

minds does there exist any doubt—none certainly exists in mine—but that the interlocutor of the Court of Session must be affirmed. I accordingly move your Lordships to that effect, and that this appeal be dismissed, with costs.

LORD O'HAGAN, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Lord Advocate (Watson)—Davey, Q.C.—Low—Pollock. Agents—Willoughby & Cox, Solicitors.

Counsel for Respondents—Benjamin, Q.C.—Balfour. Agent—W. A. Loch, Solicitor.

COURT OF SESSION.

Thursday, January 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

BAIN v. MUNRO AND OTHERS.

Succession—Executory Estate—Goodwill of a Profession—Personal or Transmissible.

A question having arisen as to whether the sum obtained from the sale of the practice of a medical man after his death fell to be included in his executry, he having bequeathed it in his will to his widow—held (*dub.* Lord Gifford) that the benefit derived from the exercise of such a profession is of a nature so personal to the individual exercising it that it cannot be transmitted after his death; and that in the circumstances as proved in the present case the value obtained from the sale of the practice of the deceased was mainly due to the recommendation of his widow, and must be held to belong to her.

Opinion (per Lord Gifford) that there may be the goodwill of a profession as well as of a trade, and that it may be bequeathed after death; and that the sum obtained for such a goodwill must be included in the deceased's executry estate, the goodwill being a thing which was derived from and attributable to him alone.

John Bain, the pursuer in this action, was a co-obligant with Alexander Munro, one of the defenders, and his son, the late Alexander Donald Neill Munro, doctor of medicine, Cupar-Fife, under a cash-credit bond granted by them to the Union Bank on 15th May 1871, for the sum of £400, and interest thereon. After Dr Munro's death on 15th March 1873 the Bank had called upon the pursuer to pay up an overdrawn balance of £437, 5s. 9d., and eventually this action of relief was brought by him against Alexander Munro, the principal debtor, and against Mrs Munro, the widow and executrix *qua* relict of Dr Munro, concluding against them, conjunctly and severally, for payment to the bank or to the pursuer of the balance due under the bond. The action as laid

was directed against Mrs Munro, as the executrix of her husband Dr Munro, and as such bound to implement a letter which Dr Munro had granted to the pursuer guaranteeing to relieve him of risk under the cash-credit.

It was stated that the total free balance of Dr Munro's estate amounted to £33, 2s. 10d.; but the pursuer alleged that Mrs Munro had been *lucratus* by her husband's death, not only in the £33, 2s. 10d., but also to the extent of £2346 or thereby, consisting of various sums, including a sum of £400, being the price which she obtained by the sale of her deceased husband's practice. Other questions were raised in the action, but it is unnecessary to notice these.

Dr Munro, by a will dated 2d October 1872, had nominated a Mr Nicholson, (who predeceased him) his executor, and it further bore that he wished his wife "to inherit all or any property I possess." There was this further provision—"She will employ him to sell my practice for her, and she shall have it in her power either to take a sum in payment—say £500 or £600—or to take bonds and security for payment of a third part of the gross drawings of the practice for four years. Mr Nicholson shall guide her, and shall see that she sells the practice. If she cannot obtain the price I have mentioned, she will take what she can get, but it is distinctly my wish that she should sell the practice. Further, I consider it would be advisable for her to sell Weston House, and realise her money for it."

It appeared from the evidence which was led in the case that, after advertisement, Weston House where Dr Munro lived, was sold to Dr W. Whitelaw, Dr Munro's successor, for £1500, who also bought for £400 the "goodwill" of his practice. For the discharge of these obligations Dr Whitelaw entered into a personal bond, one clause of which was as follows:—"Therefore I hereby bind and obligemyself and my heirs, executors, and successors whomsoever, jointly and severally, without the necessity of discussing them in their order, to pay to the said Mrs Hay Margaret Edie or Munro, and her executors and successors or assignees, the sum of four hundred pounds sterling, by five equal yearly instalments of eighty pounds each."

The following letter was written by Mr Pagan, Mrs Munro's agent, in answer to an offer made by Dr Whitelaw to purchase the practice:—

"8th April 1873.

"I have your letter of 7th curt., and I am authorised to accept your offer for Weston House and the goodwill of Dr Munro's practice . . . The bonus for the goodwill to be eighty pounds per an. for five years, payable 31st March yearly, commencing first payment 31st March 1874. . . .

"I think you had better come at once and get introduced and set to work. Mrs Munro can receive you *ad interim*, and Dr Wood is ready to do his part.

"As to a circular from us, you would need supply your qualifications, experience, &c., for our preparing same.

"I think you have secured an excellent opening, and if you attain the success I wish for you, you will have nothing to regret in settling among us."

The pursuer maintained that the £400 having been received for the sale of the practice, must be included in the executry estate, and he therefore

contended that that sum should be applied in giving him relief under the letter of guarantee above mentioned. The defender, on the other hand, maintained that the £400 was obtained for Mrs Munro's personal recommendation, and could not be included in the husband's executry estate.

After a proof had been led and various procedure the Lord Ordinary (CURRIEHILL) pronounced an interlocutor finding Mrs Munro bound to relieve the pursuer to the extent of £33, 2s. 10d.: "*Quoad ultra* assolvizies the defender, the said Mrs Hay Margaret Edie or Munro, from the whole conclusions of the summons."

The part of his Lordship's note referring to the £400 was this:—"As regards the £400 which she received from Dr Whitelaw for the sale of the goodwill of her husband's practice, payable to her by five yearly instalments of £80 each, I am of opinion that the claim of the pursuer is entirely unfounded. It is an error to talk of this as the 'goodwill' of Dr Munro's practice. There is truly no such thing as 'goodwill' in the case of business carried on by a professional man, such as a physician, surgeon, or law-agent, whose success depends entirely upon his own personal skill. It is quite different in the case of a trade or manufacture, where the employer may have the possession of patents or trade secrets, or may by long exercise of his trade or manufacture in some particular locality have drawn together skilled artisans, and attracted the custom of a district to his establishment. In such a case it is not the individual skill of the employer, but the reputation which his establishment has acquired which creates that incorporeal, but frequently valuable, estate known as the 'goodwill' of a trade. But there is no such thing in the case of a professional man. His business dies with him, and the man who comes after him in the district must depend for success upon his own exertions. It is quite true that such businesses are occasionally sold; but what is thus sold in the case of a living professional man retiring from business is truly the personal recommendation which the seller gives to his former clients or patients in favour of his successor, coupled with the predecessor's own retirement from business. But where the physician or law-agent is dead, nothing of the kind can take place. He has been removed by death from all possibility of competing with the new doctor or the new solicitor; and his voice being for ever silenced, he cannot give any recommendation to his clients or patients. But if the family of the deceased professional man offer to recommend a successor to the clients or patients of the deceased on receiving a money equivalent, what is paid for is merely the recommendation of the living members of the family of the deceased, and that is precisely what was done in the present case. Dr Munro's business had greatly fallen off during his fatal illness, which lasted for nearly half-a-year, and without his widow's recommendation it was really of no value whatever to a new doctor. And it is clearly proved that but for Mrs Munro's recommendation Dr Whitelaw, who purchased Weston House and began practice in the district, would have paid nothing for the practice, and would have had to fight his way into business entirely on his own merits. But great sympathy appears to have been felt in the district for the unfortu-

nate circumstances in which Mrs Munro became a widow, and the old patients appear to have been willing to accept her recommendation in favour of a successor, in the knowledge, and indeed with the express intention, that she might, in return for such recommendation, receive from the new doctor a valuable pecuniary equivalent. And this it is which is called by the pursuer the sale of 'the goodwill' of Dr Munro's practice. But, as I have said, there is no such thing known to the law—nothing which in any sense of the word can be held to be *in bonis* of Dr Munro at his death, or to have been taken possession of by his widow as a lucrative succession. The £400 in question was the price which Mrs Munro received, not for anything which belonged to her husband, but solely for the exertions made by herself and her friends in recommending the patients of her late husband to avail themselves of the services of Dr Whitelaw as his successor in the district."

The pursuer reclaimed, and argued—The price of the practice must be included in Dr Munro's executry, for it was obtained for a thing that he had created, and was sold by his widow as his executrix. The goodwill of a trade was a recognised species of property. It could be assigned. It was carried by the Bankruptcy Act, and was an asset in the hands of an executor. There was no distinction in principle between the sale of the goodwill of a trade and the goodwill of a profession. The latter was sold every day when the parties were alive, and there was no reason why it should not be included in the executry of a professional man deceased if it was worth anything. In the present case Dr Munro dealt with it as property in his will, and the fact was that it brought £400 when sold. The defender said that the value of it was due to the personal recommendation of Mrs Munro, but Mrs Munro's recommendation was worth nothing except as Dr Munro's widow.

Authorities—*Worral v. Hand*, 1791, 1 Peake's Cases 74; *M'Cormick & Co. v. M'Cubbin and Others*, July 4, 1822, 1 S. 541 (new ed. 496); *England v. Downs*, 1842, 12 L. J., Chan. 85; *Smith v. Everett*, June 1859, 27 Beav. 446; *Mellersh v. Keen*, 27 Beav. 236 and 28 Beav. 453; *Potter v. Inland Revenue*, June 15, 1854, 11 Hurl. and Gordon Exch. Rep. 147; *Crutwell v. Tye*, 1810, 17 Vesey 335; *Spicer v. James*, 1830, reported in Collyer on Partnership, 104; *Attorney-General v. Brunning*, Jan. 31, 1859, 4 Hurl. and Norman, 94; *Davies v. Penton*, Feb. 6, 1827, 6 Barn. and Cress. 216; *Lindley on Partnership*, 884; *Clark on Partnership*, 430; *Robson on Bankruptcy*; *Hanson on Probate Duties*, &c. 165; *Smith's Mercantile Law*, 9th ed. 193.

Argued for respondents—The goodwill of a profession was personal to the professional man, and could not be transmitted, and was worth nothing after his death. The practice in the present case was worth nothing without Mrs Munro's recommendation, which was all that was paid for, and the £400 could not be included in Dr Munro's executry.

Authorities—*Farr v. Pearce*, February 10, 1818, 3 Maddock's Repts. 74; *Austen v. Boyd*, May and June 1858, 2 De G. and Jones, 626-85; *Spicer v. James*, *supra*.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary has decided that the widow of Dr Munro received nothing as her husband's executrix which can be called the "goodwill" of his practice; and that therefore the £400 claimed by the pursuer, which is the only claim of his which has been argued before us, was not the price of anything that Dr Munro ever had, but was the price of Mrs Munro's and her friends' exertions in recommending Dr Whitelaw as her husband's successor.

It has been said by the pursuer that there was a goodwill created by Dr Munro in connection with his practice, and that in so far as a person coming into Dr Munro's business was benefited by this goodwill, to this extent the goodwill must be held to be included in Dr Munro's executry estate. But, in the first place, it is quite clear that a distinction has always been drawn between the goodwill of a trade, where the individual skill of the trader has often less to do with the success of the undertaking than other circumstances connected with it, and a profession which is only carried on with success by means of the brain and other personal qualifications of the person conducting it. The distinction which has been drawn between these is thorough, and so the law has been laid down in these cases which have been quoted to us. The benefit derived from the exercise of a profession seems to me to be so personal to the individual exercising it that nothing can be said to transmit to the effect of being assets in the hands of an administrator. The case quoted of *Spicer v. James* (Collyer on Partnership, 104) seems to me to be an authority in terms, Sir J. Leach there saying "that the goodwill of a trade of a personal nature, as that of attorney, was not a subject of administration."

If I were to decide the case upon this point, I should go upon the decisions which have been referred to, and inasmuch as we have been referred to no precedent where the goodwill of such a profession has been transmitted to executors, I should have been compelled to decide that such a thing was not possible; but I have no desire to create a precedent in this case, and it seems to me that there is here a short ground upon which it can be decided, and it is this—That what Dr Munro left behind him was substantially worth nothing without his widow's recommendation, or, at all events, what it was worth has not been proved by the pursuer. Apart from some valuation of that, we cannot give effect to the pursuer's contention. Dr Whitelaw has distinctly stated that had it not been for the goodwill and recommendations of his predecessor's widow and her friends he would have given nothing for the practice.

The house in which Dr Munro lived was his widow's property. She preferred to sell it to a man in the same profession as her husband, and she threw in along with it her own goodwill and recommendations, for which the purchaser of the house was willing to pay. But she gave him nothing which she derived from her husband, and in my opinion the Lord Ordinary has decided rightly.

LORD ORMDALE—I am entirely of the same opinion as your Lordship, and I cannot conceive how a doubt can arise in this case. Doubtless it might be hard upon children, if there were any,

to hold that this sum of £400 did not fall within the husband's executry, and it would also be hard upon creditors if they were not to get a share of the deceased's assets. But we must first ascertain they were really so deprived.

I deal with this case first as a question of fact—Were there any assets transmitted to the widow in the shape of goodwill? In regard to this question there is rather an important circumstance in the case, viz., that Dr Munro had been laid up for five months before his death. It seems to me that his practice must have been much interfered with during that time. Then I do not think that the right term is used when it is said that it was Dr Munro's "practice," and that only, that was disposed of to Dr Whitelaw. In Dr Whitelaw's letter of 7th April 1873 he offers "a yearly payment of £80 for five years to Mrs Munro;" and in Mr Pagan's letter of the 8th April, accepting Dr Whitelaw's offer, he writes as follows—"I think you had better come at once and get introduced and set to work. Mrs Munro can receive you *ad interim*, and Dr Wood is ready to do his part. As to a circular from us, you would need supply your qualifications, &c., for our preparing same." That is just what might have been expected from Mr Pagan. He and Dr Munro's widow are quite ready to enhance the value of the practice by giving their recommendation, and this was done. It was quite natural that the widow should not interfere herself, and we find in point of fact that she did not, but she did so through Mr Pagan. Then we have the parole evidence, and it seems to me that Mrs Munro's, Mr Pagan's, and Dr Whitelaw's evidence is quite conclusive. The latter says—"I would not have paid £400 for the practice itself. What I was principally paying for was Mrs Munro's goodwill and the goodwill of Mr Pagan, her friend." Therefore, upon the facts, I can have no doubt that there was nothing obtained for anything transmitted from the deceased.

Next, upon the law, I think it is impossible to hold that a medical man's practice can transmit, and that the value of the goodwill of such a practice can be considered an asset in the deceased's executry. The authorities that have been quoted seem to me to be quite conclusive, and the result arrived at through them is quite consistent with the facts of this case. Upon what ground is it that a medical man has practice at all? Surely it is his personal qualities, and these alone, which give it to him, and alas! when the breath leaves his body his practice comes at once to a conclusion; and it is the same with many other classes of men whose gains are entirely dependant upon their own personal qualities.

But besides all that, in the present case, in point of fact, there is no asset except the recommendation of the widow through the medium of Mr Pagan, and also Mr Pagan's own good word. On the whole matter, I have no doubt at all that the Lord Ordinary is right.

LORD GIFFORD—I must say I have serious doubts in this case, although I do not actually wish to dissent from your Lordships' opinion.

I must feel some distrust in my own doubts when I hear my brother Lord Ormdale say that he cannot conceive how any doubt can arise, but I think it my duty to express the doubts which I entertain, as I consider that the case raises a

question of general importance. In the first place, I think it is quite clear that there may be the goodwill of the practice of a professional man as well as of a trade. You have instances of this in the case of medical men every day. It is said that this is only the case when both parties are living, the retiring doctor and his successor. But I cannot assent to this. I see nothing to prevent a medical man bequeathing his practice to a friend. All the other elements referred to here—the possession of the house, the widow's recommendation, &c., may add to the value of the goodwill, but they are not the goodwill itself; that is only what can be attributed to the doctor himself. Supposing Dr Munro had said in his will, "I direct that my widow shall employ A B to sell my practice, one-half of the proceeds for behoof of herself, and the other half for my friend C D," and supposing the will had been carried out by the executor-nominate, who predeceased the testator, instead of by the widow as executrix *qua* relict, and that everything else had been carried out in the same way, what would have been the defence of the widow to a claim for one-half of the £400 by the special legatee? I may be wrong, but I cannot see any defence. She might injure the goodwill by withholding her good word, but if the £400 is got for it, I cannot see how she could resist such a claim.

In a case of this kind I rather prefer to look at the documents, *e.g.*, the missives of sale and the bond for the price, than at the opinions of the witnesses. Now, look at the documents and see what is sold. "A medical practice" is advertised. This is said not to be the case; it is said that a house was sold, along with the good word of the medical practitioner's widow, but I cannot take this. It was a medical practice that was advertised, and a medical practice that was sold.

It seems to me that two things are fixed—(1) that Dr Munro's medical practice was sold; (2) that £400 was paid for it. Now, will it do to say that that sum was not paid for the practice, but for other things, as, *e.g.*, the practice along with the house? I do not think we can accept such a statement as that, for the two things were sold separately—the house for £1500, the practice for £400. Now, whose property was the practice? Did it belong to a different person from him who bequeathed it? Surely not. I put the case of children by a former marriage during the discussion, not as a case of hardship, but to test whose property the goodwill really was. I put another case. Suppose there had been a competition between the widow on the one part, and children, executor, creditor, or a special legatee, on the other part, would the widow have got it all? I cannot lay down such a proposition, and I am speaking not for this case alone but in general law.

You cannot say, "The goodwill would have been worth nothing if such a thing had happened," when this thing did not happen. You must take it as you find it, bringing £400 in the market. Supposing a dispute had arisen as to who was to sell the medical practice, surely the executor of the husband would have been preferred. The widow might have sold her own recommendation if she pleased, but that is all. The goodwill of the practice was a thing that was derived from the deceased alone, and must be included in his executry.

I do not absolutely differ from your Lordships

seeing that the case is already decided. I only wish to express my very serious doubts and my dissent from the principles laid down by the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Fraser—Mair. Agent—R. Menzies, S.S.C.

Counsel for Defenders (Respondents)—Trayner—Thorburn. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, January 12.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

CRUM EWING AND OTHERS *v.* HASTIES.

Superior and Vassal—Feu-Charter—Is a Boarding-School a Private Dwelling-House?

In the feu-charter of certain subjects feued for the purpose of making a street there was this condition—that the houses to be built upon them should be "used as private dwelling-houses only in all time coming." There was also a clause enumerating at length certain objectionable trades and manufactories to which the feu was not to be applied. Both conditions were made real burdens on the feus in favour of the whole feuars and their disponees upon the lands. Where it was proposed to use one of the houses as a boarding and day-school, the proprietors themselves residing there—*held* (*rev.* the Lord Ordinary, Curriehill) that such a use would be a contravention of the conditions of feu, and interdict granted accordingly against it at the instance of other feuars in the street.

The complainers in this action were Mr Crum Ewing and others, residents in Belhaven Terrace, West, Glasgow, a street which consisted of twelve dwelling-houses, forming a separate division, facing the Great Western Road. The situation was highly eligible, and the houses were of a superior class, being of the value of from £5000 to £7000 each. All but three belonged to the complainers severally. Two of the three were for sale, and the respondents, who were Misses Hastie, had recently purchased the third, which was No. 23 of the terrace.

The original titles of these subjects when feued out by the superior all contained the following clauses:—"(*Fourth*) . . . And it shall not be lawful to nor in the power of the second party" (*feuar*) "or his foreshaids, or his or their tenants in the said lots of ground, to . . . exercise or carry on, erect, or set down upon or within the said lots of ground, or the buildings erected or to be erected thereon, any trade, businesses, process, occupation, or manufacture of brewing, distilling" (a number of different manufactories were here specified) . . . "or any other manufactories and works; nor shall it be lawful for them to erect on said lots of ground any inn, hotel, or public stable; and they are prohibited from carrying on therein the businesses of an inn, or hotel-keeper, or stabler, or of selling porter, ale, or spirituous liquors, from occupying any