sum if the account were taxed as between agent and client.

The pursuer lodged a note of objections to the Auditor's report, and claimed expenses as between agent and client.

Argued for the pursuer—The Court were entitled to construe the finding of expenses in their interlocutor—*Henderson's Trustees* v. *Tulloch*, February 4, 1834, 12 S. 399. Upon payment of the expenses found due by the Court, the trustee would be denuded of the whole estate, so that if he only got expenses as between party and party he would have to bear all his extra-judicial expenses himself. The presumption, on the other hand, was that he was entitled to be kept *indemnis*, and it was to be presumed that this was what the Court intended. He was therefore entitled to expenses as between agent and client.

Argued for the defenders—It was too late now to move for expenses as between agent and client, the Court having made the ordinary finding as to expenses, which, apart from something appearing in the interlocutor to the contrary, meant expenses as between party and party — *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862. That case ruled the present. It would be most unjust to grant the motion, as it was impossible that the whole circumstances could be before the Court now. This was not a case in which the trustee was entitled to be kept *indemnis*, as appeared from the Lord Ordinary's interlocutor by which he was only found entitled to half his expenses. Any presumption which there might be in the ordinary case for interpreting a finding of expenses in favour of a trustee to mean expenses as between agent and client was rebutted in this case.

LORD YOUNG—*Prima facie* the trustee must be kept *indemnis*. This is a debt for which the trust-estate is liable. I am not disposed to let any technicality interfere with the trustee getting what he asks for.

LORD TRAYNER concurred.

LORD MONCREIFF—It would have been better if this question had been decided when expenses were awarded. But our intention was that the trustee should be kept *indemnis*, and this could not be done if he only gets expenses as between party and party, as he is bound to denude of the whole trust-estate on payment of expenses.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel on the note of objections by the pursuer to the Auditor's report on his account of expenses, Sustain the same: Find that the proper taxed amount thereof is £183, 10s. 5½d., and subject to this alteration approve of said report and decern against the whole defenders except John Davidson Cooper for said sum of £183, 10s. 5½d."

Counsel for the Pursuer — Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders — Clyde. Agents—Drummond & Reid, S.S.C.

Thursday, July 9.

FIRST DIVISION.

SMITH AND OTHERS (DAWSON'S TRUSTEES) *v.* DAWSON.

Succession—Heritable and Moveable—Jus relictæ—Legitim—Act 1661, *c.* 32.

A deed of acknowledgment of a loan was in the following terms:—"Received from" D "the sum of five thousand pounds sterling (£5000) as a deposit for mission purposes, to bear interest at the rate of 4 per cent. per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice."

Held (1) that the sum of £5000 contained in the above acknowledgment was heritable as regards the widow's *jus relictæ*, but moveable, in virtue of the Act 1661, c. 32, as regards legitim; and (2) that in fixing legitim the said sum fell to be divided into two equal parts.

Observations (by Lord Kinnear) as to the circumstances in which a widow who has made an election between her legal and testamentary provisions is entitled to rescind that election.

Mr Michael Dawson, 12 Millar Street, Glasgow, died on 20th February 1895, and was survived by his widow Mrs Cannon or Dawson, and two daughters Mrs Wallace and Miss Catherine Dawson. He left a trust-disposition and settlement by which he directed his trustees to pay an alimentary annuity to his wife and to his eldest daughter, the said Mrs Wallace, and to hold the residue of the estate in liferent for his younger daughter the said Miss Catherine Dawson, and in fee to her children, whom failing to the Archbishop and Chapter of the Roman Catholic Diocese of the Western District of Scotland. The net value of Mr Dawson's estate was £5990, and £5000 of it was deposited with the Roman Catholic Archdiocese of Glasgow upon the terms contained in the following deed of acknowledgment:—"*Archdiocese of Glasgow—Glasgow, 23rd February* 1892.—Received from Mr Michael Dawson of 47 King Street, Glasgow, the sum of Five thousand pounds sterling (£5000) as a deposit for mission purposes, to bear interest at the rate of 4 per cent. per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice." The document was subscribed across a penny stamp by the Archbishop and the Diocesan Treasurer, and was indorsed as follows:—"The sum acknowledged on the other side has been allocated as follows to the undernoted missions on loan, but Mr Dawson is to receive his interest half-yearly direct

from the Diocesan Treasurer, who is also to repay him the capital when required on three months' notice. JOHN A. MAGUIRE,
Diocesan Treasurer.

St Alphonsus, Glasgow . .	£1000
Shieldmuir	1000
Uddingston	1500
Whifflet	1000
Longriggend	500
	£5000"

After the death of the testator the agents for the trustees, who were appointed by the trust-disposition, sent a copy of the above deed to the agents for Mrs Dawson and Mrs Wallace, who wrote repudiating the provisions under the settlement, and claimed their legal rights in the testator's estate. The agents for the said trustees in acknowledging this intimation pointed out that in their opinion the said £5000 was such an investment as fell under the provisions of the Act 1661, c. 32, and that therefore the widow had no legal rights in it. The agents for Mrs Dawson and Mrs Wallace thereupon withdrew their said intimation until the point had been considered, and the trustees in the circumstances consented to this being done. The agents for Mrs Dawson and Mrs Wallace took the opinion of counsel in the matter, and after consideration they on 5th August 1895 intimated that Mrs Wallace claimed her legal rights in her father's estate, and on 4th September 1895 they wrote in regard to the widow's claim a letter in the following terms:—"We have yours of yesterday, and we beg to intimate that Mrs Dawson will accept the provisions in her husband's settlement." She, in accordance with this intimation, accepted payment of her provisions under said settlement so far as due.

A special case was presented for the decision of the Court by (first) the trustees, (second), Mrs Dawson, (third) Mrs Wallace, and (fourth) Miss Dawson.

The second party contended that she was entitled to recal her election and claim her legal rights in the event of the Court holding that the said sum of £5000 was moveable *quoad* succession.

The first and fourth parties maintained that the second party was bound by her election, and must now accept the provisions of her husband's settlement.

The questions for the consideration of the Court were—"(1) Whether the second party is entitled, on repaying to the First party the amounts received by her from them, with interest at 5 per cent. per annum from the respective dates of payment, to claim her legal rights, or whether she is barred from claiming said rights. (2) Whether the said sum of £5000 is moveable as regards succession in a question between the first and second parties, and whether the second party is entitled to claim one-third thereof as *jus relictæ*. (3) Whether in fixing the legitim fund the division of said sum of £5000 is bipartite or tripartite?"

Argued for fourth parties—(1) There was no ground for allowing the widow to go back on her election. She had been put upon her guard by the agents of the trustees, and had advisedly made her choice. There had been no misrepresentation inducing error on her part, and there was no suggestion of fraud. Her exercise of the power was a sort of *quasi*-contract from which she could not now resile—*Inglis' Trustees* v. *Inglis*, May 31st 1887, 14 R. 740. In the case of *Macfadyen* (*infra*) there had never really been election, and so it was not in point. (2) This was clearly a contract for a sum of money containing a liability to pay interest, and accordingly even without the endorsation it fell under the Act—Stair, iii. 4, 24.

Argued for third party—The £5000 fell to be divided on the basis that the widow had no legal rights in it. The case of *Downie* v. *Christie*, July 14, 1886, 4 Macph. 1067, raised exactly the present point, and showed that the criterion was whether the document bore a clause of interest.

Argued for second party—(1) She had done nothing to bar her from recalling her choice. Nobody had been prejudiced, nor would be if she were allowed to reconsider it. That was the criterion by which the Court decided questions such as these—*Macfadyen* v. *Macfadyen's Trustees*, Dec 2, 1882, 10 R. 285. There was no authority for the proposition that election was to be treated as a contract, and the trustees were not entitled to hurry the widow into making her election, but must make themselves acquainted with her legal rights and duly put them before her—*Ross* v. *Masson*, Feb. 3, 1843, 5 D. 483, at 488. (2) This document did not fall under the 1661 Act. Prior to that Act the sum in it would not have been treated as heritable, and that Act was not intended to make anything heritable which was not so before. The document was substantially the same as a deposit-receipt, the only difference being that the interest on the latter fluctuated according to the bank rate, Nor were there any of the formalities as to repayment to be found in the documents affected by the statute. In the case of *Downie* the obligation was in the form of a mortgage, and there was no question that the document was a bond.

At advising—

LORD KINNEAR—The first question put to the Court in this case is, whether the widow of Mr Dawson is barred from claiming her legal rights. It appears that shortly after the testator's death she intimated to the trustees that she rejected the provisions in her favour and claimed her legal rights; but that when it was pointed out to her that there might be a question whether a certain investment of £5000 was subject to the *jus relictæ*, she withdrew that intimation, and six months later, after she had obtained an opinion of counsel, she intimated that she accepted the provisions in her husband's settlement, and received payment of certain sums already due. This amounts to an express election. But if it were shown that she acted under a false impression as to the relative value of her legal rights and her

testamentary provisions, it may be that she might still reconsider her position and revert to her legal rights, because nothing has followed upon her election which might not easily be undone so as to restore all parties to the same situation as if no benefit had been accepted under the will. But I think the only error suggested—for it is not explicitly set forth in the case—is that she may have been wrongly advised as to her interest in the sum of £5000 already mentioned; and it is therefore necessary to consider the question raised by the second query before determining the answer which should be made to the first.

The second question is whether the sum of £5000 is moveable as regards succession in a question between the first and second parties—that is, between the testamentary trustees and the widow—and whether the second party, the widow, is entitled to claim one-third thereof as *jus relictæ*. That depends upon whether the fund in question is heritable or moveable, according to the law as it stood before the passing of the rescinded Act of 1641. At that date personal bonds with a clause of interest were supposed to constitute *feuda pecuniæ* and were heritable *quoad* succession. The law was changed, first by the rescinded Act, and afterwards by the Act of 1661, cap. 32, which is now in force, and by which contracts and obligations for sums of money with clauses of interest are made moveable as to ordinary succession, but under this declaration, that "all such bonds, *quoad fiscum*, shall remain in the same condition as they were before the 16th of November 1641, nor shall any part thereof pertain to the relict *jure relictæ* nor to the husband *jure mariti*." The question, therefore, is whether the document set forth in the 8th article of the case is a contract or obligation for money which before 1641 must have been held as heritable. Now, it acknowledges receipt of a sum of £5000, to bear interest at the rate of 4 per cent., and to be repaid on three months' notice. It has been determined by many decisions, and it is laid down as settled law by the institutional writers, that it is the payment of interest which fixes the heritable character of a personal bond. The case of *Downie* v. *Christie* is directly in point except in this one respect, that in that case the loan was for a period of time and to bear interest periodically before the arrival of a fixed term of payment, whereas in the present case there is no fixed term of repayment, but the money is repayable on three months' notice. But that distinction makes no difference, because the old law was that where the term of payment of a bond was at a distant or uncertain date the bond was accounted heritable after the first term for payment of the interest, because the distance or the uncertainty of the term for payment of the principal afforded evidence that the creditor intended from the beginning to employ his money for a term of years together at interest. Whatever may be thought of the reason of this rule according to the now established principles of law, the rule itself was fixed. These, like other personal bonds, are now moveable by statute; but the rights of the fisk and of widows are excluded from the operation of the Act. It follows that the second party has no more right to participate in the sum of £5000 in question than if it were still heritable to all intents and purposes; and that she was rightly advised if she made her election upon that assumption.

In these circumstances I presume that she has no interest to claim *jus relictæ* in place of the testamentary provisions in her favour. But I know of no authority for holding that any express election which has been partly carried into effect can be recalled at pleasure if it has not been made in ignorance or error, but in full knowledge of the existence and value of the abandoned right in comparison with that which has been accepted. Therefore if we were to answer the first question I am unable to find in the statement of the case any state of facts which would enable us to decide it in the affirmative. In the view I take, however, of the question raised by the second query it would appear to me that the parties have no interest in the decision of the first, and therefore it is unnecessary to answer it,

The third question is whether, in fixing the legitim fund, "the division of the said sum of £5000 is bipartite or tripartite." As to that I entertain no doubt. The money is moveable as regards succession for all purposes except the fisk and the *jus relictæ*.

It follows that the executor and the children claiming legitim are entitled to share, and as no one else has a right to participate, the division must be an equal division between those two parties. The law is clearly stated by Mr Erskine—"Personal bonds due to the husband, because by the Act 1661 they are moveable in respect of succession and heritable as to the widow, must therefore increase the legitim and the dead's part but not the *jus relictæ*." I am not aware that the law so laid down has ever been called in question, and I am therefore of opinion that we should answer the third question, that the division must be into two and not into three parts.

LORD M'LAREN—I agree with Lord Kinnear's opinion upon all the points, and I will only add, with reference to the construction of this old statute of the 17th century, that while it is true that the question as to the widow's rights is not a question under the statute, but is a question under the common law of Scotland which the statute left standing as regards the widow's rights, yet I venture to think that the terms of the statute are the best evidence that we have as to the rule of the common law at that time, which in regard to the rights of the widow remains unaltered. The statute is antecedent in date to the writings of our institutional writers, and it is reasonable to suppose that the remedy was co-extensive with the mischief intended to be put right. Now, the law which it was desired to correct was the law under which certain funds that are move-

able in their own nature were considered to be heritable by reason of their running for a tract of future time, to the effect of diminishing the fund divisible amongst the younger children. I think that the case where property, which is now moveable in regard to the rights of the younger children but heritable as regards the rights of the widow, is just the case described in the statute. Now, applying that description to the particular security with which we have to deal, it seems to me that this security completely answers the description, because it contains a promise to repay the capital and also a clause of interest or annual rent. Our decision of course would have no application to receipts for money in the ordinary form, which never contain an obligement to pay the principal, and not usually a clause of interest, that being left to stand upon implication or separate agreement.

I agree that the questions should be answered in the way that has been suggested by Lord Kinnear.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court found it unnecessary to answer the first question, answered the second question in the negative, and affirmed the first alternative of the third question.

Counsel for the First and Fourth Parties —Dickson—Deas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party—Shaw—Lyon Mackenzie. Agent—Andrew Urquhart, S.S.C.

Counsel for the Third Party — Abel. Agent—J. A. Cairns, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

EDINBURGH NORTHERN TRAMWAYS COMPANY *v.* MANN AND BEATTIE.

(*Ante*, vol. xxviii. p. 828, July 14, 1891, 18 R. p. 1140; vol. xxx. p. 140, 20 R. (H. of L.) p. 7, November 29, 1892).

Company—Preliminary Expenses—Cost of Procuring Act—Professional Services of Promoters—Remuneration—Edinburgh Northern Tramways Act 1884, *sec.* 78.

It was provided by the 78th section of Edinburgh Northern Tramways Act of 1884 that "the company shall pay all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto."

Held that the promoters of the company were not in a fiduciary relation to the company so as to bar them from receiving remuneration for professional services as law agent and engineer rendered by them incident to the preparing for, obtaining and passing of the company's Act, or otherwise in relation thereto.

Held further that the promoters were not entitled to charge a commission for procuring from a bank on their own credit the requisite Parliamentary deposit.

Observations (*per* Lord M'Laren and Lord Kincairney) as to the extent of the analogy between the positions of a trustee and a company promoter.

Process—Remit—Remit to Taxing Master of House of Commons to Report on Bill of Costs of Promoter of Company.

The Lord Ordinary having remitted to the Taxing Master of the House of Commons to report on certain objections lodged by a company in an accounting to the account of the promoter of the company, with instructions to the Taxing Master to distinguish any charges not incident to the promotion of the company's private Act of Parliament, that official presented his report taxing the account at a certain sum.

Objections having been lodged to his report, and the Lord Ordinary having again remitted to the Taxing Master to report on these objections, the Court *recalled* his interlocutor, the objectors having failed to show that the Taxing Master had mistaken the nature of the duty entrusted to him or had come to a wrong conclusion on a matter of principle.

In February 1889 the Edinburgh Northern Tramways Company brought an action against Mr William Hamilton Beattie, architect, Edinburgh, and Mr George Mann, S.S.C., concluding, *inter alia*, for an accounting by them in regard to all moneys, shares, or debentures received by either of them as promoters of the Tramways Company or in virtue of a certain agreement. The defenders were the engineer and solicitor of the company respectively.

The Lord Ordinary (TRAYNER) on 16th July 1890 pronounced an interlocutor by which he found that the defenders were bound to account as desired, and "appointed the defenders to lodge in process an account of all sums of money received by them, as also an account or accounts of all sums which they claim respectively to be entitled to set off against the before-mentioned sums."

The defenders reclaimed against this interlocutor, which was affirmed by the First Division and by the House of Lords. The accounts were duly lodged by the defenders, and the case having come before Lord Kincairney, various objections were lodged thereto by the pursuers. In particular, it was maintained on behalf of the pursuers that the defenders were not entitled to remuneration for their services as law-agent and engineer in preparing and obtaining the company's Act of Parliament,