, would be endangered. 3. That their denuding in favour of the second party would under existing circumstances entirely defeat the main intention of the testator.

The second party *maintained* (1) that the trustees had no discretion to further continue the trust on any ground whatsoever, and that he or those in his right were entitled to an immediate conveyance of the estate. He submitted that on a sound construction of the settlement the only object for which the trustees could competently continue the trust was that of freeing the estate of the debt which existed at the truster's death, and that the power of the trustees to continue the trust had now ceased in respect that the course of the trust administration and the admission of the trustees showed that that object could not within the meaning of the sixth purpose of the trust be reasonably attained. He maintained that the additional considerations adduced by the trustees, to the effect that he had incurred debt and that it was doubtful whether, if the trustees denuded, the remaining annuities could be effectually secured, were both entirely irrelevant in answer to his claim. The trust-deed contained no prohibition against his incurring debt, and it expressly directed a conveyance to be made under burden of any subsisting annuities. Moreover, the suggestion that the annuities might be

prejudiced was unfounded in law. His creditors' rights could not be higher than his, and if the directions to the trustees to convey under burden of the annuities was sufficient to secure the annuities in a question with the second party, it would equally secure them in a question with his creditors. If the annuities could not be secured either against the second party or his creditors, that would not warrantthe trustees in refusing to convey in terms of the trust-deed. (2) On the assumption that the trustees had a discretion to continue the trust, that they had equally a discretion to end it, and were accordingly in any case entitled to denude in favour of him or those in his right. (3) In exercising such discretion the trustees were only entitled to have regard to the object of postponement expressed by the truster, viz., the clearing the estate of the original debt, and that for the reasons above stated they were not entitled to have regard to the other considerations adduced by them.

The following *questions of law* as amended were submitted—"1. Are the first parties bound to denude in favour of the second party, provided he discharges the debts and obligations incurred by him, of which intimation has been made to the first parties, or which stand upon the record? 2. If the preceding question is answered in the negative, are the first parties entitled in the exercise of their discretion to denude in favour of the second party? 3. If the third question is answered in the affirmative, are the first parties in exercising their discretion entitled to have regard—(*a*) to the state of indebtedness of the second party? (*b*) to any apprehended risk of failure of payment of subsisting annuities?"

The following authorities were referred to at the hearing:— *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786, 14 S.L.R. 499; *Williamson* v. *Begg*, May 12, 1887, 14 R. 720, 24 S.L.R. 490; *Cowie* v. *Muirden*, July 20, 1893, 20 R. (H.L.) 81, 31 S.L.R. 275; *Tempest* v. *Lord Camoys*, 1882, 21 Ch.D. 571, at p. 578; *in re Courtier*, 1886, 34 Ch.D. 136; *Buchanan* v. *Eaton*, 1911 S.C. (H.L.) 40, 48 S.L.R. 481.

At advising—

LORD MACKENZIE—The question in this case is whether the trustees are now bound to denude in favour of Mr Charles Wemyss Sinclair, provided he discharges the debts and obligations incurred by him, of which intimation has been made to the trustees, or which stand upon record. I am of opinion that the answer should be in the affirmative.

The trust was created by Mr James Sinclair of Forss, who died so long ago as 1876. Mr Charles Wemyss Sinclair came of age in 1883. A consideration of the second and sixth purposes of the trust make it plain what the ultimate purpose was that the truster had in his mind. It was not to create a trust that should subsist until the estate was cleared of all debt affecting it, but a trust which should subsist for the purpose of freeing the estate of debt in so far as this might reasonably be attained. The wish of the testator was that the trust should subsist for ten years, or until the heir should attain majority. Any further direction as to keeping up the trust is subordinate to what he called his ultimate purpose. On the purposes of the trust being fulfilled, the trustees were directed to convey the whole heritable and moveable estate to the heir specified. Mr Charles Wemyss Sinclair is the person now entitled, if the time has arrived at which the conveyance ought to be made. Whether the conveyance ought now to be made depends upon whether the purposes of the trust have been fulfilled, because on a consideration of the last purpose I think the truster did not empower the trustee to delay granting the conveyance after the purposes had been fulfilled. The question therefore is, Have the purposes of the trust been fulfilled? Now no word has been said against the way in which the trust has been administered, and from the explanation given by Mr Chree it appears that the condition of the estate has materially improved. The trustees, however, make the frank admission that they "do not see any prospect of clearing the estate of the debt existing at the testator's death within any period they can specify." In these circumstances is the trust to be kept up or not? It has been in existence for thirty-six years, and from what the trustees say there is no prospect of even another thirty-six years clearing the estate of the debt existing at the testator's death. In these circumstances I think that the trustees have done all that may reasonably be required of them to attain the testator's ultimate object of freeing the estate of debt, and that accordingly they now have a duty to denude.

There is one clause in the settlement which shows that the testator did not mean that the trust should continue until the whole burdens affecting the estate had been cleared off. The direction to convey is "under burden always of the heritable debts affecting my said estate, and such provisions and annuities as I may have provided to my children." The difficulty which was urged upon us by the trustees is in regard to the outstanding annuities of £190 per annum. I think that the clause I have just quoted justifies the trustees in conveying the estate under burden of the annuities even though they are declared to be alimentary. It was pointed out that if the trust administration is withdrawn the security of the alimentary annuities will not be so good, as prior creditors may force a sale of the estate or enter into possession under their bonds. This, however, is the position in which matters were left by the testator himself, and does not warrant the trustees in refusing to convey. Further considerations were dwelt upon of a character personal to the beneficiary himself. These matters do not in my opinion affect the present question. For the reasons stated I am of opinion that the second party is now entitled to a conveyance on the conditions already

stated. It is unnecessary to answer the second and third queries.

LORD DUNDAS—I am of the same opinion and shall add but little to what your Lordship has said. Counsel for the second party suggested rather than maintained that the concluding sentence of the sixth purpose of the settlement should be read as a direction that the trust is to subsist until the occurence of the event contemplated, and is then to cease. This view is, I think, plainly wrong; the direction is merely that, in the event postulated, the trust should not terminate before the grandson of the testator attained majority. The real point, however, of the case turns upon the proper effect to be given, in the circumstances which have arisen, to the declaration in the said sixth purpose of the truster's intention that the trust should subsist for ten years after his death "and such further period as, having in view my ultimate object"—viz., freeing the estate of debt—"in so far as this may reasonably be attained, my trustees may consider it necessary and expedient to keep up the same." About thirty-five years have elapsed since the testator's death, during which the estate has admittedly been administered in a most prudent and careful fashion, but it is stated in the Case that "the trustees do not see any prospect of clearing the estate of the debt existing at the testator's death within any period that they can specify." In these circumstances it seems to me that, upon the trustees' own showing, the testator's "ultimate object" cannot now "reasonably be attained" within the meaning of the said sixth purpose, and that the trust must therefore end. It was argued that by the last purpose of the trust denuding was to take place only "on the purposes of this trust being fulfilled"; that this could not be said to have happened while there are subsisting annuities created by the settlement, and that if the trustees were to denude, these annuities might be endangered. I hope that the annuities may not be endangered, but I do not think that the fact of their subsistence can be regarded as a sufficient reason for continuing the trust, looking to the express direction in the settlement that the conveyance of the estate by the trustees should be under burden of, *inter alia*, these annuities. Nor do I consider that we can give effect to the trustees' argument against denuding based on the indebtedness of the second party to creditors, which seems to be considerable. The second party undertakes, prior to any conveyance of the estate to him, to discharge the debts and obligations incurred by him of which intimation has been made to the trustees, or which stand upon the record. On this being done I do not think the trustees or the Court have any concern with the pecuniary affairs or liabilities of the second party

On the whole matter, I have come, not without a feeling of regret, to the conclusion that we must answer in the affirmative the first question put to us by the Case (as amended). If this is done, the other questions do not require to be answered.

LORD KINNEAR—I concur.

Counsel for the First Parties—Chree, K.C.—D. Anderson. Agents—John C. Brodie & Sons, W.S.

Counsel for Second Party—Constable, K.C.—Ingram. Agent—J. George Reid, Solicitor.

Saturday, December 21.

SECOND DIVISION.

SCOTT AND OTHERS (SCOTT'S TRUSTEES).

Succession—Will—Construction—Approbate and Reprobate.

A testator, who had already made provision for his children by marriage contract, bequeathed to them by will a share of the residue of his estate, "equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share." The will provided that the bequests made thereunder should be accepted by the children in full satisfaction of the marriage-contract provisions. A son of the testator died after the marriage-contract provisions had vested, but before the vesting of the testamentary provisions, leaving a child.

Held that the executrix of the testator's son was entitled to the son's provision under the marriage contract, and that in terms of the will it fell to be deducted from that portion of the residue to which the son's child was entitled under the destination in the will to children's issue, and not from the general residue fund.

Alexander Whitson Scott and others, trustees under the trust-disposition and settlement of the late James Scott, manufacturer, Dundee, *first parties;* Mrs Bella Stewart Dawson or Scott, widow and executrix of Alfred Thomas Scott, a son of the truster, *second party;* James Eric Dawson Scott, only child of Alfred Thomas Scott, *third party;* and David Scott and others, children and grandchildren of the truster, *fourth parties*, presented a Special Case for the opinion and judgment of the Court of Session.

The following *narrative* is taken from the opinion of Lord Dundas, *infra*:—"Mr James Scott, manufacturer, Dundee, died on 26th January 1908. He was twice married. On the occasion of his first marriage, in 1850, he made no marriage contract; his wife died in 1873; there were five children, four of whom survived their father and still survive, while one predeceased him, leaving a child who still survives. Mr Scott married again in 1875. By antenuptial marriage contract he bound himself, his heirs, executors, and successors, to provide and secure one-tenth part of his free personal estate as at the day of his death to the children of