

Argued for the respondent—It could not be said that the mine-owner had implemented his obligation to provide a shelter from the weather if the building was so cold that the check-weigher could not perform his duties in it; this would amount to a failure to provide him with proper facilities; “weather” had reference to heat and cold just as much as to wind or rain.

LORD JUSTICE-GENERAL—This is a stated case in which the Dalmellington Iron Company, Limited, appeal against a conviction on a complaint in which they were charged with not having afforded to one of their check-weighers proper facilities to enable him to fulfil his duties, in contravention of the Coal Mines Regulation Act 1887, section 13 (2), and of the Coal Mines (Weighing of Minerals) Act 1905, section 1 (4).

The question which is raised in the case is quite fairly put by the Sheriff-Substitute when he says—“Did the appellants fail to provide for” the check-weigher “a shelter from the weather, in respect that the said weigh-house was not artificially heated?”

The Sheriff-Substitute has stated the facts of the case at considerable length, but I think they may, for the purposes of this decision, be materially abbreviated.

The building concerned contained the furniture prescribed by the statute, and was of the necessary cubic capacity. There was no fault to be found with it as a structure. It is equally clear that this colliery is in an exposed situation, that its buildings are liable to be affected by draughts, and that in cold weather they become very cold. There is also a finding in fact to the effect that the check-weigher concerned was on several occasions absent from duty in consequence of having contracted a cold. Now it is not easy to say that anyone can enjoy immunity from cold in Scotland in the month of November. It should be noted also that it is found that this man did not wear a greatcoat.

The matter comes to this, that no fault is alleged against the company except that they did not heat this place artificially.

I am of opinion that the facts do not warrant the conviction.

The statute under which check-weighers were originally appointed, the Coal Mines Regulation Act 1887, provided, section 13 (2)—“A check-weigher shall have every facility afforded to him for enabling him to fulfil the duties for which he is stationed, including facilities for examining and testing the weighing machine, and checking the taring of tubs and trams where necessary.” Now if that provision had stood alone I should have no doubt of the meaning of the word “facility,” that this did not apply to the provision of any structure in which a check-weigher’s duties might be performed, but only that he should be allowed to perform his duties unmolested. No question of the kind we are now considering could have arisen under the Act of 1887. The Coal Mines (Weighing of Minerals) Act 1905 makes this provision—“The facilities to be afforded to a check-

weigher, under section 13 of the principal Act, shall include provision for a check-weigher of a shelter from the weather, containing the number of cubic feet requisite for two persons, a desk or table at which the check-weigher may write, and a sufficient number of weights to test the weighing machine.” This attaches a new and statutory meaning to the term “facilities.” Accordingly it is now necessary that the proprietor of the colliery should supply the things so described, but there is specification of what he is called upon to provide. He must provide a “shelter from the weather.” That the meaning of that is a structure only is clear from the words which follow describing the accessories of the shelter. Not a word is said about the temperature which has to be maintained there.

It must be observed that this is a penal statute, and must therefore be construed strictly, and that to support a conviction it must be proved that the shelter which has been provided is not a shelter within the meaning of the Act. That has not been done in the present case, and I think it could not be done, and I am accordingly of opinion that the conviction should be quashed.

LORD KINNEAR—I concur.

LORD MACKENZIE—I also concur.

The Court answered both heads of the question in the case in the negative, sustained the appeal, and quashed the conviction.

Counsel for the Appellants—Horne, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Solicitor-General (Anderson, K.C.)—R. C. Henderson. Agent—Sir W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Friday, June 21.

SECOND DIVISION.

MACKECHNIE'S TRUSTEES v. MACKECHNIE.

Trust—Trust Disposition and Settlement—Construction—Power to Carry on Business—Conversion into Private Limited Company.

A testator by his trust disposition and settlement directed his trustees “to realise as soon after my decease as expedient” his manufacturing business, “unless it appears to them and to my . . . wife . . . that it is desirable to retain the same and conduct it for behoof of my estates, in which latter event I direct my trustees with the concurrence of my said wife, to continue the said business.” The trustees

having proposed, with concurrence of the testator's wife, to convert the business into a private limited liability company under a memorandum which effected no change on the partnership and management of the old business except such minute changes as compliance with the Companies Act 1908 required, held that the trustees were entitled to make the change proposed.

William Benson Allan and others, trustees acting under the trust disposition and settlement of the deceased John MacKechnie, coppersmith and brassfounder, Port-Glasgow, *first parties*; Mrs Christina MacKechnie or MacKechnie, his widow, *second party*; Andrew MacKechnie, Port-Glasgow, only surviving child of John MacKechnie, with consent and concurrence of John MacKechnie's trustees as his curators-nominate, *third party*; and William Inglis Macadam, mercantile clerk, Govan, Glasgow, one of the residuary legatees under John MacKechnie's trust-disposition and settlement, *fourth party*, brought a Special Case for the opinion and judgment of the Court as to the powers of the trustees to form the business of the testator into a private limited liability company under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69).

The Case stated, *inter alia*—"By the said trust-disposition and settlement, the said John MacKechnie directed his trustees to hold his estate, *inter alia*—(first) for payment of his just and lawful debts and funeral expenses, and the expenses of the trust; (second) for delivery of certain furniture to his wife for her liferent use; (third) for payment of certain legacies; and (fourth) 'I direct my said trustees to realise as soon after my decease as expedient the manufacturing business presently carried on by me in Port Glasgow, unless it appears to them, and to my said wife, whose views I request my trustees to obtain and consider on this subject, that it is desirable to retain the same and conduct it for behoof of my estate, in which latter event I direct my said trustees, with the concurrence of my said wife, to continue the said business, and to pay over to my said wife, so long as she remains unmarried, the whole, or such part of the net income thereof, as they may deem necessary for the maintenance in comfort of my said wife and of my child or children then surviving, due regard being had to the opinion of my said wife as to the amount necessary for her said maintenance, with power to my said trustees to appoint a manager, who may be one of themselves or any other fit person, and to assume such manager as a partner in said business, and to allow such manager or partner to conduct said business subject to their supervision, and to pay him an adequate remuneration for his services.'

"The business carried on by the deceased John MacKechnie was that of coppersmith and brassfounder. The said business was conducted under the firm-name of William Hume & Company—John

MacKechnie being the sole partner of the firm. The business is carried on in premises which are leased from year to year—the machinery and other fixed fittings required in connection with the business being the property of the deceased's firm. The value of the machinery, fittings, utensils, and stock-in-trade of the business, apart from the value of good-will, is about £2200 sterling. It is not possible to place a value on the good-will otherwise than by a rough estimate, but it might amount to about £1000.

"At the time of the deceased's death trade was in a depressed condition, and the trustees were advised that if the business was to be then sold an adequate price could not be expected for it, and loss would be entailed to the estate, and they accordingly, with the concurrence of Mrs MacKechnie, resolved to continue the business for some time, and await better trade conditions before finally deciding as to the course which they ought to pursue.

"During the interval that has elapsed since the deceased's death the business has been managed by one of the trustees. The nett profit earned by the business since the truster's death was as follows:—For the year ending 31st March 1909, £474, 12s. 10d.; for the year ending 31st March 1910, £352, 15s. 8d.; for the year ending 31st March 1911, £748, 19s. 9d.; and for the year ending 31st March 1912, approximately £600. The net profit for the fifteen months ending 31st March 1908 was £1466, 12s. 4d. The income arising by way of profit from said business is thus very substantially greater than could be looked for were the business to be realised and the proceeds invested in ordinary trust investments.

"The trustees have, however, now come to the conclusion that it would not be expedient to continue to carry on the business as a private company, notwithstanding the fact that powers to do so are given in the settlement, as they consider it would be unwise in the interests of the trust estate to continue trading, with the risk that if a misfortune befell the business the free estate of the testator might be required to assist in paying the debts incurred in carrying on the business. They are of opinion, and the second and third parties agree with them, that if the business of William Hume & Company were formed into a limited liability company as after mentioned, with the capital belonging to the deceased still retained therein, it could be successfully carried on without endangering the other estate left by the deceased. The trustees therefore would propose to form the said business into a private limited liability company on the following lines, viz.—The company to be formed would be a private one within the meaning of section 121 of the Companies (Consolidation) Act 1908, and would be incorporated under the name of 'William Hume & Company, Limited,' the liability of each member being limited to the amount unpaid on the shares held by him. The nominal capital of the company would be fixed at £2500 or thereby in shares of £1

each. Of this amount there would be issued to the trustees or others, their nominees, in trust for the late John MacKechnie's trustees, say 2300 shares as fully paid as against the value of the business transferred to the company. This represents the sum of £2300, which is the estimated amount presently at the credit of the trustees of Mr MacKechnie in the books of the firm after providing for all liabilities. This sum is made up of—(1) The value of plant and machinery, estimated at £500 or thereby; (2) value of stock-in-trade, estimated at £1100 or thereby; and (3) debts due by sundry trade debtors, estimated at £700 or thereby. As, in the course of management of the business, accounts are, as a rule, paid monthly, and liabilities settled similarly, it has not been found necessary to provide further cash for the working of the business, and it would probably be unnecessary to issue any further capital than that issued as against the assets acquired. The trustees, however, regard it as in the interest of the business that the truster's widow, the second party hereto, should be allowed to become a shareholder, and she is willing to join the company if it shall be found to be within the competence of the trustees to form it for carrying on the business. She would take 100 shares either by purchase for cash, or by acquiring 100 of the shares to be issued to the trustees as fully paid. It is proposed that the number of shareholders should be limited to five, and that, with the exception of the second party, and one other person acting for the time being as manager as after mentioned, no person should be capable of holding more than ten shares in the concern otherwise than in trust for the first parties. Provision would be made whereby the directors of the company must be trustees for the time being under the said trust-disposition and settlement of Mr MacKechnie; and it is proposed to appoint the trustee who has been managing the business hitherto, or other competent person to be nominated from time to time by the trustees, to be manager of the company, subject to the supervision and control of the directors, at such remuneration as shall be fixed by the directors. The regulations of Table A of the Act would be made applicable so far as consistent with the foregoing proposals; and the objects of the company would be strictly limited to the carrying on of the business hitherto carried on under the powers of the trust-disposition and settlement."

The question of law for the opinion and judgment of the Court was—"Under the terms of the trust-disposition and settlement of the deceased John MacKechnie, have the trustees power to form the business into a limited liability company in the manner proposed, and to retain therein the funds of the deceased presently embarked in the business?"

Argued for the first, second, and third parties—The proposal to form a private

limited company under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sections 2, 121, and 137 (1) (a) (i), to carry on the testator's business, was within the terms of the direction in the testator's will. The business remained the same as the trustees were empowered to carry on, and continued under their management, with this further advantage that nothing was risked. On the analogous question of what was to be done with money left in a business in these circumstances the following authorities were referred to:—*Laurie v. Laurie's Trustees*, March 17, 1892, 19 R. 675, 29 S.L.R. 525; *Alexander v. Lowson's Trustees*, March 8, 1890, 17 R. 571, 27 S.L.R. 448; *Smith v. Patrick*, May 7, 1901, 3 F. (H.L.) 14, 38 S.L.R. 613.

Argued for the fourth party—The proposal was *ultra vires* of the trustees. The primary purpose of the will was to realise the business, and though there was power given to continue, conduct, and retain it, turning the business into a limited company did not fall under any of these expressions. What the trustees proposed here was really the sale to a new company—*Smith v. Patrick, cit. sup.*; *Thomson's Trustees v. Thomson*, February 22, 1889, 16 R. 517, 26 S.L.R. 368.

LORD JUSTICE-CLERK—I think that the question in this Special Case should be answered in the affirmative.

If the widow here was objecting, that might raise a totally different state of circumstances; but she is not objecting; and what is proposed to be done is simply to carry on the same business in the form of a limited company. Now I cannot see how that can be possibly to the disadvantage of the estate—it might be greatly to the advantage of the estate; and as it is not really a new business in any sense, and what is to be done is what was done before, and the difference is only in the form in which the business is to be carried on, I do not see any objection to the course proposed by the trustees.

LORD DUNDAS—I agree. This is, I take it, a friendly suit brought in order to obtain the sanction of the Court to a more or less family arrangement. The argument for the fourth party was very clearly and temperately stated by Mr Malcolm, who said, as I understood, in the first place, that the proposal to form this company was not to "retain," "conduct," or "continue" the business, within the meaning of the truster's settlement. I think that is much too narrow a reading of the language, and that in substance and in common sense this is just a continuation of the business. It was then suggested that what was proposed was a sale, but I think the same remark applies to that; in substance and in truth this is not I think a sale, but a continuation of the business. When one comes to look at the kind of private company which it is proposed to form, one sees that the control and management of it are absolutely secured to the trustees, and, so far as I can observe, no increased risk or liability to

the general estate will ensue, but the contrary. I see no reason, therefore, why we should not answer the question as your Lordship proposes.

LORD SALVESEN—I am of the same opinion. The testator, in a certain event which has happened, directed his trustees, with the concurrence of his widow, to continue his business. They did so for a number of years, with results that showed that the business is one which is capable of being carried on at a profit, and, indeed, that a very large loss would in all probability be involved to the estate if the business had to be realised. They now propose, instead of carrying it on as a private partnership, to convert it into a private company, and to make such alterations on the constitution as the Companies Act of 1908 renders necessary. I am far from saying that we could authorise trustees to carry on a business as a private company under the Companies Act 1908 generally, but one has to consider what are the terms of the memorandum of the company which the trustees propose to form. These terms are set forth, as I think the parties were bound to do before we could determine the question raised by the case, and I find that in substance there is no change upon the old private partnership except such minute changes as compliance with the Companies Act 1908 requires, and which are in no degree adverse to the interests of the fourth party as residuary legatee. The same capital is being employed; the same persons are going to control the administration of the business; and in every respect, so far as I can see, the new company will be identical with the old, with this important difference, that the rest of the trust funds will no longer be endangered should disaster ultimately overtake the business. Now these being the facts, I think the trustees are substantially within the direction of the testator, and that this proposed new company is a continuation merely of the business, and is not the establishment of a new business which is impliedly prohibited. Accordingly I am of the same opinion as your Lordship, that we should answer the question in the affirmative.

LORD GUTHRIE—I agree. In the proposal which we are asked to approve there seem to be only two differences of any moment between the business as now proposed to be carried on and the business presently in existence. The one is that certain persons will now be interested in the management and in the profits who were not interested before; but the testator contemplated that his trustees might assume an additional person as partner, namely, the manager, if they appointed one. The other difference is a substantial one, namely, that under the new proposal the rest of the estate will not now be in risk. That does not seem to me a difference that can possibly affect the question now before us, because it is in the interest of everybody, including the fourth party,

and it will be to the advantage of the estate left by the deceased.

The Court answered the question of law in the affirmative.

Counsel for the First, Second, and Third Parties—J. R. Christie. Agent—James G. Bryson, Solicitor.

Counsel for the Fourth Party—Malcolm. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, June 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.]

HOUSTON v. AITKEN.

Proof—Relevancy—Insanity—Hereditary Insanity—Will—Reduction.

In an action for the reduction of a will on the ground of fraud and circumvention, the pursuer, with a view to proving that the deceased was peculiarly liable to suffer, and did suffer, from mental disease, specified previous instances in which several of the deceased's relations had suffered from mental disorder. Objection having been taken to the relevancy of these averments, held that such evidence was not necessarily irrelevant, and objection repelled.

On 20th October 1911 Mrs Isabella C. Galloway or Houston, wife of Robert Houston, joiner, Dunfermline, *pursuer*, brought an action against Isabella Aitken, Pannie Cottage, Kennoway, trustee and executrix of her (the pursuer's) father Edward Galloway, *defender*, in which she sought reduction of a settlement executed by him on 7th December 1909, which she averred the defender—who acted as his housekeeper—had by fraud and circumvention succeeded in impetrating from him.

The pursuer, *inter alia*, averred—“(Cond. 2) The late Edward Galloway, who was seventy-one years of age at the date of his death, was for many years an engineer in the service of the Egyptian Government and in receipt of a large salary. . . . While on duty in the Red Sea the said Edward Galloway suffered from sunstroke and had to leave Egypt sooner than he intended to do. For many years before his death he suffered from arterio-sclerosis of the brain, and latterly softening of the brain. . . . (Cond. 5) The said deceased Edward Galloway was subject to violent fits of passion. On one occasion he took possession of the defender's clothes and set them on fire. He frequently behaved in an outrageous fashion and indulged in alcoholic liquor to excess. A sister of the deceased's was confined in an asylum for twelve months on account of her mental condition, and David Galloway, a brother of deceased's, was a person of weak mind. A nephew of deceased (the son of a brother) is at present