moveable. On this disposition the trustees at once entered upon office, took possession of the trust-estate, and made up titles to the heritable subjects belonging to the truster.

On 26th February 1894 Mrs Catherine Byres or Gemmell, wife of John Dick Gemmell, veterinary surgeon, Stranraer, and daughter of Mrs Byres aforesaid, executed a trust-disposition and settlement whereby she conveyed her whole estate, with full power to take possession, to the trustees named in Mrs Byres' trust-disposition.

On 23rd and 26th April 1894 Mrs Byres and Mrs Gemmell executed a deed of revocation of their respective trust-dispositions.

Mrs Byers died on 27th May 1894 leaving a testamentary writing dated 23rd April 1894 by which she bequeathed her whole estates to her daughter Mrs Gemmell, and appointed her to be her executrix.

On 3rd August 1894 Mrs Byres' trustees raised the present action of multiplepoinding and exoneration against Mrs Gemmell and the other beneficiaries under the trust-disposition in their favour, for the purpose of determining the respective rights of parties to the trust-estate. Mrs Gemmell and her husband lodged defences objecting to the competency of the action on the ground, *inter alia*, that part of the estate in question was heritable.

On 29th January 1895 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor repelling the objections to the competency of the action.

Opinion.—. . . "In the action of multiplepoinding the only parties who have as yet appeared are Mrs Gemmell and her husband. There has been no order for claims, and Mr and Mrs Gemmell have lodged defences challenging the competency of the action. . . .

"The second plea is that the action is incompetent. This was maintained on various grounds. It was maintained that it was not competent to bring into Court heritable property as the fund *in medio* in a multiplepoinding. The argument was pressed on the assumption that the whole estate was heritable, but, so far as I can see, if it be good at all, it must apply to the heritable portion of a mixed estate as well as to an estate wholly heritable. I am of opinion that the plea is ill-founded. Reference was made to Mackay's Practice, vol. i. p. 113, where it is said that the subject-matter of the fund *in medio* 'must be moveable or personal property,' and that 'land or other heritable or real property is not a proper subject for a multiplepoinding, and competition with regard to it must be determined in some other action, as declarator or reduction, but the *jus ad rem*, as distinguished from the *jus in re*, the right to demand a conveyance even of heritable property, may be determined in a multiplepoinding.' The cases quoted in support of this statement do not appear to me to bear it out. It may be that at first the process of multiplepoinding was chiefly used for the determination of competitions for a moveable fund, as the name of the action may perhaps imply. I have not, however, found proof that it was at any time confined to such competitions, and now it is every-day practice to try in a multiplepoinding all questions arising under a trust-deed of a nature fitted to be so tried, without distinguishing whether the trust-estate is heritable or moveable or mixed. The style of a summons of multiplepoinding and exoneration by trustees in the second edition of the Juridical Style Book, vol. iii. 315 (1828), clearly bears to submit to the Court the whole trust-estate, heritable as well as moveable, and that is no doubt good evidence of the practice at that date. Actions of multiplepoinding in which the whole fund *in medio* is heritage are necessarily few, but in *M'Intyre* v. *Schaw*, May 21, 1829, 7 S. 636, a multiplepoinding was expressly decided to be competent in which the whole fund *in medio* was a share of an heritable bond, and in which the question was whether it ought, on account of certain specialities, to be dealt with as heritable or moveable estate. In this case it certainly does not appear that the estate put into Court is wholly heritable, as probably the greater part of it consists of an heritable bond, which is now in most relations moveable estate. The trust-estate seems therefore to be a mixed estate."

Counsel for the Pursuer and Real Raisers —M'Lennan—Wilton. Agent—P. Pearson, S.S.C.

Counsel for the Defenders—Lord Advocate (Pearson, Q.C.)—Guy. Agents—Henderson & Clark, W.S.

Wednesday, July 29, 1896.

OUTER HOUSE.

[Lord Kyllachy.

BROWN *v.* ROBERTSON.

Executor—Liability to Creditors of Deceased — Public-House — Goodwill — Value of Goodwill of Tenant.

The widow of a publican who had carried on business without a lease was appointed executrix, obtained a transfer of the certificate, and carried on the business for her own behoof. In an action at the instance of a trustee for the creditors on the husband's estate it was decided that the widow was bound to account as executrix for the value of the goodwill as at the date of the husband's death. *Held* (*per* Lord Kyllachy) that in estimating the amount of this liability the test was the amount which a trustee for the creditors of the husband would have obtained for the goodwill—considered as an introduction to the landlord, and to the licensing authority—from a purchaser who was aware that the widow would be a rival applicant for the licence.

[Sequel to *Brown* v. *Robertson*, May 21, 1896, 33 S.L.R. 570].

The facts in this case appears sufficiently from the preceding report and from the opinion of the Lord Ordinary.

On 24th July 1896 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Having considered the cause, finds that the value of the goodwill of the public-house business mentioned on record *in bonis* of the deceased at the date of his death did not exceed the sum of £50, and with this finding continues the cause: Grants leave to reclaim."

Opinion.—"I have considered the proof in this case, and have come to the conclusion that the pursuer has failed to prove that the goodwill of the deceased's business had—so far as it was a subject *in bonis* of the deceased, and capable of transmission to his executors—a higher value than the £50 entered in the inventory, and tendered by the defender.

"The goodwill of a public-house to a large extent attaches to the premises, and belongs to the landlord. The tenant's goodwill, at least if (as in the present case) the tenant has no lease, consists mainly in the value to his successor of the introduction which it is in his power to give to the landlord and to the licensing authority. Still, that introduction may often have a substantial value; and accordingly I think it quite possible that if the deceased had, during his life, sold his tenant's goodwill, he might—backgoing as the business was—have realised for it from £200 to £300.

"It is however common ground that this or any similar price could only have been obtained subject to the conditions (1) that the licence should be transferred by the Magistrates; and (2) that the purchaser should be accepted by the landlord. Assuming an absolute sale—that is to say, a sale on the footing that the purchaser took his chance of those conditions—the evidence seems to show that it would have been difficult, even during the deceased's lifetime, to have obtained any price for the tenant's goodwill.

"To justify therefore the demand which the pursuer now makes, it would require to be shown that the deceased's executrix had, as such, the means of securing to a purchaser, first, the landlord's acceptance of him as tenant; and second, the transfer to him of the deceased's licence.

"Now, I confess I do not see how either of these points can be affirmed. Upon the evidence I should think that the probabilities were the other way. The test is to suppose that the deceased had left, say, an executrix-nominate, representing interests different from those of his widow and children, or that his estate had been at once sequestrated, or that this particular asset had been confirmed by an executor-creditor. What in any of those cases would have been the likelihood of the legal representative being able to secure for his nominee acceptance by the landlord and the magistrates? The evidence makes it plain that it would have been at least likely that the claims of the widow, or of her nominee, would have been preferred. The landlord was examined, and in fact says so. No doubt the defender possessing the double character of widow and (prospective) executrix, got accepted without difficulty. And possibly if she had sold the combined goodwill which she possessed in both characters she might have got for it perhaps as much as the deceased would have got. But she would, I think it is clear, have done so mainly, if not entirely, in respect of the transference of her individual claims as widow. And that being so, she cannot, in my opinion, be bound to account to the creditors for what would really have been the price of her personal recommendation. What she has to account for is what was *in bonis* of the deceased—that is to say, what the deceased could transmit to his legal representatives. And in my opinion the value of the goodwill which was thus transmissible is not proved to have exceeded the sum of £50. I shall therefore make a finding to that effect, and continue the cause. There are some minor matters of figures apparently at issue between the parties, but I am informed that these have been or are in the course of adjustment."

Counsel for the Pursuer—W. Campbell—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Defender—Guy. Agent—A. C. D. Vert, S.S.C.

Wednesday, January 6, 1897.

OUTER HOUSE.

[Lord Kyllachy.

MURRAY *v.* MACKENZIE.

Prescription—Negative Prescription—Trust—Claim against Representative of Trustee.

A claim against the representative of a trustee for a sum alleged to be due under the trust is not a claim of trust accounting, but of an ordinary debt, and the negative prescription is a good answer to it.

The facts of this case are fully stated in the opinion of the Lord Ordinary.

On 6th January 1897 the Lord Ordinary (KYLLACHY) assoilzied the defender from the conclusions of the action.

Opinion.—"The pursuer in this case is Sir William Robert Murray, baronet, who claims to be heir-at-law of General Sir John Murray, who died in 1827; and he brings the action to obtain an account of a certain trust-fund, consisting of the price of a Scotch estate, which fund on the death of Sir John was destined and became payable to his heirs and assignees. The trust was constituted by a certain marriage-contract dated in 1807. The estate was sold by the trustees, and the price received in 1814; and the pursuer's case is that the price was a heritable subject, and, however disposed of, has not been paid or accounted for to General Sir John Murray