The only valid defence of this nature to the Railway Company's action would have been a decision obtained by the trader in an arbitration invoked by him, and such a decision was also necessary to justify an action for recovery of overcharges already paid. The result was that the Railway Company were entitled to decree in the action at their instance, and that the Grain Company's action ought to be dismissed.

At advising—

LORD TRAYNER — We have here two actions, one at the instance of the North British Railway Company against the Grain Storage and Transit Company, and the other by the Grain Company against the Railway Company. The action first mentioned is first in date and the leading action; the second action has for its purpose the enforcing of the alleged rights pleaded in defence to the first action.

The Railway Company (under the restricted conclusion now insisted in) sue for payment of certain rates due to them by the defenders in respect of the carriage of various quantities of grain between January 1893 and February 1894. The quantities of grain carried are not in dispute, nor are the rates charged for such carriage said to be in excess of what the pursuers are entitled to charge (except as after noticed), and therefore *prima facie* the pursuers are entitled to decree. But the defenders maintain in answer to the pursuers' claim (1) that they are entitled to have the rates reduced to those at which goods have been carried by the pursuers for other traders, and (2) that the rates sued for are subject to deduction on the ground that the goods were carried in waggons belonging to the defenders themselves. These defences must be considered separately.

I. It is conceded by the defenders that they cannot maintain their claim urged in the first defence on the ground that the undue preference to other traders was in contravention of the Railway Clauses Act 1845; accordingly it can only be maintained on the ground that the alleged undue preference was contrary to the provisions of the Railway and Canal Traffic Act of 1854. But we cannot give effect to that defence; we can neither inquire into the facts alleged, nor give the defenders the remedy they seek, because under section 6 of the Regulation of Railways Act 1873, and section 8 of the Railway and Canal Traffic Act of 1888, the jurisdiction to deal with such matters is conferred exclusively upon the Railway Commissioners.

The second defence is based (1) upon an alleged agreement, and (2) upon the provisions of the Act of 1892. I agree with the Lord Ordinary that the alleged agreement is not proved, and therefore the defenders can only rely upon the statutory provision. It is to the effect that where goods are carried for a trader in his own waggons the railway company's rate shall be reduced by a sum (in the event of the railway company and the trader differing about it) to be determined by an arbitrator appointed by the Board of Trade. Now, here the Railway Company and the trader differed as to the amount of the reduction, but no steps have been taken by the trader to have an arbitrator appointed to settle the difference and fix the amount of the reduction. Until that is done the amount of the reduction cannot be ascertained, and consequently the amount of the reduction to which the defenders are entitled is not known. It is difficult to give effect to a reduction, the amount of which is at present indefinite. It must be put in figures before we can allow it as a reduction from or set-off against the pursuers' money claim.

The defenders ask, however, that their action may be sisted (not dismissed) until the amount of the reduction is ascertained. The Lord Ordinary thinks it better and more convenient to dismiss the counter action at once. I am not prepared to differ from him. The defenders should have proceeded long ago to have their claim determined in the manner pointed out by the statute, and they cannot complain if their neglect of their own rights occasion them the expense of a new summons. I would have been more inclined to listen to the defenders' request had any diligence proceeded on the action now depending, which it was desirable to maintain. But there is nothing of the kind here.

On the whole matter, I agree with the Lord Ordinary, and am for adhering to the interlocutors reclaimed against in both actions.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the North British Railway Company—Sol.-Gen. (Dickson), Q.C.—Balfour, Q.C. — Grierson. Agent — James Watson, S.S.C.

Counsel for the North British Grain Storage Company — Guthrie — Clyde. Agents—Drummond & Reid, S.S.C.

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*Tuesday, January* 29, 1895.

## OUTER HOUSE.

[Lord Kincairney.

## BYRES' TRUSTEES *v.* GEMMELL AND OTHERS.

*Process — Competency — Multiplepoinding —Heritable Estate.*

A heritable subject may competently form the fund *in medio* in a multiplepoinding.

(See *Byres' Trustees* v. *Gemmell and Others*, December 20, 1895, *ante*, vol. xxxiii. p. 236, and 23 R. 332.)

On 14th February 1894 Mrs Mary Henry or Byres executed a trust-disposition whereby she appointed David Logan and others her trustees for certain purposes, and conveyed to them her whole estate, heritable and

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.

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*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].