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 entirity 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* 12*th 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

relief was refused, which statement the said sheriff shall afterwards appoint to be answered, and shall, if required, nominate an agent to appear and answer on behalf of such poor person, and shall further if necessary direct a record to be made up and a proof to be led by both parties."

By Act of Sederunt 12th February 1846 it is enacted—section 1—"That where relief has been refused by any parish or combination to any poor person who shall have made application for relief, such poor person may apply to the sheriff of the county without the intervention of an agent, and either verbally or in writing." Section 2—"That the sheriff shall forthwith proceed to consider the facts stated by such poor person, and if he be of opinion upon the facts as stated that such poor person is not legally entitled to relief he shall at once pronounce a deliverance to that effect." Sec. 6—"That where" the procedure following on a statement lodged by the inspector, as prescribed in section 73 of the Act, has been followed, "the sheriff . . . shall proceed to pronounce judgment in the cause, finding substantively such poor person to be legally either *entitled* or *not entitled* to relief."

Relief having been refused to the present appellant by the Parish Council of Rutherglen, he applied verbally to the Sheriff-Substitute, who on 24th September 1903 pronounced the following interlocutor:—"The Sheriff-Substitute of Lanarkshire having heard the oral statement made on behalf of Gilbert Harper, 70 Mill Street, Rutherglen, complaining against the Inspector of Poor of the parish of Rutherglen for refusing or not considering his application for relief, and having also heard the agent for said inspector as to the reasons for such refusal or delay—Finds upon the facts stated that the said applicant is not shown to be legally entitled to relief, and therefore declines to make the order applied for."

Note.—"Among the facts stated was this, that in August last the Parish Council considered a previous application for applicant, and refused it on the ground that his mother had then in possession a substantial sum of money, being about £80, part of a sum of £150 or thereby obtained as compensation for the death of her second husband. Although she was married a third time, and although the applicant was out of her house after March 1903, and supported by a married sister, the Sheriff-Substitute does not think he can assume that the money was all spent, so that his mother was unable to support him.

"This application was made to the Parish Council on 8th September, only a month after the previous one, and will be before the Council on 8th October."

Against this interlocutor the applicant appealed to the Court of Session by lodging a note of appeal in common form.

The respondents objected to the competency of the appeal.

No record had been made up in the application. There was no note of evidence.

The Sheriff-Substitute's interlocutor and note and the note of appeal formed the whole process before the Court.

Argued for the respondent—The appeal was incompetent. The Act of 1845 and the Act of Sederunt of 12th February 1846 prescribed the procedure to follow a finding by the Sheriff on a verbal application that the applicant was not entitled to relief, though in the case of a finding to the contrary there were precise provisions for the making up of a record. There could be no appeal from a deliverance on a verbal application. In the absence of a record there was nothing to enable the Court to review the Sheriff's deliverance. Proceedings in the Sheriff Court in which there were no written pleadings could not be reviewed. In the only case in which an appeal had been taken without a record having been made up, the appeal had been held incompetent—*Strain* v. *Strain*, June 26, 1886, 13 R. 1029, 23 S.L.R. 739.

Argued for the appellant—If an applicant was found entitled to relief after a record had been made up, no objection could be taken to the competency of an appeal at the instance of the inspector of poor. The respondent's contention would lead to the inequitable result that an appeal might be taken from an adverse deliverance at the instance of one party but not at the instance of the other. An appeal had been held competent from a Dean of Guild Court in a case in which there was no record—*Allan* v. *Whyte*, December 20, 1890, 18 R. 332, 28 S.L.R. 252. The appeal was competent at common law, and it was not excluded by any statute.

Counsel for the respondent did not present any argument on the merits against the appellant's right to parochial relief.

LORD JUSTICE-CLERK—We have heard an excellent debate on the question of the competency of this appeal, and upon that question I am of opinion that it is competent. The Act of Sederunt makes it quite plain that if there is a deliverance by which a pauper is found by the Sheriff to be entitled to obtain relief, that matter can be dealt with on appeal to this Court at the instance of the inspector of poor. The Sheriff has found that the present applicant is not entitled to relief, and it would be strange if one of the parties affected by his deliverance had a right of appeal and the other had not. The case of *Strain* was a case *in pœnam*, and that distinguishes it from the present case, in which I cannot see how one of the parties can be excluded from appeal if the Sheriff's deliverance is against him, an appeal at the instance of the other party against an adverse deliverance being unquestionably competent.

No attempt is made to defend the Sheriff's deliverance on the merits. My opinion is that the appeal should be sustained.

LORD YOUNG—I have some doubt, and I cannot say that it is altogether removed, as to the competency of this appeal, but I think that the Sheriff-Substitute when he

refused the application mistook his duty altogether. The claim for relief was by a blind and deaf young man, quite unable to maintain himself and altogether destitute, but with certainly a right to be maintained by his mother if she was able to maintain him. It was quite unreasonable that the pauper should be left to bring an action against his mother and her husband for an order for his maintenance. It was ridiculous to say that he was to bring such an action, and be left to starve until he got the order on his mother. He had to be maintained somehow, and the proper authorities to maintain him were the parochial authorities, it being open to them to have recourse against the mother if upon consideration they came to think that that was the proper course. The Sheriff-Substitute does not seem to have considered that at all; he simply refused this application because this pauper's mother had some money. In these circumstances I am of opinion that we should sustain this appeal to the effect of recalling the judgment of the Sheriff-Substitute and remitting to him to make an order on the parochial authorities to grant interim relief to the pauper.

LORD TRAYNER—The question—I think an important question—here raised is as to the competency of this appeal. I cannot say that I have any doubt on that subject. I think the appeal is competent. The constitutional principle is that every judgment of an inferior court is subject to review, unless such review is excluded expressly or by necessary implication. It is argued for the respondent that this appeal is excluded by the terms of section 73 of the Poor Law Act of 1845. It cannot be said to do so expressly. Does it do so by necessary implication? I think not, because it makes no provision whatever for the case which happened here. It provides certain procedure where the Sheriff has granted the pauper's application, but it makes no provision for (and does not appear even to contemplate) the case of that application being refused. I am of opinion that in neither case (whether the application is granted or refused) is the Sheriff's judgment made final. The pauper's application is for the enforcement of a legal right, and the only answer to it is that the right does not exist. This question is submitted by the statute to the Sheriff of the county—a judicial officer—who is to determine upon it in that capacity. It is a judicial deliverance, and therefore subject to review, unless as I have said excluded. I find nothing whatever in the statute to warrant or even suggest the view that the Sheriff's deliverance is to be final, and therefore on principle it is subject to review.

LORD MONCREIFF was absent.

The Court sustained the appeal, found the appellant entitled to interim relief as applied for, and remitted to the Sheriff to make an order on the Inspector of Poor of the parish of Rutherglen to grant interim relief to the appellant.

Counsel for the Applicant and Appellant—G. Watt, K.C.—Morton. Agent—W. A. Hyslop, W.S.

Counsel for the Respondent — Deas — D. P. Fleming. Agents—H. B .& F. J. Dewar, W.S.

Saturday, November 7.

SECOND DIVISION.

MACKAY *v.* GRANT.

Reparation—Slander—Rixa—Mere Vulgar Abuse—"Liar"—"Swindler"—Bystanders Asked to Hear Accusations as Witnesses.

A, in denial of a statement by B that A was due an account to B, said that B was a liar. Ten months afterwards A again met B, and in the presence of two bystanders called him a liar and a swindler, and stated that hell was too good for him. He then added, "I repeat it before two respectable witnesses."

B having raised an action for damages for slander against A, *held*, after a proof, that while A's statement on the first occasion was made *in rixa*, and not in a defamatory sense, the words used by A on the second occasion must be held to have been used in a defamatory sense, and not *in rixa*, and that B was entitled to damages.

This was an action brought in the Sheriff Court at Dornoch by Alexander Mackay, station-agent, Rogart, against William Grant, merchant there, concluding for £100 as damages for slander.

The pursuer averred that on 10th December 1902 at Rogart station, and in presence of pursuer and of George Mackay and James Matheson, both railway servants at Rogart, and of others, the defender stated that the pursuer was "a liar and the biggest swindler in the parish, and that hell was too good for him," and that the pursuer was thereby injured in his feelings, reputation, and business.

The defender pleaded, *inter alia*—"(3) The words complained of having been used by the defender *in rixa*, and as a retort to the words used by pursuer of and concerning him, and being words of mere vulgar abuse, and no specific charge made, defender falls to be assoilzied from the conclusions of this action, with expenses."

A proof was allowed, the import of which was as follows—The pursuer succeeded the defender as station agent at Rogart. Friction arose between them as to accounts outstanding between the defender and the Railway Company. On 27th February 1902, when the defender went to the railway station to have some coals weighed, the pursuer insisted on receiving prepayment of the weighing charges, viz., twopence. This led to an altercation, during which the pursuer stated that he had had to pay a previous account for the defender. The