The Court dismissed the appeal.

Counsel for Petitioner (Respondent)—Hunter, K.C.—Munro. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Objectors (Appellants)—Jameson. Agents—Carmichael & Miller, W.S.

Saturday, May 30.

FIRST DIVISION.

TURNER'S TRUSTEES *v.* FERNIE AND OTHERS.

Succession—Trust—Direction to Purchase Government or First-Class Office Annuities—Annuities not Declared Alimentary—Right of Beneficiary to Capital Sum.

A testator directed his executor to pay to his Scotch trustees certain sums to be invested by them in the purchase of annuities for certain parties named. He further provided—"And I declare that all annuities . . . shall be purchased . . . from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, . . . and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf . . . think fit, . . ." The annuities were not declared alimentary.

The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, *held* that the beneficiaries were entitled to payment.

Tod v. *Tod's Trustees*, March 18, 1871, 9 Macph. 728, 8 S.L.R. 445, *followed*. *Hutchinson's Trustees* v. *Young*, October 29, 1903, 6 F. 26, 41 S.L.R. 14, *distinguished* and *commented on*.

By his will the late Robert Blackburn Turner of Goosery, Bengal, India, who died, domiciled in Scotland, on 17th March 1906, directed his executor to pay to his Scotch trustees the sum of Rs. 10,000, to be invested by them in the purchase of an annuity for the benefit of Margaret Fernie, then residing in Glasgow, for her life. He also directed his executor to pay to the said trustees a sum sufficient for certain purposes therein mentioned, to be held upon the trusts therein declared, *inter alia*—"To set apart three several sums of Rs. 15,000 each, and to invest each of the said three sums of Rs. 15,000 in the purchase of three several annuities, that is, Rs. 15,000 to be expended in the purchase of each such annuity, one in the name and for the benefit of my sister Jane Wilson, wife of William Wilson, residing in Possil Park in Glasgow aforesaid, another for the benefit and in the name of my sister Jane Fleming, the widow of Joseph Fleming of Glasgow aforesaid, and the third for the benefit and in the name of my sister Martha Morgan, the wife of James Morgan, at present residing in Slottville, in the state of New York, in the United States of America."

The testator further provided—"And I declare that all annuities which by this my will I direct to be purchased by my executor or my Scotch trustees shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf think fit, and that such annuities shall be made payable to the persons in whose names and for whose benefit they have respectively been purchased, in equal half-yearly or quarterly portions, and shall be enjoyed by them respectively as their respective separate property, free from the control of any husband to whom any of them respectively may be married."

The annuitants having called on the trustees to pay them the principal sums instead of investing the money in the purchase of annuities, a special case was presented for (1) the trustees, who were in doubt as to their power to make such payment, and (2) the annuitants.

The case, *inter alia*, stated—"(6) The purchase of Government annuities is mainly regulated by the Acts 16 and 17 Vict. cap. 45, and 45 and 46 Vict. cap. 51, section 2. Section 25 of the former 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 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 further provides that in case of any such bankruptcy or insolvency the commissioners for the reduction of the national debt shall repurchase and cancel the annuity, the receipt of the assignee or assignees to the commissioners being constituted a sufficient discharge thereof. (7) The first parties 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.

"In these circumstances the first parties maintain that they are not bound to pay over said sums to the second parties, and that they are bound to purchase the annuities on behalf of the second parties; or otherwise, that they are entitled in their discretion to purchase annuities for the second parties, or such of them as they

may consider proper. The second parties respectively maintain that having intimated a demand for payment of the said capital sums . . . the first parties, as trustees foresaid, are bound to make payment."

The *questions of law* were—"(1) Are the first parties bound to purchase annuities for behoof of the second parties as directed by the will? (2) Are the first parties entitled in their discretion to purchase annuities for behoof of the second parties or such of them as they shall consider proper? Or (3) Are the first parties bound to make payment to the second parties respectively of the capital sums directed to be invested in the purchase of annuities on their behalf?"

Argued for the first parties—The first parties were willing to pay over the principal sums if they were in safety to do so. The direction to purchase annuities, however, indicated an intention on the part of the testator to protect his beneficiaries against loss, and in these circumstances the trustees were bound, looking to the recent case of *Hutchinson's Trustees* v. *Young*, October 29, 1903, 6 F. 26, 41 S.L.R. 14, to purchase annuities. The present case was distinguishable from those of *Tod* v. *Tod's Trustees*, March 18, 1871, 9 Macph. 728, 8 S.L.R. 445, and *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715, where it was held that trustees were not bound to purchase annuities in face of a demand by the beneficiaries for payment of the principal sums—for the terms of this bequest clearly inferred a direction to the trustees to purchase such annuities as were alimentary and not assignable. As to the effect of declaring an annuity alimentary, reference was made to *Cosens* v. *Stevenson*, June 26, 1873, 11 Macph. 761, 10 S.L.R. 526.

The second parties were not called upon.

LORD PRESIDENT—The late Mr Blackburn Turner left a will the material provisions of which, so far as the questions before your Lordships are concerned, are these—he directed his executor to pay to certain Scotch trustees Rs. 10,000, to be invested by them in the purchase of an annuity or annuities in the name and for the benefit of Miss Margaret Fernie. He further directed his executor to pay to these trustees a sum sufficient to enable them to set apart three sums of Rs. 15,000 each, to be invested in the purchase of annuities in the name and for the benefit of three other ladies whom he there named. Then, near the end of the will he made this declaration —"that all annuities which by this my will I direct to be purchased by my executor or my Scotch trustees shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office as my said executor or Scotch trustees shall in this behalf think fit."

These ladies now come forward and they ask the trustees to pay over to them the capital sums mentioned in the will, because they say that they do not desire to receive them in the form of annuities, as provided for in the will, it being their intention, should they receive them in that form, to realise the annuities and possess themselves of the capital sums. In fact, the situation here is exactly like the situation that existed in the case of *Tod's Trustees*, 9 Macph. 728. The trustees, however, have felt bound to resist that proposal, professedly on the authority of the decision in the recent case of *Hutchinson's Trustees*, 6 F. 26.

I confess, if the matter had to be considered in the light of these two decisions, I would have found a difficulty in reconciling the case of *Hutchinson* with the case of *Tod*, and if the matter were to come up in a form requiring it I think it would be necessary that these decisions should be reconsidered. But here I think no such necessity arises, for the present case is easily distinguishable from that of *Hutchinson*. I think the decision in the case of *Hutchinson* went on the ground that the judges found there an expressed anxiety on the part of the testator to protect the legacies she was giving, *i.e.*, not to give the legacies in the form of a capital sum to the beneficiaries. There that anxiety was extracted from two provisions in the will. First, no option was given to the trustees, they were to purchase government or savings bank annuities only. Secondly, the annuities were declared to be strictly alimentary. Here neither of these provisions is present. The direction in the will to purchase Government annuities is not specific as it was in *Hutchinson;* it is merely mentioned as one of several investments that the trustees may in their discretion make. In other words, the mention of Government annuities can in no way be attributed to a desire for cutting down the rights of the annuitants; it is obviously introduced for the sole purpose of ensuring the safety of the provisions. And there is no declaration that the annuities are to be alimentary only. That seems to take the present case out of the circumstances that had to be considered in the case of *Hutchinson*, and to bring it into line with *Tod*, and many other cases, in which a similar decision has been arrived at. That leads me to the conclusion that the beneficiaries here are entitled to what they ask.

I reserve my opinion as to the difficulty of reconciling the case of *Hutchinson* with that of *Tod*. But if this matter should come up again in a form requiring the reconsideration of the more recent decision, I think that greater attention should be given to the differences between the various classes of Government annuities than seems to have been done in the case of *Hutchinson*.

LORD M'LAREN — If the testator had shown by the use of the word alimentary that it was his desire to give some protection to the objects of his gift, and had limited the trustees to such Government annuities as were non-assignable, I should have thought there was some substance in the argument—that is to say, that the trustees were bound to carry out the testator's direction to buy non-assignable annui-

ties, and so to give the annuitants such protection as that class of annuities would afford. I wish to reserve my opinion on such a case as I have indicated, as also in regard to the case where a testator has conferred on his trustees a discretion to make the annuity alimentary.

I see no evidence, however, that this testator in directing his trustees to buy annuities intended anything more than to bestow these annuities as a convenient form of investment. There is no indication that he thought these ladies were likely to run into debt or to require protection by way of restriction, and that, I think, is why the annuities he selected were such as might be realised by the annuitants.

In these circumstances, the principle of *Tod* v. *Tod's Trustees*, 9 Macph. 728, and other cases, such as *White's Trustees* v. *Whyte*, 4 R. 786, is, I think, clearly applicable, because the Court ought not to compel a beneficiary to accept a gift in a disadvantageous form when it is in his power by calling it up to obtain possession of the principal sum.

LORD KINNEAR—I am of the same opinion. This testator has left sums of money to certain ladies, and he has given them the sole and exclusive right therein, so that no one else has any interest whatever in the sums so bequeathed; and there is no restriction or limitation whatever on the absolute right given to the legatees. I think it clear we cannot infer a direction to trustees to restrict the rights of an annuitant from the duty to select a good investment, even although among the investments favoured by the testator there may be one which would make it more difficult for the annuitant to sell and assign these annuities. If a testator wishes to confer on trustees a duty to restrict the rights of a beneficiary, he must do so in plain terms. There are many cases in which a discretion of this kind has been given to trustees for the protection of beneficiaries, but to infer such a discretion solely from the existence of a power to select one of several investments is I think out of the question.

As to the power to select investments, it was given, I think, for the ordinary and natural purpose of securing safety; and accordingly the trustees are directed to purchase from the Government or from a first-class company or annuity office. The beneficiaries demand payment of the money which it is proposed to sink in the purchase of annuities; and since there is nothing in the will to prevent their turning the annuities into money if they please, it is for them to determine whether it is more for their advantage to take their legacies in the one form or in the other. I think the case of *Tod* v. *Tod's Trustees*, 9 Macph. 728, which follows a long series of decisions, is sufficient authority for declaring that the beneficiaries are entitled to what they demand.

LORD PEARSON was absent.

The Court answered the third question in the case in the affirmative, found it unnecessary to answer the other questions, and decerned.

Counsel for First Parties—Chree. Agents—M. MacGregor & Company, W.S.

Counsel for Second Parties—Cullen, K.C.—Valentine. Agents—Alexander Morison & Company, W.S.

Saturday, May 30.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

NELSON & COMPANY *v.* CORPORATION OF GLASGOW.

Expenses—Decree in Name of Agent-Disburser—Compensation.

In an action by the pursuer against the defenders for payment of a sum due for mason work executed under a contract, the defenders pleaded, *inter alia*, "No title to sue." The Lord Ordinary allowed a preliminary proof on the question of title, and thereafter, as a result of the proof, repelled the plea and found the pursuer entitled to expenses. The pursuer thereafter having moved for decree in name of the agents-disbursers, the Lord Ordinary superseded consideration of the motion *in hoc statu* in respect that a counter claim for expenses against the pursuer might arise in the subsequent course of the litigation. The pursuer having reclaimed, *held* that while the course taken by the Lord Ordinary was competent the interlocutor should in the circumstances be recalled, and decree granted as craved.

Hugh Nelson & Company, builders, Glasgow, brought an action against the Corporation of Glasgow concluding for payment of the sum of £750. This sum was the balance remaining due of the sum of £8323, 18s. 7d., being the sum fixed under a contract for mason work.

In a statement of facts the defenders averred that the contract founded upon was a contract between them and a firm of Nelson & Company which had gone bankrupt and whose sequestrated estates were in the hands of a trustee. They also stated that under the contract it was provided that if the work were not completed in time the contractor should be bound to allow a deduction of £10 for each day beyond the period fixed for completion of the work in the contract; that the work had not been timeously completed, and that the total amount of the deductions to be allowed by the contractor was £1200; that the contract also provided that if the contractor became bankrupt the defenders should have power to relet the contract, and that the contractor should be liable for the additional cost thereby incurred;