is seventy years of age is past child-bearing. So far as I can see there is only one recorded case where a woman of seventy gave birth to a child. That case is referred to by Taylor (Med. Jur., 7th ed. 675), and also by more recent writers. There is, however, only one such case, and that very exceptional case appears to me rather to prove than to disprove the rule. I am prepared in this case, without laying down any general rule, to hold that the lady here is past child-bearing, and that it is consistent with the right and duty of the first parties to purchase the annuity as proposed in the third question. That question I would accordingly answer in the affirmative.

LORD MONCREIFF (who was absent at advising, and whose opinion was read by the LORD JUSTICE-CLERK)—I regret that I cannot concur in the judgment. I recognise as clearly as your Lordships do that there is now no possibility of issue of the marriage of the second parties looking to the advanced age (70 years) of Mrs Chaumette. I also recognise the desirability of giving the spouses the fullest benefit which the law will permit of the marriage contract funds.

But in my opinion the possibility of issue is not a question of law for the Court. It is a question of fact—a physiological question if you please—on which parties to this case are not agreed, or at least will not say that they are agreed, I am therefore of opinion that it is not the province of the Court to answer such a question, or queries depending upon it. I fear that this decision will hamper us in subsequent cases in which the age of the lady may not be so advanced.

Apart from this I doubt the power of the first parties to sink the capital in purchasing an annuity for Mr Chaumette. According to *Menzies* v. *Murray*, 2 R. 507, and other authorities, the consent of Mrs Chaumette *stante matrimonio* is quite insufficient in law to validate such a use of the trust funds.

LORD KINCAIRNEY, who was present at the advising to make a quorum but who was not present at the debate, gave no opinion.

The Court pronounced this interlocutor:—

"Answer the questions of law therein stated by declaring that the parties of the first part are entitled at the request of the second parties to apply the trust funds in the purchase in their own names as trustees of such annuities on the joint lives of the spouses and the survivor, such annuities to be held and applied by the trustees as unassignable income for the alimentary use of the spouses: Find and declare accordingly, and decern."

Counsel for the First Parties—Guthrie, K.C.—Macphail. Agents—H. & H. Tod. W.S.

Counsel for the Second Parties—Dundas, K.C.—Craigie. Agents—Mackenzie & Black, W.S.

Wednesday, November 20, 1901.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MELROSE-DROVER LIMITED *v.* HEDDLE.

Bankruptcy — Trade-Marks—Sale of Business with Goodwill and Right to Use Trade-Marks Containing the Firm's Name—Bankrupt Not Allowed after Discharge to Use Similar Trade-Marks Containing His Own Name.

A B carried on business under the firm name of A B & Co. The estates of the firm were sequestrated. The trustee sold the business with the stock and goodwill and the right to use certain trade-marks and labels previously used by the firm. After his discharge A B proposed to resume the business formerly carried on by him, and to use certain labels and trade-marks which had been used by him before the sequestration. *Held* (1) that he was not entitled to represent himself as carrying on the old business which had been sold; and (2) (*altering* judgment of Lord Stormonth Darling, who had granted interdict against A B Limited as regards the labels and trade-marks in question to their use in so far as they contained the firm name of A B & Co.) that A B was not entitled to use any of the labels or trade-marks in question whether they bore the firm name of A B & Co. or only his own name of A B; and interdict *granted* at the instance of a limited company, the successors of the firm which had purchased the business, against his doing so.

The firm of James Heddle & Company, of which James Heddle was the sole partner, and which carried on business as wholesale wine and spirit merchants in Leith, was sequestrated in March 1892, and Mr Charles John Munro, C.A., was appointed trustee on their estates. For some time prior to 1892 the firm had carried on a considerable business, and in connection therewith had distinctive trade-marks and labels which were known in the trade as distinctive of the articles manufactured and sold by it. The trustee in the sequestration, with concurrence of the commissioners, sold the goodwill of the said business, with the right to use the firm's name, to Melrose-Drover & Company, now represented by the complainers Melrose-Drover, Limited. The said trade-marks and labels, with the right to use them, were made over by the trustee to the purchasers of the business and the goodwill. The fact of the sale having taken place was at once made public by the trustee and the purchasers by an advertisement in the *Scotsman* on 18th March 1892, which set forth the sale by the trustee, and contained on the part of the purchasers the following intimation:—"We have pleasure in intimating that we

will from this date carry on the business of J. Heddle & Company on the same lines and under the same name, brands," &c. A circular containing a copy of the advertisement was issued to the customers of J. Heddle & Company, and along with it a circular (dated 28th March 1892) by Mr Heddle, in which he stated that his estate having been sequestrated, "the goodwill, plant, and business of James Heddle & Company was acquired by Messrs Melrose-Drover & Co." This circular further stated that Messrs Melrose-Drover & Co. "have attached my business to the export department of theirs, and arrangements have been made with me whereby the business will be carried on under my management in all respects as formerly."

From the date of that circular until the end of 1898 Mr Heddle continued in the employment of Melrose-Drover & Company, who during the whole of that time, in the knowledge of Mr Heddle, carried on the business they had bought under the name of James Heddle & Company, and used the trade-marks, brands, and labels connected therewith which Mr Heddle had used before his sequestration. Mr Heddle obtained his discharge in April 1894, but was not retrocessed. His trustee was discharged in the following year. The arrangement in virtue whereof Mr Heddle acted as manager of the business under Melrose-Drover & Company subsisted down to the year 1898, when the business of Melrose-Drover was converted into the company of Melrose-Drover, Limited, but it was not continued after that date.

Thereafter the complainers received a letter from Mr Heddle dated 9th September 1899, which so far as material was as follows:—"*James Heddle & Co.* (*James Heddle*). Messrs Melrose-Drover & Co. and Messrs Melrose-Drover, Ltd., Leith. Sirs—I hereby intimate to you that I have resumed business, under my own trade name, and using and to use, with the assertion of exclusive right to the same, and to the use of, the trade-marks, labels, &c., of my firm of James Heddle & Co. Caution is therefore hereby given to you, that the use of any of the above by you, or by any other person whatever, without my special concurrence or authorisation, given as from and after this date, will render all persons so doing, or passing off goods so marked, liable to actions at law." . . .

The complainers thereupon brought the present action of suspension and interdict against James Heddle, the sole partner (so far as known to the complainers) of the firm of James Heddle & Company, as such partner and as an individual, and the said James Heddle & Company, in which they prayed the Court to interdict the respondents from "carrying on the business of wine merchants . . . 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 James Heddle & Co., Jas. Heddle. & Co., or J. Heddle & Co."

The contentions of the parties sufficiently appear from the opinion of the Lord Ordinary (STORMONTH DARLING), who, on 11th January 1901, pronounced this interlocutor:—"Suspends the proceedings complained of, and interdicts, prohibits, and discharges 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, in so far as these contain the firm name of James Heddle & Co., Jas. Heddle & Co., or J. Heddle & Co., or any other trade mark, trade name, brand, or label, in so far as containing any of the said firm names, and decerns: Finds the respondents liable in expenses: Allows an account thereof to be given in," &c.

Opinion.—"For some years prior to 1892 the respondent Mr Heddle carried on business in Leith as a rectifier of spirits and manufacturer of non-alcoholic beverages, under the trade name of James Heddle & Co. In that year he was sequestrated, and the trustee in the sequestration, with concurrence of the commissioners, sold the goodwill of the business, with right to use the firm's name, to Melrose-Drover & Co., who are now represented by the complainers. The sale was publicly announced at the time by the trustee and the purchasers, and within a few days thereafter the respondent himself issued to his customers a circular in which he narrated the fact of the sale, and intimated that arrangements had been made with him whereby his business, having been attached to the export department of Melrose-Drover & Co., would be carried on under his management in all respects as formerly. It is admitted that such an arrangement was made between Melrose-Drover & Co. and the respondent, and it is not pretended by the respondent that the effect of it was to make him a partner of that firm. He was merely an employee of theirs, without even a fixed period of employment; but the arrangement in fact subsisted down to the formation of the limited company in the end of the year 1898. Of course this arrangement related merely to the respondent's personal services, and was distinct from the contract of sale, which he had no power and did not profess to make. Unfortunately his services were not taken over by the complainers, and on 9th September 1899 he addressed to them the letter set out on record. In that letter he avows the intention, and asserts the right, to resume business under the firm name of James Heddle & Co., and to use the trade marks and labels of that firm. The purpose of this note is to restrain him from so doing.

"Now, the rights of a trader, the goodwill of whose business has been sold by his trustee in bankruptcy, are well ascertained. With one exception they are exactly the same as those of a trader who has sold his business by his own voluntary act. Both may set up a new business in the same

line and in the same locality. The sole difference in favour of the man whose business has been sold in bankruptcy is that he cannot be restrained from soliciting his old customers, while the voluntary seller can be. But in neither case may the trader represent himself as carrying on the old business which has been sold. He may start afresh in his own individual name, or under a new firm or description, but he must not assume the name of the old business, nor use the trade marks or labels which belonged to it, because these have become the property of another. I find the authority for these propositions in *Cruttwell* v. *Lye* (1810), 17 Vesey, 335; *Churton* v. *Douglas* (1859), Johnson's Reports, 174 (decided by Lord Hatherley when Vice-Chancellor); *Hudson* v. *Osborne* (1869), 39 L.J., Ch., 79; *Walker* v. *Mottram* (1881), 19 Ch. Div. 355; and *Trego* v. *Hunt* (1896), App. Ca. 7. Perhaps I may quote a couple of sentences from the joint opinion of Lush and Lindley, L.JJ., in *Walker* v. *Mottram*, as that was a case founded on by the respondent—'An assignment of a business and its goodwill without more,' say these learned judges (and they are speaking of an assignment in bankruptcy), 'appears to us to pass now just as much and no more than in the days of Lord Eldon. As against the assignor, it confers on the assignee the exclusive right to carry on the business assigned, and as incidental to this it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right not only to sue the assignor for damages if he has infringed these rights, but also to restrain him from infringing them if he manifests an intention to infringe them.'

"Applying these principles to the present case, I find that the complainers do not seek to prevent the respondent from setting up a new business of the same sort in Leith in his own individual name. But he is not content with that. The right which he claims is an exclusive right to represent himself as carrying on the old business of James Heddle & Co. That is what he claims in the circular to which I have referred, and in his answer to this note. Accordingly there is no need for any proof of tendency to mislead the public. His avowed reason for insisting on the use of the old firm name and label is to show the public that he, and not the limited company, is in right of the old business. By so stating his case he makes it possible for the complainers to ask for interdict *de plano*, and with regard to the first part of the prayer, which relates to carrying on business under the old name, their claim to such an interdict is, I think, undeniable.

"I thought that the second part of the prayer, as originally framed, was open to the objection of vagueness, and the complainers some time ago amended it by limiting the labels which they wish the respondent restrained from using to those which contain the firm name of James Heddle & Co., or any variation of that name. I propose further to limit the interdict by adding the words 'in so far as containing the firm name.' There may be other things in the labels, such as the chess knight within cross lances, which the respondent is entitled to use, so long as he couples them with his own individual name of 'James Heddle.' The real gravamen of the complaint is, that he must not by the use of labels or in any other way represent himself as carrying on the old business. But as he is undoubtedly entitled to trade in his own name, I think it would be carrying restraint too far to debar him from using an old device in conjunction with his own name.

"I heard the case some months ago, but I delayed giving judgment, because the respondent announced his intention of bringing an action to cut down the sale of the business. That case has been argued on preliminary pleas, and my opinion in it will show that, if I am right, the way is clear for deciding the present question."

The respondents reclaimed, whereupon the complainers, taking advantage of the reclaiming-note, argued that the interdict granted by the Lord Ordinary was too limited in its scope, and submitted that they were entitled to interdict as craved in the prayer of the note without the words "in so far as containing the firm name," by which the Lord Ordinary had, they maintained, unduly limited the scope of the interdict. Their argument sufficiently appears from the opinions of the Lord Ordinary and the Court.

Argued for the respondent — He was within his right in carrying on business in his own name, and the complainers must prove fraudulent intent. There was no averment of fraud upon record. In supporting his argument he quoted the following authorities—*Burgess* v. *Burgess*, March 17, 1853, 3 De G. M. & G. 896; *Turton* v. *Turton*, May 20, 1889, L.R., 42 Ch. Div. 128; Sebastian, Law of Trademarks, 4th ed., p. 260; *Montreal Lithographing Company* v. *Sabiston* [1899], A.C. 610; *Smith* v. *M'Bride & Smith*, October 27, 1888, 16 R. 36, 26 S.L.R. 22; *Dewar* v. *Dewar*, March 29, 1900, 7 S.L.T. 443.

At advising—

LORD JUSTICE-CLERK — [*After dealing with other points in the case*]—The Lord Ordinary has restricted the interdict to the use of the name of James Heddle & Company, and using trade-marks, trade names, brands, and labels containing the name James Heddle & Company. This is complained of as too limited an interdict, and I am of opinion that it is so. I think they are entitled to be protected against his using such symbols or devices on labels or marks as were in use in conjunction with the name of James Heddle & Company in the former business, whether before or since the sequestration, as might lead buyers to suppose that they were getting the goods of James Heddle & Company. Thus the former labels, &c., had as a device a chess-knight with two cross spears. If Mr Heddle were allowed to use this device with his own name I cannot doubt that it would tend to deceive the public. I think

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.