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

or his heirs-at-law. It was, the pursuer admits, carried by the settlement of his, the pursuer's, late father Sir Robert Murray, but he claims to be assignee under a certain writing to any interests created under that settlement.

"The action is directed against Sir Alexander Muir Mackenzie of Delvine, as the heir-at-law of the late Sir Alexander Muir Mackenzie, the last survivor of the trustees, and as such heir 'vested in the trust-estate created by said marriage-contract, so far as the same has not been discharged.' It calls upon the defender to account for the trustees' intromissions, and, failing an account, to make payment to the pursuer of the sum of £14,530, being the alleged proceeds of the sale of the said estate. There is no averment that the defender has himself intromitted with the trust-estate. But the title under which the estate was held by the trustees contains a destination to the survivors of the trustees, and the heir of the last survivor, and this, according to the scheme of the action, makes the defender liable to account.

"It seems a sufficient answer to the action as thus laid that the defender is not, and never was, a trustee under the marriage-contract, at least in any sense in which he can be liable to account. As heir-at-law of the last surviving trustee, he succeeded, it may be, to the trust-estate; and as such he might have been called as defender to any action of adjudication at the instance of the beneficiaries or a judicial factor. But he did not succeed to the office of trustee, or incur any liability by virtue merely of the destination in his favour—a destination whose only object was to preserve continuity in the title. Of course, if he had made up a title, he might have been required to denude; or if he had assumed possession, he might have been called to account. But nothing of that sort is, as I have said, alleged.

"The case, however, was (no doubt for sufficient reasons) argued on the assumption that the liability really in question was a liability of a different kind, viz., a personal liability by the defender, as representing the last surviving trustee, to implement that trustee's obligations, including his liability to account for or make good this particular fund. And although I doubt whether this case is covered by the record—it in particular not being alleged that the defender does represent his grandfather so as to be liable for his debts—I am unwilling to throw out the action on what might appear to be a merely technical ground. I shall therefore assume what seemed to be admitted, that the defender does represent his grandfather, and also that the action is to be taken as directed against him in that view.

"But then this at once brings up, and brings up in a comparatively simple form, the question of the negative prescription. It is not so stated on record, but it was ascertained and admitted in the course of the debate that the late Sir Alexander Mackenzie died in 1835, and that the defender's liability, if it now exists, was a liability which came into existence in that year—now more than forty years ago. I confess I am not able to see how, in that state of the facts, the negative prescription can be denied its ordinary effect. I heard an excellent argument on the question how far that prescription applies, or can apply, to claims of accounting under a trust—that is to say, to claims of beneficiaries against trustees; and reference was made to various points and distinctions which are to be found canvassed at length in the cases of *Barns*, 19 D. 626, and the previous cases of *Pollock*, M. 10,702, 2 Pat. App. 495; and *Kinloch*, M. Appx. Prescription No. 4, 5 Paton, 35. But if it be taken that the defender is here sued simply as his grandfather's representative, it does not seem to me that we have here to deal with any question of that sort. The defender is *ex hypothesi* not a trustee, and has never been so. He has not during the period of prescription owed any duty to, or stood in any fiduciary relation to, the pursuer. The relation at the best has been only that of debtor and creditor. The claim against the defender, if it be a claim, is at best only a claim of debt, and that being so, I think there is an end of the matter.

"It would have been a different question—I by no means say that the result would have been different—it is not necessary to decide that—but it would have been a different question if the body of trustees, or the last surviving trustee, had been still alive, and had been asked for accounts with reference to an intromission which occurred in 1814, and to a trust fund of which the trusts expired in 1827. I am far from saying that the negative prescription would not equally in that case have applied. But the present is, for the reasons I have explained, not a case of that kind at all.

"It would also, I need hardly say, have been a different question if the fund, being admittedly extant, standing on a trust title (as, for example, invested in the trustees' names), the pursuer by declaratory adjudication or otherwise sought to vindicate the fund, and for that purpose brought an action against the defender, or (the trustees being still alive) brought a similar action against the trustees. That would of course be a different question altogether, and I am not to be taken as holding or even suggesting that the negative prescription could there be pleaded.

"Lastly, while disposing of the case upon the ground I have now stated, I desire to add that I am by no means to be taken as affirming the pursuer's views as to the heritable character of this fund, or the validity of the title which, assuming it to be still extant, he sets up to it. Neither am I to be taken, on the other hand, as throwing any doubt on the defender's statements that, according to the best information he can obtain, the fund in question was properly paid over to General John Murray's executors on 10th April 1828. If that payment were proved, it

would probably have been in itself conclusive, because these executors, it would seem, were or held for the pursuer's authors, but in the view I take it is not necessary, and would not be right, that I should put the defender to the expense which a proof would involve."

Counsel for the Pursuer—J. A. Reid—Laing. Agents—Philip, Laing, & Company, S.S.C.

Counsel for the Defender—Dundas—Macphail. Agents—Mackenzie & Kermack, W.S.

Friday, March 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TORRANCE (GUNN'S TRUSTEE) *v.* WARDLAW AND ANOTHER (TRAILL'S TRUSTEES).

Bankruptcy—Illegal Preference—Construction of Agreement—Statute 1696, *cap.* 5—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 110.

A landlord entered into an agreement with a farm-steward whereby the latter was to receive 95 acres of a certain farm rent free as part of his salary. It was stipulated that at the commencement of the agreement the whole stock and implements on the farm were to be sold except the stock and implements necessary to work the 95 acres. These latter were to be valued in the same way as if the land-steward were an incoming tenant, and were also to be valued at the termination of the agreement, the difference in value thus ascertained being paid, as the case might be, either to or by the farm-steward, who was also to give the landlord a similar valuation at each term of Whitsunday.

On the death of the farm-steward the landlord entered into possession of the stock and implements of the farm and sold them.

Within sixty days of the farm-steward's death his estates were sequestrated.

In a question with the trustee in the sequestration, *held* (*aff.* judgment of Lord Kyllachy) that the Act 1696, cap. 5, and sec. 110 of the Bankruptcy Act 1856, did not apply, that the landlord was entitled to take possession of the stock and implements on the death of the farm-steward which terminated the agreement, and that he was bound to account to the trustee only for the difference in amount between the valuation at the beginning and the valuation at the end of the agreement.

On 8th April 1887 David Wardlaw and Others, Traill's trustees, entered into an agreement with George Gunn, land-steward, Castlehill, Caithness, to the following effect:—(1) The Home Farm of Castlehill was for the greater part to be let as grass parks with the exception of 95 acres. (2) "These 95 acres to be given rent free to Mr George Gunn as part of his salary as ground officer. In addition to this Mr Gunn to receive a free house, coal, and a money salary of £50 per annum." (3) If the permanent grass in any part of the grass parks was to give way, Mr Gunn was to take a course of cropping of that part, and an equivalent acreage of the 95 acres to be let as grass parks. (4) "The whole of the stock, crop, and implements on the farm to be sold before Whitsunday 1887, except three horses and the implements necessary to work the 95 acres. The horses and implements retained, as well as the corn crop of 1887, fallow break, dung, &c., to be valued by an auctioneer as if Mr Gunn were incoming tenant to the farm at Whitsunday 1887." (5) The agreement to be yearly, and terminable at four months' notice by either party. On the termination of the arrangement, a valuation to be made in the same way as at the commencement, and the difference in value to be paid either to Mr Gunn or by Mr Gunn, as the case might be. (6) Mr Gunn to give the factor on the estate at each term of Whitsunday a valuation of the stock, crop, implements, &c., on the farm.

Mr Gunn took possession of the farm, stock, implements, &c., in terms of the agreement. In October 1894 Traill's trustees intimated to him the termination of the agreement at Whitsunday 1895.

Mr Gunn died on 14th May 1895, and thereupon Traill's trustees caused an inventory thereof to be made and took possession of the said stock and implements, and on the 17th of May sold them, retaining the proceeds in their possession.

On 6th July 1895 the estates of Mr Gunn were sequestrated, and Mr William Torrance was appointed trustee in the sequestration.

On 5th May 1896 Mr Torrance raised an action against Traill's trustees concluding for declarator that the stock and implements on Castlehill Home Farm belonged to George Gunn at his death and vested in the pursuer as his trustee under the Bankruptcy Statutes; and further that the defenders were bound to account to the pursuer for their intromissions with the said stock, implements, and other subjects.

The pursuer founded on articles 4 and 5 of the agreement, and averred, *inter alia*—(Cond. 6) . . . "From and after Whitsunday 1887, up to the date of his death, the said George Gunn carried on said farm occupied by him under said memorandum solely for his own behoof and without accounting to the defenders in any way for his intromissions. By defenders' instructions the said George Gunn's name was entered in the valuation roll as tenant of the said farm of Castlehill, and they required him to pay the tenant's taxes therefor, which he did. He held said farm as tenant under the defenders, and was