low the transactions into the hands of the limited company. We are told that the pursuer's business was sold to a limited company in 1903. I do not think the defender is entitled to see what the profits of the limited company were. It is not the same business. We must strike out the whole of article 3.

I am disposed to think that in this case the defender is not entitled to the income-tax returns. These returns are just returns of income generally, and not specially of profits arising from business.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

Counsel for Pursuer — Shaw, K.C. — Dewar. Agent—Alexander Ramsay, S.S.C.

Counsel for Defender—Jameson, K.C.—C. D. Murray. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday February 26.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WOOLLEY & SON *v.* MORRISON.

Interdict—Interdict against Sale of Liquors in Marked Bottles—Trade Name.

A firm of beer bottlers, W. & Son, sought to have B. interdicted from selling beer which was not bottled by them in bottles which had "W. & Son" embossed on them. The complainers averred that they had their name put upon the bottles used by them, *inter alia,* as a trade description and to inform the public, and that the public so understood that the contents were bottled by them. After a proof, interdict *refused* (*affirming* judgment of Lord Kyllachy).

This was an action of suspension and interdict at the instance of Charles Woolley & Son, beer bottlers and aerated water manufacturers, 49 Elm Row, Edinburgh, against William Morrison, wholesale bottler, 2 King's Road, Portobello, in which the complainers sought to have the respondent interdicted "from selling or exposing for sale, or from having in his possession for sale or for any purpose of trade, beer, ales, stout or aerated waters, or any other alcoholic or non-alcoholic drinks, not bottled or manufactured by the complainers contained in bottles which bear the name of the complainers either impressed, embossed, engraved, sand-blasted, moulded, or otherwise marked thereon."

The complainers averred—"(Stat. 2). The quality or condition in which bottled beer, ales, or stout is sold depend upon the care and skill of the bottler. (Stat. 3). The complainers for the purposes of their business own a large number of bottles upon which their name is marked. The name is in most instances moulded on to the bottle in the process of manufacture. The bottles are purchased by the complainers for use in their own business exclusively, and the name upon them, besides assisting the owners to retrieve their property, is put upon the bottles as a trade name or trade description to inform the public, and the public so understand, that the contents are beer, ales, or stout bottled by the complainers, or aerated waters of the complainers' manufacture. There is a contract between wholesale bottlers in Edinburgh and district, whereby they have formed themselves into an association called The Edinburgh and District Aerated Water Manufacturers Defence Association, Limited, and having its registered office at 57 York Place, Edinburgh. The members of the said association are by the terms of their said contract permitted to lift each others' beer, ale, stout, and aerated water bottles, from which they select those branded or marked with their own name. They then send those which do not belong to them to the bottle exchange or clearing house of their said association, in order that those may then be sent to their respective owners. The said contract is based on the expectation that each bottler will receive back the whole of his own bottles through the medium of the bottle exchange. The respondent is not a member of the bottle exchange, and has never received authority to lift or use the complainers' named bottles. (Stat. 4). The respondent has in the past been using for beer, ales, stout, or aerated waters of his own bottling or manufacture bottles belonging to the complainers and bearing the complainers' name, and the respondent may continue the practice to the detriment of the complainers' business."

The respondent pleaded—"(2.) The complainers' statements being unfounded in fact, the note should be refused, with expenses. (5.) *Esto* that there has been use by the respondent of the complainers' marked bottles, such use having been accidental, unintentional, and *bona fide,* and attended by no prejudice to the complainers or the public, suspension and interdict should be refused."

After a proof the Lord Ordinary (KYLLACHY) on 21st November 1903 refused the prayer of the note.

Opinion.—"The question in this case, as presented at the discussion, is a question not as to unlawful appropriation of the complainers' property or as to infringement of the complainers' trade mark. The facts, as they have come out may suggest such questions. But they are not raised in this action, nor does the proof contain materials for their decision.

"The complainers' case as presented is rested on a different ground, viz., that the respondent being, like the complainers, a bottler of beer and ale, he (the respondent) has bottled and put into the market beer contained in bottles embossed with the complainers' name, and has thereby, as complainers say, represented that the beer

so bottled and sold by him is beer of the complainers' bottling. It is said that he (the respondent) has thus deceived or attempted to deceive the public, and has done so to the complainers' prejudice.

"Now, it may be conceded that if the bottles in question had been embossed not merely with the words "C. Woolley & Co.," but with the words "Bottled by C. Woolley & Co.," there would have been strong grounds for holding that this *prima facie* involved a use of the complainers' name which if it did not in fact deceive was at least fitted to deceive the trade and and the public. Further, even taking the words as they stand, it is probably true that it might be established by evidence that they bear, or have come to bear, the secondary sense which the complainers attach to them. The questions, however, are whether they necessarily bear that meaning, and if not, whether there is sufficient evidence that they are fitted to convey that meaning to the trade and the public.

"Having considered the proof, I find myself obliged to answer both questions in the negative. It is impossible, I think, to hold that necessarily, or even *prima facie*, the sale of beer in bottles embossed with the complainers' name involved a representation that the beer was bottled by the complainers any more that it involved a representation that the beer was brewed by them or that the bottles were made by them. *Prima facie*, embossment of the name would seem only to indicate that the complainers were owners of the bottles. And the evidence, if we are to appeal to the evidence, goes to show that in point of fact such was the main and primary object of the embossment—the object in view really being to secure the property of the bottles, and to facilitate their recovery when they became empty.

"It therefore requires to be shown affirmatively that the understanding of the public, or at all events the understanding of the trade is, and in December 1902 was, that in the business of bottling the bottler is always the owner of the bottles used by him, and that such a thing as, for instance, the hiring of bottles, or the more or less promiscuous exchange of bottles, is a thing unknown. All this, I say, requires to be proved. And that being so, it is perhaps enough to say that the complainers' proof appears to me to be insufficient. The evidence which they adduced did not, I must say, strike me as, at the best, very convincing. But it involved besides several difficulties which I think serious. In the first place, it seems clear that prior to the institution of the bottle exchange in March 1902 there was a practically promiscuous usage by traders of the bottles of other traders. It further, I think, appears that from that date to the date of the acts complained of less than a year had elapsed, a period I think hardly sufficient for any contrary usage to be recognised by the trade and the public. And then, lastly, I cannot overlook that, even in the complainers' own practice—their practice down to the present time—there has been such an amount of looseness as to make it really impossible to affirm that their embossed bottles once put into the market may not quite in ordinary course pass by exchange into the possession and use, if not into the ownership, of persons like the respondent, persons taking such bottles in exchange for their own bottles and proceeding to use them.

"On the whole, therefore, I am of opinion that the complainers have failed to prove that the respondent's use of their bottles deceived the trade or the public, or was in the circumstances fitted to deceive the trade or the public. The result is that I must refuse the suspension, with expenses.'

The complainers reclaimed, and argued—The complainers were entitled to interdict even if the respondent was using their name innocently without any intention to take advantage of it—*Millington* v. *Fox*, 1838, 3 Mylne and Craig, 338. The respondent's use of the complainers' bottles was calculated to deceive purchasers—*Reddaway* v. *Banham*, L.R. (1896), App. Cas. 199. The respondent's actings were contrary to the Merchandise Marks Act 1887 (50 and 51 Vict. c. 28), secs. 2 and 5 (1) (c), (2) and (3).

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—Much of the argument which we have heard has been addressed to the question of an infringement of trade-mark contrary to the provisions of the Merchandise Marks Act, but there is no averment as to the statute on record. However, taking the case upon the merits, if the complainers could show that there had been fraudulent use of any device belonging to them they would be entitled to interdict. From the evidence it appears perfectly clear that until the institution of the Bottle Exchange in March 1902 it was quite common for bottles to be sold with the name of one person on the label and the name of another embossed on the bottle. The fact that the Defence Association was instituted is in itself proof of this indiscriminate use of marked bottles. Now, it cannot be said that because such an association was formed and advertised in the newspapers such a practice can be set aside in a day. It must take time to alter such a public understanding. The complainers might have been entitled to interdict if there had been intent to defraud. In the present case there was no such intention. A few bottles were discovered to have been sold by the respondent bearing embossed upon them the name of the complainers, and that is all. The respondent had no desire to infringe any right of the complainers. Of course, if any trader were found using a label or trade-mark belonging to any other person, and continuing to do so for a long time, that might afford a ground for interdict, for there would be intention to defraud. But there is no such case here. I think the Lord Ordinary's opinion is most clear, and I concur in all that he says.

LORD TRAYNER—I am substantially of the same opinion. I think the Lord Ordinary correctly states that the question in this case as presented at the discussion is a question not as to an unlawful appropriation of the complainers' property or as to infringement of the complainers' trade-mark. The whole case turns on what the name embossed on the bottle means to the public. The cases quoted to us were cases of goods bearing a trade-mark or a trade-name which indicated that the contents of the bottles were manufactured by one person, when in point of fact they were manufactured by another. There is no such case here. The name embossed on the bottle might have been indicative of the ownership of the bottle, but gave no indication as to the manufacturer of the contents, because in each case the bottle bore a separate label to indicate who was the manufacturer. But apart from this, this is not a case for interdict. The respondent's position is quite frank. He acknowledges that he may have sold the bottles bearing the name of the complainers, but says that such a sale was accidental, and that had he been asked he would have been willing to take reasonable precautions against a recurrence of it. When a man comes into Court in this position, it cannot be said that he is to be subjected to interdict. On these grounds I think that the prayer of the note should be refused.

LORD MONCREIFF—I am of the same opinion, and for the reasons stated by the Lord Ordinary

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainers and Reclaimers—Campbell, K.C.—A. A. Fraser. Agent—George Arnott Eadie, S.S.C.

Counsel for the Respondent — C. D. Murray—J. H. Henderson. Agents—Kelly. Paterson, & Co., S.SC.

Saturday, February 27.

SECOND DIVISION.

[Lord Pearson, Ordinary.

GORDON'S TRUSTEES *v.* FORBES.

Process—Multiplepoinding—Claimant as Creditor Resident Abroad—Mandatory.

Circumstances in which a claimant in an action of multiplepoinding who claimed as a creditor and who was resident abroad *held* (*reversing* judgment of Lord Pearson) not bound to sist a mandatory.

An action of multiplepoinding was raised in February 1902 by the trustees acting under the trust-disposition and settlement of the deceased William Gordon, solicitor, Aberdeen, in connection with the distribution of the deceased's estate. The pursuers called as defenders all the persons so far as known to them who had any interest under certain testamentary writings left by Mr Gordon.

A claim was lodged by Miss Jessie Forbes, 69 Crown Street, Aberdeen, as a creditor of the deceased.

Miss Forbes was not called as a defender in the action, but she averred that in consideration of her abandonment of a certain claim against a third party in whom the deceased took an interest, he had bound himself to pay her an annuity of £25 per annum during all the years of her life. This obligation she averred "was undertaken in a document in the following terms:—'35 *Albyn Place, 29th April* 1898.—My dear Miss Jessie—I am sorry that I am still unable to give you such a reply as you would wish, and I need scarcely again remind you of what I have so often expressed as to difficulties in the way. All I can say at present is, that I guarantee, from whatever source it may ultimately come, £25 a-year, say at Whitsunday yearly. I know it is not much, but it will, I trust, be of a little use.—Believe me, with best wishes, yours very sincerely, WILLIAM GORDON.' On 7th May 1898 Mr Gordon sent the claimant a letter in the following terms:—'My dear Miss Jessie—With reference to my last letter I send you enclosure, being £25, to be continued at Whitsunday yearly.—With best wishes, believe me, yours very sincerely, WILLIAM GORDON.'" The claimant further averred that she "received the £25 mentioned in said letter, and thereafter Mr Gordon made payment to her during his life of the said annuity of £25 at the usual half-yearly terms." She claimed "to be ranked and preferred upon the fund *in medio* for an annuity of £25 a-year during all the years of her life; or alternatively to be ranked and preferred upon said fund for such sum as will enable her to purchase an annuity of this value."

On 18th July 1903 the Lord Ordinary (PEARSON) pronounced an interlocutor containing findings with regard to all the claims lodged except Miss Forbes'. With regard to that claim his Lordship said in the course of the opinion which he delivered that he was prepared to find it irrelevant as it stood, but that he would give Miss Forbes an opportunity of amending it.

In the end of September 1903 Miss Forbes went to South Africa on account of her health, and in order to seek a livelihood, *animo remanendi.*

On 19th November 1903. an amendment of Miss Forbes' claim having been lodged, the Lord Ordinary, on the motion of the pursuers and real raisers, ordained Miss Forbes to sist a mandatory within fourteen days.

On 8th December the Lord Ordinary, in respect that Miss Forbes had failed to sist a mandatory, repelled her claim. His Lordship granted leave to reclaim.

Miss Forbes reclaimed, and argued—The present difficulty had been created by the deceased, and the claimant was not bound to sist a mandatory—*North British Railway Company* v. *White, &c.*, November 4, 1881, 9 R. 97, 19 S.L.R. 59.

Argued for the pursuers and real raisers—The claimant was not called as a defen-