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Thursday, February 1.

SECOND DIVISION.

(Before Seven Judges).

[Lord Kyllachy, Ordinary.

PHILP v. MARTIN.

*Executor—Property—Goodwill of Going  
Business—Act 9 Geo. IV. cap. 28.*

A wine and spirit merchant having died intestate on 7th December 1891, his widow continued the business in her husband's name, using for that purpose the existing stock, shop fittings, &c. On 16th February 1892 she obtained a transfer of the licence to her own name, the magistrates preferring her application to that of the executor-dative *qua* next-of-kin of her husband. From that time the business was carried on in her name by her till her death, and thereafter by her executor until the expiry of the licence in May 1892. Her executor then sold the business, goodwill, stock, and fittings for £1500, of which he paid £250 to the heir-at-law in satisfaction of all his claims.

The husband's executor sued the widow's executor for an account of all intromissions with the estate had by (1) the widow and (2) the defender.

*Held* by a majority (1) that the profits of the business between the death of the husband and the transfer of the licence belonged to the pursuer; beyond that date that the profits belonged to the widow and her executor; (2) that the defender was entitled to the price of the goodwill—*diss.* Lord Trayner and the Lord Justice-Clerk, who were of opinion (1) that the profits derived from the business during the existence of the licence were due to the pursuer as derived solely from the husband's estate; (2) that so far as goodwill attached to the premises, the heir-at-law had received it; the remainder attached to the business, and the pursuer was entitled to the price of the business including the goodwill.

The Act 9 Geo. IV. cap. 58, provides—"Sec. 19. Provided always and be it enacted that if any person duly authorised to keep a common inn, alehouse, or victualling house as aforesaid, shall die before the expiration of the certificate to him or her in that behalf granted, it shall be lawful for any two or more of the justices of the peace or magistrates of the county or royal burgh respectively in which such house or premises are situated, to grant to the

executors, representatives, or shponees of the person so dying, and who shall be possessed of such house or premises, a transfer of the certificate to keep or continue such house or premises as a common inn, alehouse, or victualling house, as before such death, until next general or district meeting to be held under the authority of this Act."

John Henderson Philp having in November 1875 married Mrs Jeannie French or Philp, proprietor of a wine and spirit business in Glasgow, the licence was transferred to him. Philp died on 7th December 1891, intestate and childless, survived by his widow, his mother, three brothers, and one sister. His widow took possession of all his moveable property, and also of the wine and spirit business, which she continued to carry on. Upon 16th February 1892 she applied to the magistrates for transfer of the existing licence to herself. This application was opposed by Thomas Philp, writer, Glasgow, executor-dative *qua* next-of-kin of the deceased John Philp, but the transfer was granted. Mrs Philp died on 23rd February 1892, having by her settlement appointed Matthew Martin, Glasgow, her sole executor and universal legatee.

Upon her death Martin took possession of all the moveable property, and also of the wine and spirit business which he carried on, and of which he retained the profits till 16th May 1892, the date of the expiry of John Philp's transferred licence. He then sold the business and goodwill, stock and fittings, to Thomas Logan, Pollockshaws, for £1500, of which he paid £250 to Arthur Philp, heir-at-law of the deceased John Henderson Philp, and proprietor of the public-house premises, in satisfaction of all his claims as heir-at-law and in consideration of his granting and accepting the purchaser of the goodwill as tenant for seven years at a yearly rent of £45.

Upon 19th July 1892 Thomas Philp brought an action against Matthew Martin for an account of the intromissions with Philp's estate, first by the widow and afterwards by the defender.

The pursuer averred—" (Cond. 6) The said Mrs Jeannie French or Philp immediately after the death of the said John Henderson Philp, without any title, and before confirmation of the executor as aforesaid, at once took possession of the said deceased's wine and spirit business, and continued to carry on the business till the date of her death on the 23rd February 1892. She retained the profits of said business, and refused to account therefor to the pursuer, as executor aforesaid. The profits of said business amounted on the average to at least £6 per week. (Cond. 7) Immediately after the death of the said Mrs Jeannie French or Philp, the defender, as her sole executor and universal legatee, entered into possession of her estate. . . . He also entered into possession of the said wine and spirit business, and carried it on and retained the profits till the 16th May 1892, when he sold the business without the authority of the pursuer, as executor aforesaid. The defender retains the sums realised by the

sale of the goodwill, stock, and fittings of said business, which cannot amount to less than £1536, 6s. 2d. The defender is called on to produce a statement of the proceeds realised by the sale of said business. In reference to the statement in answer it is admitted that at the date of Mrs Philp's death the licence was in her name. Explained that the licence was wrongously obtained by her at the said licensing court, contrary to the provisions of the Act 9 Geo. IV., cap. 28, secs. 19 and 20, which is referred to for its terms. Any sum received by her executor for the goodwill of the business forms part of the estate of the deceased John Henderson Philp."

The defender averred—"At the date of her death the licence was in Mrs Philp's own name. Accordingly, the defender, as her executor and universal legatee, took possession of the business, and sold the goodwill thereof for a sum of £1400. Out of that sum the defender paid to Arthur Philp, the heir-at-law of the late Mr Philp, a sum of £250. This sum was paid to Arthur Philp in satisfaction of all his claims as heir-at-law, and in consideration of his accepting the purchaser of the goodwill as tenant of the shop."

The pursuer pleaded—" (1) The defender being sole executor and universal legatee of the late Mrs Jeannie French or Philp, is bound to count and reckon with the pursuer, as executor condescended on, for her intromissions with the estate of the late John Henderson Philp. (2) The defender having intromitted with the estate of the deceased John Henderson Philp, is bound to reckon with the pursuer as executor condescended on, as concluded for."

The defender pleaded—" (2) The goodwill of the said business having belonged to Mrs Philp at the date of her death, the defender is not bound to account for the value of the same to the pursuer."

Upon 21st January 1893 the Lord Ordinary found—" (1) That the defender is bound to account for the profits of the business mentioned on record from the death of the late John Henderson Philp to the date of the transfer of the licence to his widow, under deduction of the sum of 30s. per week as remuneration for the widow's personal services; (2) that the defender is not bound to account for any further profits; and (3) that he is not bound to account for any part of the sum received by him for the goodwill of the business sold by him in May 1892: With these findings appoints the case to be put to the roll for further procedure, reserving in the meantime all questions of expenses.

"*Opinion.*— . . . There are two points on which I heard argument the other day, and which it is necessary to decide. The first point is as to the profits of the deceased's business between his death on 7th December 1891 and the transfer of the licence obtained by his widow on or about 16th February 1892. During that period the widow, who had all along, it appears, managed the business, continued to man-

age it as before, using for that purpose the stock, shop-fittings, &c., which were undoubtedly part of the husband's moveable estate. The question is, whether besides accounting for the stock and shop-fittings, she is bound to account for the profits which she made during that period.

"I am of opinion that the profits in question belonged to the deceased's executry estate, subject, of course, to a reasonable allowance to the widow for her personal services. The widow had at this time no title of her own to which to ascribe her possession. The business was conducted by her in the deceased's name, and the profits having been earned by the employment of the deceased's stock-in-trade and other moveable property, I see no reason why she, or rather her executor, should not account for these profits.

"The other question is as to the goodwill of the business, which is said to have been appropriated by the widow, and to have been sold for a large price by the defender as her executor. . . .

"I am of opinion that the pursuer has no claim to participate in the sum derived by the defender from the goodwill of the business. The defender did not sell on pursuer's behalf, and stands in no fiduciary relation to the pursuer. Any goodwill which existed at the husband's death was necessarily extinguished when the widow, not on behalf of the pursuer, but in competition with him, obtained a transfer of the licence to herself. From that time, in my opinion, the business with the profits and goodwill, so far as not attached to the premises and belonging to the heir, belonged to the widow or her estate, and it was the business thus acquired by the widow, and not the husband's business, which was eventually sold by the defender."

The pursuer reclaimed, and argued—First, the pursuer was entitled to the profits until the date of the sale, not merely until the date of the transfer. Second, as regarded the goodwill, the business was that of the husband when he died, and it then became the property of the executor. The transfer of the licence did not transfer the property; it was merely a permission from the magistrates to sell liquor without interference from the police; it did not affect the property of the business. As a matter of fact the magistrates had misunderstood the provisions of Act 9 Geo. IV. c. 58. The widow and her executor merely carried on the husband's business, and as they had sold it they had to account for the proceeds. The goodwill was attached to the personal interest in the business, and not to the property in the premises—*Bain v. Monro*, January 10, 1878, 5 R. 416.

The respondent argued—As regarded the profits of the business, it was admitted that as the business belonged to the deceased J. H. Philp at the time of his death, the profits belonged to his estate until the transfer of the licence to the widow, and must be accounted for. But under the statute the transfer of the licence transferred the busi-

ness so that it became the property of the widow, and the profits therefore went to her and her executor, so that he was not bound to account for them after the date of the transfer. As regarded the goodwill of the business, it attached to the heritable subject, and was not personal. The heritable property in which the business was carried on went to the deceased's heir-at-law. The respondent had settled with him, and the appellant could not be heard as objecting to the respondent's right to sell what was really a heritable subject. It was plain that the goodwill was attached to the house, both upon the cases cited and because it was owing to the facts of the position of the house, its accessibility and prestige, that the goodwill had any value. The case of *Bain v. Monro*, cited *supra*, had no applicability here, as the goodwill there was held to be a question of personal recommendation — *Hughes v. Assessor for Stirling*, June 7, 1892, 19 R. 840; *Drummond v. Assessor for Leith*, February 5, 1886, 13 R. 540; *Bell's Trustees v. Bell*, November 8, 1884, 12 R. 85; *Macfarlane & Dailly v. Assessor for Dundee*, June 13, 1891, 18 R. 939.

#### At advising—

LORD YOUNG—John Philp died intestate and childless on 7th December 1891 survived by a widow, his mother, three brothers, and one sister. Arthur, his eldest brother is his heir, and a younger brother Thomas (the pursuer) his executor. John (the deceased) was at his death proprietor of a public-house of the value of £45 a-year. He was in the personal occupation of this house in which he carried on the business of a publican. At his death there were in the premises fittings and stock-in-trade of the value of £102, 9s. per inventory and valuation, the accuracy of which is, I understand, admitted. The widow, on her husband's death, arranged with his heir for permission to occupy the premises and carry on the publican business therein at a rent, as I gather from the accounts, of £40 a-year. It is immaterial that the arrangement with the heir was made subsequent to the discovery that the will in the widow's favour had been revoked. She occupied accordingly (as we must hold with the landlord's permission), and carried on the business till her death on 23rd February 1892, after which her brother and executor (the defender) continued the occupation and the business till the following Whitsunday. On 20th March 1892 the defender entered into the agreement with the landlord of the premises, the import of which is that the latter should grant a lease thereof for seven years at a rent of £45 to Mr Thomas Logan, a tenant of the defender's selection, the defender paying £250 to the landlord as a consideration for the agreement. This agreement was implemented, and Logan has accordingly been in occupation of the premises as tenant since Whitsunday 1892. The defender's transaction with the landlord for Logan's behoof was obviously, and of course, in pursuance of a prior understanding or bargain between Logan and

himself, which was to the effect that Logan should pay him £1400 for the goodwill of the business, together with the stock and fittings as existing at Whitsunday 1892.

This action of count and reckoning was raised on 19th July 1892, and the first request for an accounting, so far as appears, was made on 21st June. No demand was ever made for possession of the shop-fittings or the stock-in-trade left by the deceased, or claim intimated in respect of them prior to 21st June. The explanation of this delay, and the misapprehension of both parties for a time, may be something connected with the destruction or cancellation of the will which the deceased Philp had certainly made in favour of his widow. This topic need not be pursued, as we must take the case on the footing that the deceased died intestate, and that his executor is entitled to an accounting accordingly. Nor to the account which has been judicially given on that footing is there any objection by the pursuer, except with respect to—1st, The profits of the publican business carried on by the widow and the defender between the date of Philp's death and the following Whitsunday; and 2nd, the sum which the defender received under his bargain with Logan in excess of, first, the value of the shop-fittings and stock-in-trade; and second, the sum of £250 paid by the defender to the landlord.

The case is the simple one of a man dying intestate while carrying on the business of a publican in premises which were his own property. The title to the premises, with the right of immediate occupation, passed to the heir, while the executor had right to any personal property therein with a title and duty to realise it, and dispose of it as intestate estate of the deceased. The nature, amount, and value of such personal property here was ascertained by an inventory and valuation made at the time, and the accuracy of which is, as I have stated, admitted. That the executor had no right to carry on business in the premises, or indeed to occupy them for any purpose is clear. Then had he any right except a right to demand the personal property which was therein at the death of the deceased owner? In other words, would his right have been satisfied by handing over to him this personal property—that is, the fittings and stock specified in the inventory, or paying him their value if *bona fide* consumed?

The pursuer on the one hand contends that "the business," or the "goodwill" of the business which the deceased had been carrying on down to his death was part of his executry estate, and that if his widow or any other carried it on thereafter, the profits must, as an accessory, be part of that estate, and also the price thereof if ultimately sold. The defender, on the other hand, disputes this contention, and maintains that the pursuer had no right or title by himself or another to carry on business in the premises, which had passed to the deceased's heir, or to hinder the heir himself or any other, whether the widow of the deceased or a stranger from doing

so. The heir's right was, he contends, indisputable not only to carry on the business of a publican in the premises which had become his property, but to confer such right upon anyone he pleased, whether the widow of the deceased proprietor, or a stranger—the executor of the deceased having no right or interest in the matter entitling him to interfere beyond demanding possession of any property in the premises belonging to the execruty estate, and to prevent, if he thought fit, the use of the deceased's name. He further maintains that the occupation and particular use of the premises—that is as a public-house—by the widow till her death, and thereafter by himself, cannot be questioned by the pursuer, who had no right to any occupation or use thereof. With respect to his bargain or transaction with Mr Logan, the defender maintains that the import of it was that he should for a consideration agreed on between them, successfully use his influence with the landlord of the premises, to procure for Mr Logan a seven years' lease at a rent of £45, and hand over to him the fittings and stock which were on the premises at his entry or the date of the bargain. This, he says, did not on the one hand affect his obligation to account to the pursuer for the fittings and stock as ascertained to exist at Mr Philp's death, or on the other give the pursuer any right or interest in his bargain with Mr Logan to which he was no party.

And first, with respect to the pursuer's claim for the profits. It is not averred, and we have no ground for assuming it to be the fact, that the widow in carrying on the business after her husband's death used the name of her deceased husband. She obtained a licence in her own name as soon as practicable, and there is no suggestion of any objection by the pursuer to the name in which the business was carried on, either by the widow or the defender, during the brief period that they carried it on. He was resident in the place, and certainly had an eye on the premises where the business was carried on—for he opposed the widow's application for a licence and tried to procure one for himself. The incident is immaterial otherwise than as tending to show (1) that the pursuer was cognisant of all that the widow did about the business, and (2) that so far from aiding her by good will he did what he could to hinder her. He could not fail to know that the widow believed that she was carrying on the business on her own account and not for him, and if he thought the belief erroneous he neither said nor did anything to undeceive her. Nor if her deceased husband's name was on the sign and allowed to remain unaltered (which we have no reason to believe), did he signify in any way that this was an invasion of his right or involved any liability to him. The business was originally hers, and if her husband's name was ever substituted for hers on the shop sign, I do not doubt that after his death she would, on an intimation that the pursuer thought

its continuance an invasion of his goodwill, have restored her own. The notion that its continuance was any benefit to her on the one hand, or detriment to the execruty estate on the other, does not commend itself to my mind. The pursuer's first communication regarding the business was in June after the widow's death, and when the premises and the business were in the hands of Mr Logan, who, I assume, used his own name in carrying it on. There is no averment to the contrary. I have therefore no occasion to consider whether or not the pursuer was entitled to object to the widow or any other using the name of the deceased. It was not used, so far as we know, and certainly no objection on this head was ever stated. But assuming that it was used in violation of the pursuer's right, I cannot hold that his remedy lies in a demand for the profits of the business. He might have put a stop to the use, and possibly claimed damages if he sustained any, but to stand by without objection or communication of any kind, and then, after a lapse of time, claim the profits on the footing that the business was being carried on for him, is a view of his right which I cannot assent to. Nor, in my opinion, can this claim to profits be supported by the fact that use was made of the fittings and stock specified in the inventory. The use was without title, but the things themselves were quite lawfully in the widow's custody and possession at her husband's death. We have no reason to impugn the integrity and good faith of her conduct on a doubt of the statement that she was ignorant of the destruction of the will in her favour, and without the will she had, *jure relictae*, the substantial beneficial interest in them to the extent of one-half. The executor made no claim till after her death, and I have no difficulty in rejecting the proposition that his remedy for the use without title is a claim to the profits of the business. The only legal and equitable claim which he can make is that the things themselves or their value, as to which there is no dispute, shall be accounted for and made forthcoming. On this first head therefore—the claim to profits—my opinion is in favour of the defender.

Second, with respect to the pursuer's claim upon the bargain which the defender made with Mr Logan. The pursuer's case on this head is that he was in right of "the goodwill" of the business of the deceased John Philp; that he was at liberty to withhold or confer it on whom he pleased and on such terms as he pleased; and that the defender having sold it to Mr Logan and so conferred it on him, must be assumed to have done so on his, the pursuer's behalf, and so be liable to account to him for the price. The defender answers that the goodwill which he sold to Logan, was the goodwill of the business which he succeeded to and took possession of as executor and universal legatee of the widow who was carrying it on at her death under a licence in her own name; that the substance and reality of his bargain with Logan was that he should procure from

the landlord a lease of the premises to him for seven years at a rent of £45, Logan paying him £1400 if his influence and efforts to that end were successful; that he was not acting for or in communication with the pursuer, and did not bestow on Logan (which indeed he could not do) any right which the pursuer could give or withhold.

On this head also my opinion is in favour of the defender and against the pursuer. In the first place, I think it clear that the only goodwill which the pursuer had to dispose of was liberty to use the name of the deceased John Philp in carrying on the business of a publican. He might have sold this liberty to anyone who was willing to buy it, or had he found anyone who was willing to pay him for his influence and efforts to procure a lease of the premises from the landlord, he might have transacted with him, just as any other might whose services in such a matter were appreciated and sought for. But the only goodwill which as executor he was or is at liberty to dispose of, is, as I have said, the right to carry on the publican business under the name of the deceased John Philp. It does not appear that hitherto anyone has thought this liberty worth buying, but if any such person shall hereafter turn up he must apply to the pursuer as the only one who can sell it.

I may add in conclusion that with respect to the pursuer's claim for profits the case would in my opinion have been the same had the widow, immediately on her husband's death, obtained a lease from the landlord for seven years from 28th December 1891 (the date of the death) at a given rent, and remained alive and carried on the business during the seven years, for no limit to the time during which the pursuer might have delayed his demand for an accounting, on that footing, occurs to me, consistently with the view which he urges of his right, and the widow's liability as in legal estimation manager for him, although she had no intention of occupying that position, or thought that she did. Again, suppose that towards the end of the seven years, or say after the lapse of two, three, or four years, she sold the goodwill of what both she and the purchaser from her honestly believed to be her own business, together with her successful influence with the landlord to procure for the purchaser a transference and prolongation of the lease in his favour — I am unable to see why the pursuer would not have been entitled to the price as on a sale of his property made by the widow as acting for him, if the arguments on which he rests his demands on the defender are well-founded. Nor is there any specialty of importance in the fact of widowhood, for the case would obviously have been the same had a stranger to the deceased obtained a lease of the premises from the landlord, and carried on the business of a publican therein, or had the landlord himself entered on the occupation and taken up the business of a publican. The view of being, in the estimation of law, manager or agent of the executor, and

liable accordingly cannot be dependent on the circumstance of widowhood, or, so far as I am able to see, on the circumstance of the time that has elapsed before interposition by the executor being six months or six years.

**LORD RUTHERFURD CLARK**—The pursuer is the executor of the deceased J. H. Philp, who carried on within his own premises the business of a wine and spirit merchant. He died intestate on 7th December 1891. He was succeeded in his heritage by his brother Arthur Philp.

On the death of Philp his widow carried on the business in the same premises till her death on 23rd February 1892. Notwithstanding the opposition of the pursuer, the licence which her husband held was transferred to her, and the heir allowed her to continue in the occupation of the premises. After her death the defender, as her executor, carried on the business till 16th May 1892, when he sold the goodwill for £1400. He sold it in the belief that it belonged to him as the executor of Mrs Philp. He had no other title, and he sold in that capacity. But at the same time he undertook to obtain and did obtain for the purchaser a seven years' lease of the premises.

The pursuer says that the goodwill was a valuable part of Philp's executory estate, and he claims the benefit of the sale made by the defender. In other words, he claims the price, less £250, which was paid to the heir for the lease.

In my opinion the proposition of the pursuer is not true in fact. I do not think that he had any goodwill to sell, and if he had a right to anything which could be described by that name, I am satisfied that it had no value. We have high authority for saying that the goodwill of such a business goes with the house—(*ex parte Punnett*, November 18, 1880, 16 Ch. Div. 226; *Cooper v. Metropolitan Board of Works*, November 24, 1883, 25 Ch. Div. 472). "It is not what is called a personal goodwill." It is, as Lord Eldonsaid, the chance that customers will continue to resort to the same place. The pursuer had no right to the house, and could give none. Indeed, he was not entitled to enter it save for the purpose of removing the effects of the deceased. He had not even a licence of which a purchaser might have got the benefit. I do not enter into the question whether the magistrates did right in preferring the claim of the widow. It is enough that he had no licence. In these circumstances I cannot see that the pursuer had anything to sell or that he could assign a purchaser into any right.

In the course of the discussion the pursuer did not attach much or any value to the right which he claims. He relied chiefly on the fact that a sale of the goodwill was made by the defender, and he contended that as the business was his, he was entitled to adopt the sale, to the effect of requiring the defender to account for the price.

I have already pointed out that the defender did not profess to sell anything

that belonged to the pursuer. He sold the goodwill under his title as executor, and therefore as part of the executry of the widow. In other words, he sold the goodwill, if it formed part of that executry estate. He did nothing more. I doubt if he had anything to sell unless it might be his undertaking to obtain a lease from the heir, though the fact that the widow had been in possession of the licence might be of some value to the purchaser.

If this be so, I do not see how I can sustain the claim of the pursuer. I see no ground on which he has a right to adopt the sale. The defender sold what he believed to be his own, and he sold nothing unless the goodwill, which he professed to sell as part of Mrs Philp's executry estate. The pursuer cannot, I think, take benefit by the sale, which in the case supposed would be a sale of nothing.

The pursuer might have a claim if he could show that he was injured by what the defender had done. He could appeal to the maxim, *Nemo debet esse locupletior damno alterius*. But he was in no sense injured. Nothing was taken from him. No right belonging to him was diminished or affected. He remained exactly as he had been, with the same power of sale, and with the same power of making the sale effectual if he had anything to sell. Consequently he is not seeking to recover a loss, but to make a gain, to which in my opinion he has no title.

I have been hitherto assuming that the business carried on by the widow was the business of her husband, and that the goodwill of that business fell into his executry. But I concur with the Lord Ordinary in holding, that not later than the transference of the licence, the business was the business of the widow. The business of J. H. Philp necessarily perished because it could not be carried on by his executor, and the executor could not carry it on because he had no licence and no right to the premises. The widow in no sense represented her husband, and did not carry on the business on account of his executry estate. On the contrary, she opposed the pursuer's claim for a transference of the licence, for the obvious purpose of excluding the pursuer and making the business her own. The proprietor allowed her to occupy the premises, and in the absence of any allegation to the contrary, I must hold that this permission was given to her for her own benefit. There is nothing to suggest that it was given to her as the servant of the pursuer, or for the benefit of her husband's executry estate. The pursuer could not have prevented the widow from carrying on the business on her own account. He could have withdrawn the stock-in-trade and fittings which belonged to her husband. But he could do nothing more. It is true that she made use of the stock, but that is of no importance except in so far as it may affect her obligation to account.

I am therefore of opinion that the business which existed at the widow's death

was her own, and that any goodwill which attached to it formed part of her executry estate.

For these reasons, I hold that the interlocutor of the Lord Ordinary should be affirmed.

LORD ADAM and LORD KINNEAR concurred with Lord Rutherford Clark's opinion.

LORD TRAYNER—The interlocutor of the Lord Ordinary prefixed to this reclaiming-note only expresses the result of the application of findings pronounced by him in his interlocutor of 21st January 1893. It is these findings which are now brought under review.

The case before us is this—The late John Henderson Philp at the time of his death (7th December 1891) carried on business as a wine and spirit merchant. He died intestate, and the pursuer is his executor *qua* next-of-kin. Mrs Philp was survived by his widow, who immediately entered on possession of the premises occupied by her husband, and carried on the business which had been her husband's until her death on 23rd February 1892 without any title, but having obtained a transfer of the licence granted to her husband to her own name about a week before, namely, on 16th February 1892. Mrs Philp left a settlement by which she appointed the defender her executor and universal legatee, who in that character sold the business and goodwill thereof. The questions now are—(1) To whom belong the profits derived from the business from the date of Mr Philp's death till it was sold; and (2) to whom does the sum received for goodwill belong?

On the first of these questions the Lord Ordinary is of opinion that the profits derived from the business, as carried on between the date of Mr Philp's death and the 16th February 1892, when the licence was transferred to the name of the widow, belong to the pursuer, but that beyond that date the profits belong to the widow, and the defender as her executor. The ground on which the Lord Ordinary proceeds is, that after her husband's death, and until the house was transferred, the widow had no title to which to ascribe her possession; that the business was her deceased husband's business, and that the profits were earned by the employment of the deceased husband's stock-in-trade and other moveable property. I agree with the views so expressed by the Lord Ordinary, but I think on these grounds that the pursuer is entitled to more than the Lord Ordinary has awarded him. The transfer of the licence did not transfer the business; it gave the widow authority to deal in excisable liquors, but nothing more. Accordingly, what she did deal in after the transfer of the licence was nothing more nor less than what she had been dealing with before the transfer, and that was her husband's business, "stock-in-trade, and other moveable property," all then belonging and due to the pursuer as the husband's executor. In my opinion the whole profits derived from the business from the date of Mr Philp's

death until the time when it was sold are due to the pursuer, having been derived solely from the employment of the late Mr Philp's estate. These profits are, of course, to be ascertained after making due allowance to the widow or others for services rendered in the business.

With regard to the second point, the disposal of the sums obtained for goodwill, I differ from the Lord Ordinary. I do not consider it necessary here to inquire whether the goodwill of a business falls to the heir-at-law or the executor, for that question does not really arise here. The heir-at-law has been settled with; he claims no more than he has got, and the pursuer does not question the heir's right to keep what he has got. But after the heir-at-law has been paid what is or is supposed to be his share of the goodwill, what becomes of the balance? The Lord Ordinary awards it to the defender as executor of Mrs Philp, because (1) he, the defender, in selling the business, did not sell on the pursuer's behalf; and (2) because on the transfer of the licence to the name of the widow, "any goodwill which existed at the husband's death was necessarily extinguished." I do not think these reasons warrant the Lord Ordinary's conclusion. First, it is immaterial whether the defender in selling the business sold it for the pursuer or not. The question is, whose property did he sell? not on whose instructions or authority did he sell it. If the business, stock, and fittings were the property of the deceased Mr Philp or his executor, then Mr Philp's executor is entitled to the price realised by the sale. That result is not affected by any consideration as to the seller's right or authority to sell. Now, that the stock and fittings were the property of the pursuer when sold is not, in my opinion, open to the slightest doubt. They were part of Mr Philp's estate admittedly at the date of his death—they never were transferred to or acquired by his widow—they remained therefore part of Mr Philp's executry claimable by the pursuer. The actual stock in the shop when Mr Philp died, was of course different from that in the shop when sold. But the latter was the equivalent of the former, and was all bought and paid for out of the proceeds of the business. As to the goodwill—it attached either to the premises or to the business carried on in the premises, or partly to both. So far as it attached to the premises, the heir-at-law, the owner of the premises, has received it—what remains must attach to the business, for it was not an independent and separate right or asset in itself. Then if it was attached to the business, and went with the business, the price paid for it must go, just like the price of the stock and fittings, to the person to whom it belonged. The buyer of the business paid somewhere about £1500 for business, goodwill, stock and fittings. Of that a certain proportion has been paid to the owner of the premises—rightly or wrongly. The balance, it appears to me, can belong to nobody but the person *in titulo* to the business, good-

will, stock, &c., and that is the pursuer. The transfer of the licence to the widow, whether granted to her in competition with the pursuer or not, could not diminish the estate of Mr Philp nor extinguish the goodwill any more than it could extinguish the business itself, nor could it transfer to her any asset belonging to her deceased husband. It did not make the business or the goodwill; it only enabled the widow to carry on lawfully the business her husband had left. I think, therefore, the pursuer is entitled to the amount realised by the sale of the business, including the goodwill, less the amount paid to the heir-at-law, and less the value of anything sold and included in the price (if there was any) which the widow had purchased after her husband's death out of her own funds.

LORD JUSTICE-CLERK—I concur entirely in Lord Trayner's opinion.

LORD PRESIDENT—I agree with the remarks made by Lord Young, and I also concur in Lord Rutherford Clark's opinion.

The Court adhered.

Counsel for the Reclaimer—Guthrie—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Respondent—Dundas—A. S. D. Thomson. Agents—Gill & Pringle, W.S.

Thursday, February 1.

## SECOND DIVISION.

(Along with Three Consulted Judges.)

[Lord Kincairney Ordinary.]

### BAILLIE v. HUTTON.

*Road—Burgh—Pavement of Public Street—Common Law Liability as regards Safe Upkeep of Pavement—Reparation.*

Where the title to a house in a public street of a burgh included the *solum* of the pavement in front of it, held (*diss.* Lord Young) that the proprietor was bound at common law to keep the pavement in safe condition for foot-passengers.

*Road—Burgh—Pavement of Public Street—Construction of Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), secs 279, 289, 317, and 326—Liability for Safe Upkeep of Street Pavement in Glasgow not Taken over by Police Commissioners—Reparation.*

Where the title to a house in a street on the register of public streets for Glasgow included the *solum* of the pavement in front of it, held (*rev.* Lord Kincairney, and *diss.* Lord Young and Lord Adam) that the proprietor was liable for accidents occurring through the unsafe condition of the pavement until the pavement had been taken over by the Police Commissioners in terms of section 326 of the Glasgow Police Act 1866.