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

deceased or under a disposition made by the deceased more than twelve months before his death, where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise." — Section 7, subsection 1—"In determining the value of an estate for the purpose of estate duty, allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but allowance shall not be made (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and take effect out of his interest."

The Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, brought an action against Dame Mary Agnes Winwood Hughes or Gunning, widow of the late Robert Halliday Gunning, doctor of medicine, and others, executors-nominate of the said Robert Halliday Gunning, acting under the joint will executed by him and the said Dame Mary Agnes Winwood Hughes or Gunning, dated 5th November 1896, and recorded in the Court Books of the Commissariot of Edinburgh 3rd May 1900, concluding for payment of the sum of £2013 as estate duty remaining due and payable in respect of property passing on the death of the said Robert Halliday Gunning, with interest on said sum at 3 per cent. from the date of his death.

Dr Gunning died in London on 22nd March 1900. He died domiciled in Scotland, and the defenders gave up an inventory of his estate. The total value of the estate belonging to Dr Gunning at the time of his death, according to the inventory, amounted to £161,676, 0s. 1d. From this were deducted funeral expenses and debts incurred by the deceased amounting, as represented by the schedules to the inventory, to £80,866, 6s. 8d. This left a net remainder of £81,009, 14s. 4d., in respect of which sum estate-duty, levied at the graduated rate of 5½ per cent., and amounting to £4455, was paid by the defenders with interest.

Among the debts which were scheduled in the inventory and were deducted in bringing out the net value of the estate were included a series of bonds granted by the deceased in favour of the University Court of the University of Edinburgh and certain other academic, scientific, and religious bodies for the endowment of prizes and the promotion of certain educational and philanthropic purposes. These bonds were granted in 1900, and amounted with the interest thereon at the date of the grantor's death to the total aggregate amount of £26,862.

The pursuer averred as follows:—"(Cond. 3) When the various bonds were granted it was the understanding of parties that Dr Gunning should make payment as and when it suited his convenience. . . . He continued to pay interest on the bonds at 4 per cent. or latterly at 3 per cent. (Cond. 4) For the purpose of estate duty the obligations constituted by the said bonds were not such debts as could properly form a deduction from the value of the property passing on the deceased's death. They were not, in fact, debts incurred for any consideration in money or money's worth, or for the deceased's own use and benefit. They were gratuitous obligations undertaken spontaneously, and were simply acts of bounty on the part of the deceased. (Cond. 8) If, in conformity to the provisions of the statutes, no allowance had been taken on account of the debts in the said bonds, the net value of the estate chargeable with duty in place of being £81,009, as returned in the inventory, would have been £107,871, or for the purposes of assessment, £107,800. This is the true dutiable value of the estate, and the duty on this sum leviable at the graduated rate of 6 per cent. amounts to £6468, or a sum of £2013 greater than the amount of duty paid by the defenders on the return which they gave in their inventory."

The defenders denied liability for the sum sued for, and averred:—"(Ans. 3) Said bonds set forth the considerations for which Dr Gunning, either at the date of granting said bonds or previously thereto, and in connection with obligations previously undertaken by him, became a debtor to the persons or institutions in whose favour the said bonds were granted. Said debts were incurred by Dr Gunning in order that he might advance certain scientific, religious, and philanthropic and public objects, of which he had for many years been a strong supporter, and for the advancement of which, according to his own views and schemes of management, he had paid and was willing to pay money. Dr Gunning became the debtor of the persons in whose favour the bonds were granted only on their undertaking to carry out according to his wishes the work or schemes for the establishment of which he was paying. Instead of granting said bonds at the dates when he did so Dr Gunning would have relieved himself of the obligations which he had undertaken by making payments in cash to the various persons or bodies who had undertaken to carry out his schemes; but owing to the fact that Dr Gunning's fortune was mostly invested in Brazil, and that Brazilian securities were, in consequence of a revolution, difficult to realise at the time, Dr Gunning granted the bonds referred to. Under these bonds payment was due and could have been enforced at the first term of Whitsunday after the bonds were granted. It is denied that there was any understanding between the parties to said bonds that Dr Gunning should make payment as and when it suited his convenience. (Ans. 4) Denied. Said debts were incurred for consideration in money and money's worth within the meaning of the Finance Act 1894, and form a good deduction from the estate of the deceased.

In any event, when said bonds were granted by Dr Gunning and accepted by the various persons or bodies in whose favour they were granted, Dr Gunning became a trustee, holding his property in trust for said persons or bodies. The grantees, when they accepted said bonds, became bound to spend money on the advancement of certain objects, and did in fact so spend money and incur liabilities. Before accepting said bonds and incurring said liabilities, the grantees satisfied themselves, by examination into his affairs, of Dr Gunning's financial stability. As the result of their inquiries they were willing and arranged to accept said bonds instead of getting an immediate payment in cash. After said bonds were granted and accepted Dr Gunning continued to hold his securities under burden of a trust in favour of the grantees of said bonds. Possession and enjoyment of property affected by said trust was *bona fide* assumed by the grantees under the bonds immediately upon the creation of said trusts. The amount of said bonds is not to be deemed as property passing on the death of the deceased Dr Gunning."

The bond, granted by Dr Gunning in favour of the University of Edinburgh, and dated 6th March 1890, was as follows:—"I, Robert Halliday Gunning, doctor of medicine . . . considering that, with the view of commemorating the jubilee of her Majesty Queen Victoria, of expressing my gratitude to my alma mater, and of enouraging the scientific study of medicine, I founded in the year 1887, being the jubilee year of Her Majesty's reign, eleven post-graduation prizes in the University of Edinburgh, of the value of £50 each, and each recurring triennially, known as the Gunning Victoria Jubilee Prizes, *videlicet*:—(*First*) the Munro Prize for Anatomy [here followed an enumeration of the other prizes]: And whereas I bound myself to the University to provide the capital sum of £5000 for the purpose of paying the said prizes and the expenses connected with the examinations, and I have meanwhile provided interest at the rate of 4 per centum per annum on the said sum: And whereas the University authorities have, since the year 1887, published a scheme for the said prizes in the University Calendar, and have otherwise advertised it, and it is right and proper that they should have from me a formal obligation for the foresaid capital sum of £5000 with the interest thereon: Therefore I do hereby bind myself, and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to pay the sum of £5000 sterling to the University Court of the University of Edinburgh, incorporated by and in virtue of 'The Universities (Scotland) Act 1889,' and their successors, or to their assignees whomsoever, for the purposes of the said Gunning Victoria Jubilee Prizes, at the term of Whitsunday 1890, within the head office of the Commercial Bank of Scotland, Limited, George Street, Edinburgh, with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of 4 per cent. per annum from the date hereof to the foresaid term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the same, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the said term of Whitsunday next for the interest due preceding that date. . . . Declaring that the said sum of £5000, and interest thereof, shall be held by the said University Court in trust always for the purpose of endowing the foresaid 'Gunning Victoria Jubilee Prizes,' in terms of a scheme adjusted by me with the Senatus Academicus of said University, and of any revisions or improvements which may yet be made on said scheme by me during my lifetime, or after my death by the Faculty of Medicine in the said University. And I consent to the registration hereof for preservation and execution."

The other bonds proceeded on much the same lines as the above, with variations in the language of the narrative clauses.

The bond above quoted and some of the other bonds were registered in the Books of Council and Session for preservation and execution.

The pursuer pleaded, *inter alia*, as follows:—"(1) To determine the value of the deceased's property for the purpose of estate duty, no allowance or deduction ought to be made of the debts in question, because they were not incurred for full consideration in money or money's worth, and wholly for the deceased's own use and benefit. (2) In respect that the sums contained in the said bonds are not debts for which, within the words and meaning of the Finance Act 1894, an allowance ought to be made, they fall to be reckoned in ascertaining the chargeable value of the property passing on the deceased's death, and the defenders are liable for the additional duty therefore due."

The defenders pleaded, *inter alia*, as follows:—"(2) The sums contained in said bonds not forming part of the property of the deceased passing at his death, estate duty is not due thereon, nor is the amount of said bonds to be added in estimating the net value of the estate of the deceased. (3) The sums contained in said bonds having been held in trust by Dr Gunning for behoof of the grantees of the bonds under arrangements made between Dr Gunning and them, said sums fall within the exception contained in section 2, subsection 3, of the Finance Act 1894. (4) *Separatim*—The sums contained in said bonds being debts for which, in determining the value of an estate under section 7 of the Finance Act 1894, an allowance should be made, defenders were entitled to deduct said sums in estimating the net value of Dr Gunning's estate, and the defenders should accordingly be assoilzied from the conclusions of the summons."

The arguments of the parties sufficiently appear from the opinion of the Lord Ordinary (STORMONTH DARLING).

LORD STORMONTH DARLING—"My judgment here is for the Crown. In sub-

stance what the late Doctor Gunning did was this. His main object was to endow certain academic, scientific, and religious bodies with capital sums, the interest of which was to be used by them for promoting public objects in which he was interested. If he had effected his purpose in the ordinary testamentary way the money so bequeathed would of course have formed part of his estate at his death, and would have been liable to estate-duty. He desired, however, that his benefactions should take effect during his life, some of them dating from the first jubilee of Queen Victoria and being associated with Her Majesty's name. The ordinary way of carrying out that part of his purpose would have been to pay the capital down to the various bodies, in which case, of course, the money so paid would have formed no part of his estate at his death, and would have borne no duty. But Dr Gunning desired to retain the capital in his own hands, and to pay merely the interest in the meantime, his reason, as explained by his executors, being that Brazilian securities, in which his fortune had been mainly invested, were difficult to realise at the time. Accordingly, about the year 1890 he granted the various bonds, specimens of which are set out. . . . It is true that under these bonds payment was legally due, and could have been enforced at the first half-yearly term after their respective dates. But in point of fact (as was natural, looking to the relation of the various bodies to their benefactor) the grantees were content to receive from Dr Gunning the interest during his life, and the capital sums contained in the bonds remained unpaid at his death, and were debts due by his executors.

"Now, the rule of the Finance Act of 1894 with respect to debts is to be found in section 7, sub-section (1). In determining the value of an estate for the purpose of estate-duty, allowance is to be made for reasonable funeral expenses and for debts and encumbrances; but an allowance is not to be made 'for debts incurred by the deceased, or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth, wholly for the deceased's own use and benefit.'

"The question therefore is, whether the debts in these bonds were incurred for full consideration in money or money's worth, wholly for the deceased's own use and benefit; and I think it plain that the answer to that question must be that they were not. It is said that the consideration for the bonds was the carrying out of certain scientific and religious purposes in which Dr Gunning was interested. But that was not a consideration in money or money's worth. Neither was it for Dr Gunning's own use and benefit, except in the transcendental sense in which every philanthropist benefits by his own munificence.

"An alternative argument was maintained for the defenders, without, I think, much confidence in its success. It was to the effect that the capital sums in these bonds were not debts at all, but were property held by the deceased as trustee for the various grantees, and as such exempted from estate-duty by section 2, sub-section (3), of the Act. If every debtor is a trustee for his creditor this argument is a good one, but not otherwise. The truth is, that Dr Gunning by his own generous act made himself the debtor of these various bodies, and that was his sole legal relation to them. The defenders themselves quite properly recognised it when they gave up an inventory of his estate as including these sums, although they afterwards proceeded to deduct them as debts for which allowance ought to be made. Besides, section 2, sub-section (3), does not recognise as trust property anything which was held by the deceased under a disposition made by himself, unless 'possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.' It is, of course, impossible to predicate that of the capital sums in these bonds."

The Lord Ordinary granted decree against the defenders for payment to the pursuer of the sum of £2013, and interest thereon as concluded for, with expenses.

Counsel for the Pursuer—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders—Guthrie, K.C. —Grainger Stewart. Agents — Auld & Macdonald, W.S.

Tuesday, March 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PARKER *v.* THE LORD ADVOCATE.

Crown — Mussel-Fishing — Property — Exclusion of Public.

Held that mussel scalps on the foreshore and bed of an estuary, where such foreshore and bed are the property of the Crown, form part of the patrimony of the Crown, and may either be administered by the Crown through its officers, or conveyed by disposition or let in lease to an individual, to the effect of excluding the public from taking mussels from the scalps.

In June 1897 the Board of Trade granted to the Fishery Board for Scotland, for a yearly rent of £1, a lease for thirty-one years of the right of mussel-fishing and of maintaining mussel beds within a certain area in the river Clyde between Greenock and Cardross. In October 1897 a sub-lease of this right for a period of twenty-one years at the same rent was granted by