

called on to decide. It is enough for the decision of the case in the pursuer's favour if we hold that Buchanan was interested in this business as a partner, and of this I have no doubt. The reasons given by the Sheriff, based upon the terms of the agreement, for holding that Buchanan is the sole partner, are sufficient to support the view that Buchanan is at least a partner, and that, as I have said, I am prepared to affirm. If any question arises between Saunders and Buchanan as to their relative rights and liabilities under the agreement, it may be that Saunders may be able to show that as between them he is not a partner or liable as such. But meantime it is enough to hold that Buchanan is a partner, and on that ground to give the pursuers decree.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was absent at advising—I am also of opinion that the judgment of the Sheriff should be affirmed for the reasons which he states very tersely in his note. I do not think that anyone can read the documents which formed the contract between the defenders without seeing that the true trader with the largest interest in the concern was Buchanan and not Saunders. In other words, that truly construed the documents disclose a contract of partnership between Buchanan and Saunders.

Is there any reason in law why this, the manifest truth of the contract, should not receive effect? I can find none. It must now be taken on the one hand to be the law that the receipt by a person of a share of the profits of a business does not of itself make him a partner; neither does it of itself make a person a partner that having advanced money in loan he stipulates for a certain amount of control over the business in order to secure the debt. But both these things—receipt of a share of the profits, and control of the business—are, whether taken separately or together, important elements in deciding whether there is partnership or not.

On the other hand it is equally certain that a person who is truly a partner will not escape responsibility however emphatically he may declare in the contract that he is not a partner and is not to be considered a partner.

In each case the whole circumstances must be considered. I do not think it necessary to repeat what has already been pointed out by the Sheriff and by your Lordships as to these circumstances in the present case which indicate partnership beyond this, that unlike the English cases referred to by the Sheriff this is not a case of a loan made by Buchanan to an existing and independent trader. It is not really a case of loan at all. Buchanan created the business out of his own funds and Saunders was merely Buchanan's creature—I do not use the word in an offensive sense—who was ostensibly to carry on the business as his own and accept liability, but really to act as manager practically during Buchanan's pleasure and be remunerated by

receiving a proportion of the profits and a salary.

It is not easy to argue from one case to another on this question. The cases of *Mollwo* and *Badeley* at first sight go far to support the appellant's contention. The latter case goes further than I should be prepared to follow in at least one respect. But they were both cases in which the Court on consideration of the circumstances were satisfied that there was a genuine loan and a genuine security, and that the true purpose of the transaction was to secure the loan, not to make the lender a partner. Our judgment will not trench on the principles of law upon which these cases proceeded.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against; remitted to the Sheriff to of new decern against the defenders as craved; and found the defender Buchanan liable in expenses in this Court.

Counsel for the Pursuer and Respondent—Campbell, K.C.—Hunter. Agent—Alfred A. Murray, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—Younger. Agent—Campbell Faily, S.S.C.

Thursday, October 29.

SECOND DIVISION.

HUTCHINSON'S TRUSTEES v. YOUNG & OTHERS.

Succession—Trust—Direction to Purchase Government or Savings Bank Annuities—Annuities to be Alimentary—Continuing Trust not Provided for—Right of Annuitant to Demand Payment of Capital.

A testatrix directed her trustees "to provide and apply the sums after mentioned in the purchase of Government or Savings Bank annuities for the persons after mentioned" (then followed the names of the beneficiaries and the respective sums bequeathed to each), "and the said annuities shall be strictly alimentary, and shall be payable to the said annuitants on their own receipt." The testatrix further provided and declared, *inter alia*, that the annuities bequeathed by her should "not be assignable or affectable by creditors." She made no provision for a continuing trust.

The Government Annuities Act 1853 (16 and 17 Vict. cap. 45), which regulates the purchase of Government or Savings Bank annuities, enacts, sec. 25—"The right, title, interest, and benefit in and to any annuity . . . purchased under the provisions of this Act shall not be assignable by the original proprietor thereof so as to enable the assignee to receive the same during the

lifetime of the said proprietor, except in case of the insolvency or bankruptcy of an individual proprietor, when the same shall become the property of his or her assignee or assignees for the benefit of his or her creditors."

In a special case certain of the annuitants maintained that they were entitled to have paid over to them respectively the capital sums required to purchase the respective annuities bequeathed to them. *Held* that the trustees were bound to invest the sums bequeathed to the annuitants in Government annuities payable to the annuitants according to the directions of the trustor so far as these directions could be carried out.

Miss Margaret Hutchinson, Somnerfield Lodge, Haddington, died on 9th May 1902 leaving a trust-disposition and settlement whereby she directed her trustees "to provide and apply the sums after mentioned in the purchase of Government or Savings Bank annuities for the persons after named" (then followed the names of the annuitants, who were all females, and the respective sums bequeathed to each), "which annuities . . . shall be strictly alimentary, and shall be payable to the said annuitants on their own receipt." The trustor further "expressly provided and declared that any legacies, provisions, or annuities bequeathed by me in favour of females are granted exclusive of the *jus mariti* and right of administration and *jus relicti* of any husband or husbands to whom any of the said female legatees may at any time be married, and shall not be affectable by the debts or deeds of such husbands, or by the diligence of creditors in any way; and such legacies, provisions, and annuities shall be payable to the said beneficiaries upon their own receipts or acknowledgments, and shall not be assignable or affectable by creditors." There was no provision for a continuing trust.

Certain of the beneficiaries to whom Miss Hutchinson bequeathed annuities having requested her trustees to make immediate payment of the capital sums directed to be invested in annuities, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees, and (2) the beneficiaries who demanded immediate payment.

In addition to the facts narrated above, the case stated as follows:—"The purchase of Government or Savings Bank annuities is mainly regulated by the Government Annuities Act 1853 (16 and 17 Vict. c. 45). Section 25 of the said Act provides that the 'right, title, interest, and benefit in and to any annuity . . . purchased under the provisions of this Act shall not be assignable by the original proprietor thereof so as to enable the assignee to receive the same during the lifetime of the said proprietor, except in the case of the insolvency or bankruptcy of an individual proprietor, when the same shall become the property of his or her assignee or assignees for the benefit of his or her creditors.' The section

farther provides that in case of any such bankruptcy or insolvency the Commissioners for the Reduction of the National Debt shall re-purchase and cancel the annuity, the receipt of the assignee or assignees to the Commissioners being constituted a sufficient discharge thereof. The first parties have applied to the Comptroller of the Savings Bank Department of the General Post Office, and have ascertained that, according to the practice of the Department with regard to annuities issued by it, while the right to an annuity itself cannot, apart from insolvency or bankruptcy, be assigned, the half-yearly payments are made either to annuitants themselves or parties holding powers of attorney granted by annuitants, and further that under their regulations the Department cannot, or at any rate will not, grant a bond of annuity containing a clause that the annuity shall be strictly alimentary and shall exclude a trustee in bankruptcy."

The first parties maintained that as alimentary annuities could not be obtained from Government it was their duty to invest the money in annuities made payable to themselves, or to take some other means to maintain the alimentary character of the funds. In any case, they maintained that it would not be in accordance with their duty to pay over the capital sums directly to the second parties, but that they were bound to purchase Government annuities in the ordinary way, because while such annuities would not protect the annuitants against the contingency of bankruptcy, they would at any rate secure them against some of the contingencies for which the trustor intended to provide.

The second parties maintained that in the circumstances they were entitled to have paid over to them respectively the capital sums required to purchase the respective annuities bequeathed to them by the testatrix. Alternatively, they maintained (1) that any Government or Savings Bank annuities purchased under the directions in the settlement should be taken payable to the second parties respectively, and (2) that the first parties had no power to vary the directions of the testatrix as to the purchase of said annuities.

The following were the questions of law:—" (1) Are the first parties entitled or bound to pay to the second parties the capital sums directed by the late Miss Hutchinson to be invested in the purchase of annuities for the second parties respectively? or (2) Are the first parties bound to invest such sums in Government or Savings Bank annuities payable to the second parties according to the directions of the trustor so far as these directions can be carried out? or (3) Are the first parties bound to invest the sums in question in annuities in such, and if so what, way as will effectually secure the alimentary character of the rights of the beneficiaries?"

Argued for the first parties—The real purpose of the testatrix could be accomplished by the purchase of Government annuities; such annuities were not at the

absolute disposal of the annuitants, and therefore were not in the same position as ordinary annuities—*Kennedy's Trustees v. Warren*, July 19, 1901, 3 F. 1087, 38 S.L.R. 827.

Argued for the second parties—However clear the intention of the testator was, if it could not be carried out in its entirety it could not be carried out at all. The Court could not create a trust for the accomplishment of the truster's intention, and the annuitants were entitled to immediate payment—*Allan's Trustees v. Allan and Others*, December 12, 1872, 11 Macph. 216, 10 S.L.R. 141; *Murray v. Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715.

LORD JUSTICE-CLERK—I have not any serious doubt in this case. The purpose of the testatrix, as stated in her will, is to exclude the claims of creditors and others from the property left to her beneficiaries. It may be that this cannot be done effectually except by means of a continuing trust, for which no provision has been made. But the failure of Government annuities to give effect in every respect to the intention of the testatrix is not a sufficient ground for setting aside her wishes. She has expressly directed her trustees to invest in Government annuities, and I think that her wishes should be carried out.

LORD YOUNG—I am of the same opinion, and I have no doubt upon the matter. Money which is bequeathed to anybody with directions for securing the enjoyment of it by the beneficiary is under no protection whatever when it gets into the beneficiary's hands, because when it is there it is subject to all the claims of creditors. However strongly and clearly expressed the intention of the testator may be to protect the beneficiary against his or her indiscretion or creditors it can only be very partially carried out. Here the testatrix intended to protect her beneficiaries, and so far as it is possible to protect them by following her directions her intention must receive effect. She directed her trustees to purchase Government annuities, and that direction must be carried out.

LORD TRAYNER—Had the direction of the truster in this case been simply a direction to her trustees to purchase annuities subject to the conditions expressed in her will I should have found it difficult not to agree with the second parties that they are entitled to immediate payment of the capital sums required to purchase their respective annuities. But the distinction between the present case and the cases cited to us on behalf of the second parties is, that here there is a direction to purchase "Government or Savings Bank annuities." The truster desired as far as possible to protect her beneficiaries against loss, and she selected this method—the purchase of Government annuities—as the method by which, as she thought, her purpose could be best effected, and in the hope of getting such protection as Government annuities afforded. The fact that Government annuities are not in all circumstances

beyond the reach of creditors does not seem to me any reason for refusing to carry out the testator's wish expressed in such plain terms. I am therefore in favour of answering the questions of law by finding that the trustees are bound to invest the sums referred to in Government annuities in favour of the persons named in the will.

LORD MONCREIFF was absent.

The Court answered the questions of law by "declaring that the first parties are bound to invest the sums there referred to in Government annuities payable to the second parties according to the directions of the truster Miss Margaret Hutchinson, so far as those directions can be carried out."

Counsel for the First Parties—Mackenzie, K.C. — Constable. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for the Second Parties—Solicitor-General (Dundas, K.C.)—Cullen. Agents — Constable & Sym, W.S.

Thursday, October 29.

SECOND DIVISION.

[Sheriff Court at Glasgow.

HARPER v. INSPECTOR OF POOR OF RUTHERGLEN.

Process—Appeal from Sheriff Court—Competency—Poor—Poor Law (Scotland) Act 1845 (8 and 9 Vict. c. 83), sec. 73—Act of Sederunt 12th February 1846, secs. 1, 2, and 6.

Held that an appeal to the Court of Session is competent against a deliverance of a Sheriff-Substitute finding an applicant for parochial relief not legally entitled thereto, although such deliverance has proceeded upon a verbal application and no record has been made up or note of evidence taken.

This was an appeal at the instance of Gilbert Harper, 70 Mill Street, Rutherglen, from a deliverance of the Sheriff-Substitute (MITCHELL) at Glasgow upon a verbal application by the appellant for parochial relief.

The Poor Law (Scotland) Act 1845 enacts—section 73—"If relief shall be refused to any poor person who shall have made application for relief, it shall and may be lawful for such poor person to apply to the sheriff of the county in which the parish or combination from which such poor person has claimed relief . . . is situate, and the said sheriff shall forthwith, if he be of opinion that such poor person is, upon the facts stated, legally entitled to relief make an order upon the inspector of the poor or other officer of such parish or combination directing him to afford relief to such poor person in the meantime until such inspector or other officer shall, on or before a day to be appointed by the said sheriff . . . give in a statement in writing showing the reasons why the application of such poor person for