that the limiting words inserted by the Lord Ordinary, viz., "in so far as containing any of the said firm names," restrict too much the scope of the interdict, for it would leave it open to Mr Heddle to use any of the forms formerly used by James Heddle & Company without any alteration whatever except the deletion of "& Company," which would be plainly most misleading to persons who had been accustomed to the general appearance of the labels and marks formerly used. I am of opinion that the interdict should be as asked for in the prayer of the petition without restriction.

LORD TRAYNER — [*After dealing with other points in the case*]—There is only one point on which I differ from the Lord Ordinary. It is this. In granting interdict against Mr Heddle using the labels acquired by Melrose-Drover & Company from the trustee his Lordship has restricted the interdict so as to allow Mr Heddle to use at least some of the labels (his Lordship only refers to one of them as an example) provided the name appearing on the label is merely "James Heddle" and not "James Heddle & Company." The label selected by the Lord Ordinary as an example, if examined, only shows how dangerous it would be to restrict the interdict as proposed, for that label with the name "James Heddle" upon it would be undoubtedly calculated in my opinion to mislead. It is not distinguishable except on a careful examination (such as ordinary purchasers would not give) from the same label with "James Heddle & Company." In my view Mr Heddle should be interdicted from using any label now which he used in connection with his business before sequestration. All these labels, I think, were acquired by the purchasers along with the goodwill. With this alteration on the judgment in the interdict case I think the judgment of the Lord Ordinary should be affirmed and the three reclaiming-notes presented by Mr Heddle refused.

LORD MONCREIFF—[*After dealing with other points in the case*]—The only point on which I differ from the Lord Ordinary is that he has taken too favourable a view of the reclaimer's right to use the trade labels, and I think that the interdict should be so worded as to prevent him from using a colourable imitation of the labels previously used in connection with the business which his trustee sold to the respondents.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Interdict, prohibit, and discharge the respondents from carrying on the business of wine merchants and spirit dealers, whisky blenders, rectifiers, and British wine makers, and exporters of wines and spirits, under the name of James Heddle & Company, and from using the trade marks, trade names, brands, and labels, samples of which are contained in No. 22 of process, or any other trade mark, trade name, brand, or label containing the firm name of James Heddle & Company, Jas. Heddle & Company, or J. Heddle & Company, which had been used by the respondents in connection with their business prior to 18th March 1892: Find the complainers entitled to expenses, and remit," &c.

Counsel for the Complainers and Respondents—A. S. D. Thomson. Agents—Snody & Asher, S.S.C.

Counsel for the Respondent and Reclaimer—Party. Agent—Party.

Wednesday, January 15, 1902.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BONNER'S TRUSTEE *v.* BONNER.

Expenses—Trustee—Action by Wife's Testamentary Trustee against Husband—Defender Successful in Action by Trustee for Recovery of the Only Possible Asset of the Trust—Trust.

A testamentary trustee under a settlement by which the testatrix conveyed her whole estate to him for behoof *primo loco* of a son who had disappeared, brought an action against the testatrix's husband for recovery of a certain sum in the defender's hands. Apart from the sum so sued for there was no asset falling under the trust. The defender was assoilzied. *Held* that he was entitled to expenses against the pursuer, there being nothing in the circumstances to prevent the application of the ordinary rule that expenses should follow the result.

Process — Reclaiming-Note — Adversary's Reclaiming-Note Taken Advantage of for Sole Purpose of Bringing Findings as to Expenses under Review — Competency—Expenses.

Held that it was competent for the respondent to proceed with a reclaiming-note, which was not insisted in by the reclaimer, for the sole purpose of submitting to review the Lord Ordinary's findings as to expenses.

This was an action at the instance of the trustee on the testamentary estate of Mrs Elizabeth Fullerton Abel or Bonner against her husband Robert Bonner, in which the pursuer concluded for payment of a sum of £1100.

The action was ultimately unsuccessful. The questions upon which the case is now reported were (1) Whether the defender was in the circumstances entitled to expenses against the trustee; and (2) Whether the defender was entitled to take advantage of a reclaiming-note brought by the trustee but abandoned by him in order to bring the Lord Ordinary's interlocutor under review in so far as it found no expenses due to the defender. It appeared that apart from the sum claimed in the action there was no trust estate.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"This case relates to a sum of £1100, which is claimed on the one hand by the trustee under the disposition and settlement of Mrs Bonner, who died on 8th October 1900, and on the other hand by her husband. Mr and Mrs Bonner were married in 1879, having executed an antenuptial contract of marriage which did not apply to *acquirenda*. In 1880 Mrs Bonner succeeded to a sum, including the £1100 in question, on the death of her father. On 24th February 1881 the spouses executed a mutual settlement whereby they each conveyed to the survivor their whole estates, and in particular £1100, which it was stated in the deed 'has been advanced to me, the said Robert Bonner, by my said wife, to purchase my business premises in Upper Kirkgate, Aberdeen, out of her separate funds acquired through her father.'

"For ten years before Mrs Bonner's death she and her husband lived separately, and on 9th August 1900 she executed a trust-disposition and settlement, by which she conveyed to the pursuer as trustee her whole estate for behoof of her son by a former marriage, who had disappeared, and failing his reappearance within five years, then in charity, and she recalled all former settlements made by her.

"After the debate the pursuer amended his record by adding an averment that Mr Bonner renounced his *jus mariti* over the estate in question, but he does not say when or on what occasion this was done; the defender has denied the statement, and has averred that if he did, the renunciation operated as a donation *inter virum et uxorem* which was revocable and was then revoked."

On 11th June 1901 the Lord Ordinary assoilzied the defender, and found no expenses due to or by either party.

Note.—[*After the narrative quoted above the Lord Ordinary proceeded*]—"I am of opinion that there is no need for further inquiry, and that the defender must succeed.

"Seeing that the parties were married in 1879, and that the wife succeeded to the money in question in 1880, the provisions of the Married Women's Property Act do not apply, and the right to the money when Mrs Bonner succeeded to it undoubtedly passed to the defender *jure mariti*. It was, however, maintained by the pursuer that the *jus mariti* had been renounced, and that the property of the £1100 was thereby re-transferred to Mrs Bonner. The pursuer maintained that without express renunciation of the *jus mariti* such renunciation might be inferred, and ought to be inferred, from the language of the mutual settlement, or otherwise that the mutual settlement might be regarded as proof that the *jus mariti* had in fact been renounced. The cases of *Wright's Executor* v. *City of Glasgow Bank*, January 24, 1880, 7 R. 527, and *Smith* v. *Smith's Trustee*, November 26, 1884, 12 R. 186, were referred to as showing that the *jus mariti* might be held to be renounced by inference and without express renunciation, and they sufficiently establish that general proposition. But I am not prepared to give that effect to the mutual settlement if, as the pursuer contends, it has been revoked. At all events, if the deed could be held as involving by implication a renunciation of the *jus mariti*, it could be so held only on the condition that it would be effective as a settlement of the £1100 to the survivor. The defender maintained that Mrs Bonner's will could not be held to revoke the mutual settlement, and that she had not power to revoke it, and he put the dilemma that if the mutual settlement was not revoked it effectually conveyed the £1100 to the defender as survivor, and if it was revoked the right of the defender under his *jus mariti* was left unaffected.

"It was, I suppose, to meet this difficulty that the pursuer added the averment that the *jus mariti* had been renounced. No date and no particulars are given, and I rather think that the averment is irrelevant for want of specification. But in any view it seems to be met by the defender's answer that such a renunciation amounted to a donation *inter virum et uxorem* by him, and was revocable by him, and was effectually revoked—*Ker* v. *Nelson*, May 14, 1875, 2 R. 676.

"I am of opinion that the defender is entitled to the sum of £1100."

The pursuer reclaimed, but abandoned his reclaiming-note.

The defender took advantage of the pursuer's reclaiming-note for the purpose of bringing the Lord Ordinary's interlocutor under review in so far as it found no expenses due to or by either party, and argued—The defender having been brought into Court and assoilzied was entitled to expenses, and he was not deprived of that benefit merely because the pursuer was a trustee. The fact that the defences were so formidable as to necessitate an amendment of the pursuer's record did not affect the right of a successful defender to expenses.

Argued for the pursuer—Mrs Bonner's trustee was bound to raise the action in discharge of his duty to safeguard the interest of her absent son. The dilemma put by the Lord Ordinary led to this result according to the conclusion arrived at by his Lordship, that in any event there was no trust estate, and if the defender was found entitled to expenses, that could only be a finding against the trustee personally; but that would be a great hardship, because when the action was raised the alleged donation whereby the defender renounced his *jus mariti* was unrevoked so far as regards any expression of intention on the part of the defender was concerned, and the trustee was bound to set up Mrs Bonner's settlement if possible. Even though the Court were of opinion that the Lord Ordinary might reasonably have decided differently, the case was not one in which the Court would alter the Lord Ordinary's finding on a question of

expenses—*Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 557.

LORD ADAM—This is a reclaiming-note by the trustee on Mrs Bonner's trust-estate in an action in which he claimed a sum of £1100 from Mrs Bonner's husband. The Lord Ordinary has assoilzied the defender, and finds no expenses due to or by either party.

The reclaiming-note has been abandoned by the trustee, but the defender has taken advantage of the reclaiming-note to bring under review the Lord Ordinary's finding as to expenses. There can be no doubt that it is competent to take advantage of an adversary's reclaiming note in this way, even if the only question raised is the question of expenses.

Upon the merits of the question I confess I see no reason why the ordinary rule as to expenses was not followed in this case, and why expenses were not given to the successful party. It may be true that in the absence of Mrs Bonner's son it was right and proper for the trustee upon her estate to bring the question of Mr Bonner's right to the sum in question before the Court, but he was bound to do so at his own cost if unsuccessful. The action was nothing but an ordinary claim by one litigant against another, and there was no reason why, in a question between them the ordinary rule as to liability for expenses should not be followed. It is unfortunate for the pursuer that there is no trust estate from which he might have been entitled to be indemnified. He was bound to consider this circumstance before beginning the litigation, and in any case it is a circumstance with which the defender has no concern.

Accordingly I am of opinion that the defender is entitled to be assoilzied with expenses, and that the Lord Ordinary's interlocutor should be altered to this extent.

LORD M'LAREN—It sometimes happens where two parties differ as to the construction of a will or written instrument that a decision is necessary in the interest of both parties, and in such cases—sometimes by consent, sometimes without consent—we hold that neither party is entitled to expenses, treating the cause in litigation as a necessary act of administration. But this is not a case of that kind. I think that where a wife's trustee and her husband are standing on their rights expenses should depend on the result.

The only specialty is that the trustee in this case has no trust funds, but that does not seem to me to afford any reason why the ordinary rule as to expenses should not be followed.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court found the defender entitled to expenses, and *quoad ultra* adhered.

Counsel for the Pursuer and Reclaimer—Guthrie, K.C.—Chisholm. Agent—R. C. Gray, S.S.C.

Counsel for the Defender and Respondent—C. D. Murray. Agents—Alexander Morison & Co., W.S.

Tuesday, January 28.

OUTER HOUSE.

[Exchequer Cause.

H.M. ADVOCATE *v.* GUNNING'S TRUSTEES.

Revenue—Estate Duty—Property Passing on Death—Allowance for Debts—Property Held by Deceased on Trust — Bonds Granted by Deceased to Public Institutions for Public Purposes—Sums Due not Paid at Date of Death—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (3) *and sec.* 7 (1).

A, with a view to endow certain academic, scientific, and religious bodies, for the purpose of promoting public objects, bound himself to each of the favoured bodies to provide a certain capital sum, the interest of which was to be used by the favoured body for promoting the specified objects. A, desiring to retain the capital sums in his own hands, and to pay merely the interest in the meantime, granted in 1890, a series of bonds to the several favoured bodies for the capital sums allotted to them respectively, each bond proceeding on the narrative that the granter had bound himself to the body to whom the bond was granted to provide the sum mentioned in the bond for the specified purposes set forth therein. Payment was legally due under the bonds, and could have been enforced at the first half-yearly term after their respective dates, but during A's lifetime the grantees received from A merely the interest, and the capital sums in the bonds remained unpaid at A's death in 1900.

Held (1) that the debts in the bonds were not incurred "for full consideration in money or money's worth, wholly for" A's "own use and benefit," within the meaning of section 7, sub-section 1 of the Finance Act 1894; (2) that the capital sums in the bonds were not property held by A, as trustee for the various favoured bodies within the meaning of section 2, sub-section 3, of the Finance Act 1894; and consequently (3) that the sums in the bonds fell to be reckoned in ascertaining the value of A's property passing on his death in respect of which estate-duty was payable under section 1 of the Finance Act 1894.

The Finance Act 1894 (57 and 58 Vict. cap. 30), enacts as follows:—Section 2, sub-section 3—"Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person under a disposition not made by the