difficulty and perhaps hardship of this, when, as she says, her husband has deserted her and gone to New Zealand, but that cannot affect the question as between her and her father-in-law or his representatives.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—M'Lennan — Craigie. Agents — Miller & Murray, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—M'Millan. Agent—W. B. Rainnie, S.S.C.

Saturday, March 12.

SECOND DIVISION.

MURRAY'S TRUSTEE *v.* M'INTYRE.

Heritable and Moveable—Goodwill—Public-House.

A publican who carried on business in a public-house owned by himself disponed the premises in security for a loan. After the loan had been called up, but not paid, the publican executed a trust-deed on behalf of his creditors.

Thereafter a sum of £950 was offered to the trustee as purchase price of the goodwill, fittings, fixtures, and working utensils of the business on condition that the purchaser was accepted by the landlord as tenant for seven years at a specified rent, and that the purchase money should be paid on the transfer of the licence to the purchaser. The trustee, with consent of the heritable creditor, accepted the offer, and the licence was transferred to the purchaser, who became tenant in terms of his offer. Of the purchase money, £900 was adjusted as the price of the goodwill.

Held, in a question between the trustee and the heritable creditor, that this sum was to be treated as being the proceeds partly of heritable and partly of moveable estate.

Observations (*per* Lord Moncreiff) on *Philps' Executor* v. *Martin*, February 1, 1894, 21 R. 482, 31 S.L.R. 384.

In January 1898 Daniel Murray, who carried on business as a publican in a public-house in Glasgow, of which he was the owner, disponed the premises to Douglas M'Intyre in security for a loan of £1415.

In 1901 M'Intyre called up the loan. Murray was unable to pay it, but continued to pay interest on it down to 20th February 1903.

On 5th February 1903 Murray, having got into difficulties, granted a trust-deed on behalf of his creditors in favour of Richard M'Culloch, accountant, Glasgow.

On 17th February 1903 the trustee received the following among other offers:—"Dear Sirs,—I hereby offer you the sum of nine hundred and fifty pounds sterling (£950) as purchase price of the goodwill, fittings, fixtures, and all working utensils of Mr Daniel Murray's spirit business situated at 40 Kinning Street, Glasgow, on the following conditions:—(First) that I be accepted by the landlord as a tenant, and a lease be granted me for not less than seven years from Whitsunday first at a yearly rental of £49; (second) that the purchase money be paid on my getting transfer of the licence at the Licensing Court in April first and possession given; (third) that stock in hand be taken over at mutual valuation and paid for in cash.—Yours truly, JOHN STIRLING."

The trustee requested M'Intyre to concur in granting a lease of the public-house to Stirling, and M'Intyre consented to do so on the condition that the question as to the person entitled to the price of the goodwill should be settled by special case. The trustee agreed to this, Stirling's offer was accepted, and in May 1903 the licence was transferred to Stirling, who became tenant of the public-house for seven years in terms of his offer. Of the purchase price of £950, £50 was adjusted as the value of the fittings, fixtures, and working utensils, and £900 was lodged in bank in the joint-names of the trustee and M'Intyre to await the decision in the special case.

The special case was thereafter presented to the Court, the parties to it being (1) the trustee, and (2) Douglas M'Intyre.

The questions of law were—"1. Is the said sum of £900 to be treated as being wholly the proceeds of moveable estate? 2. Is the said sum to be treated as being wholly the proceeds of heritable estate? 3. Is the said sum to be treated as being the proceeds partly of heritable and partly of moveable estate?"

The special case stated—"The parties have agreed on the allocation of the said sum in the event of the Court determining that it is partly heritable and partly moveable."

Argued for the first party—The price of the goodwill was moveable estate, and fell to him to be administered in terms of the trust deed. At anyrate, a portion of the price of the goodwill was moveable—*Hughes* v. *Assessor for Stirling*, June 7, 1892, 19 R. 840, 29 S.L.R. 625. The case of *Philps' Executor* v. *Martin*, February 1, 1894, 21 R. 482, 31 S.L.R. 384, was distinguishable from the present, as in that case the question arose between an heir and an executor, and in such a question the Court refused to consider the value of the goodwill apart from the premises.

Argued for the second party—The goodwill of the public-house was heritage, and formed part of the value of the premises which belonged to him as heritable creditor. The price of the goodwill therefore belonged to him — *Philp's Executor* v. *Martin*, *supra*; *Bell's Trustees* v. *Bell*, November 8, 1894, 12 R. 85, 22 S.L.R. 59.

At advising—

LORD TRAYNER—I am not prepared to assent to the proposition that the goodwill of a public-house business goes with the

house, if that is maintained as a general and abstract rule, regardless of the special circumstances of each case. In the sale of such a business with the goodwill thereof, there are or may be elements, and elements of importance and value, of a purely personal character which go to enhance if not produce the goodwill. For example, a man may sell the public-house business carried on by him, with a right to the purchaser to carry it on in the seller's name, or in some name or under some sign to which the seller has exclusive right. That right can only be conferred by the seller—the landlord of the premises could not confer it. Again, the sale of a goodwill precludes the seller from going after or soliciting his old customers to follow him to his new premises; also a personal benefit conferred on the buyer and personal disadvantage imposed on the seller, with which the owner of the premises has no concern. Other instances might be given of the elements of personal goodwill connected with the sale of such a business. I think some such considerations were involved in the sale in question. I cannot therefore say that the goodwill in this case was entirely attached to or dependent on the transferred occupation of the premises. But such occupation no doubt entered into the goodwill, although what its value or importance was as compared with personal goodwill we have no means of judging, and we are not called on to decide. I am therefore for answering the third question in the affirmative.

LORD MONCREIFF—I remain of the opinion which I, along with Lord Kyllachy, expressed in the case of *Hughes* v. *Stirling* (19 R. 840), that goodwill of a publican's business is, or may be in certain circumstances partly heritable and partly moveable, and that although perhaps it is in most cases chiefly attached to the premises there is or may be a personal element in it, and in particular that by selling the goodwill the proprietor impliedly agrees with the purchaser not to compete with him for the licence or canvass old customers, and not to represent himself as carrying on the old business. Therefore the only question which I have to consider is whether the views there stated by Lord Kyllachy and myself have been overruled or modified by later decisions, and in particular the decision of the majority of the Judges in the Seven Judges case of *Philp's Executor* (21 R. 482). After carefully considering the opinions in that case, and in particular the opinion of Lord Rutherfurd Clark, which was concurred in by Lord Adam and Lord Kinnear, I am of opinion that the case was decided upon specialties, and that it does not conflict with the case of *Hughes* v. *Stirling*. Indeed, it would be strange if it did conflict with that decision, because the Lord Ordinary whose judgment was affirmed was Lord Kyllachy.

The special features on which the case turned I think were these. On the death of the owner of the public-house, who died intestate, the business was carried on by his widow until her death about three months later, in February 1891. Shortly before her death she applied for a transfer of her husband's licence to her own name, and succeeded in obtaining it, notwithstanding the opposition of her husband's executor. After her death the business was carried on by the widow's executor until May 1892, when it was sold along with the stock and fittings by the widow's executor for the sum of £1500, £250 of which was paid to the heir-at-law of Philp as his share of the goodwill.

Now, it will be observed that neither the widow nor her executor had any right whatever to the business, and that when the widow's executor sold the goodwill in May 1892 he sold not on account of Philp's executor but on his own account as executor of Philp's widow, he having arranged with the heir-at-law to satisfy his rights in the goodwill.

Now, the view which Lord Rutherfurd Clark took of the case was this—first, that if Philp's executor had any right or interest in the goodwill it was not affected by the sale by the widow's executor, which proceeded on the false assumption that he had a right to dispose of it. But, secondly, he says—"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."

From this it will be seen that the case was very special, and although there are in Lord Rutherfurd Clark's opinion indications that he regarded the goodwill of such a business as entirely heritable, I do not think that view was required for the decision of the case. In this case the matter can be tested by asking whether the second party would have given £950 for the occupancy of the premises and the fittings, &c., Murray being left free to compete for the licence and carry on the old business in the neighbourhood. I think it not doubtful that he would not.

I therefore should be disposed to answer the first two questions in the negative and the third in the affirmative.

I understand that parties are agreed as to proportions.

LORD JUSTICE-CLERK—I have never on my own opinion been able to concur in the view that such a goodwill as we have to deal with in this case was necessarily wholly heritable, and would only yield to that view if it had been so authoritatively ruled by the Court. I agree in thinking that this has not been decided as a general question. In this case I have no difficulty in concurring with your Lordships in the view you have expressed.

LORD YOUNG was absent.

The Court answered the third question of law in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First Party—Campbell, K.C.—Guy. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Second Party—Kincaid Mackenzie, K.C.—Younger. Agents—Auld & Macdonald, W.S.

Saturday, March 12.

SECOND DIVISION.

MARTIN AND OTHERS, PETITIONERS.

Trust—Advances to Minor Beneficiary—Vesting Postponed.

A truster by his settlement destined certain shares of his estate, on the death of his widow, to his daughters in liferent and their children in fee, and he declared that the interest of his grandchildren in the shares liferented by their mothers should not vest in them until they respectively attained majority. On the death of the truster's widow, predeceased by one of his daughters, but survived by that daughter's husband and only child, a petition was presented by that grandchild of the truster, aged 16, and her father, who was not well off, with the concurrence of the trustees under the settlement referred to, praying the Court to authorise the trustees to pay to the minor petitioner and her father the free income of her prospective share until she attained majority. The Court *authorised* the trustees to make a specified annual payment from the income of the minor petitioner's unvested share of the trust estate.

This was a petition at the instance of Mary Elizabeth Theodora Martin, daughter of Charles James Martin, East India merchant, 1 Oxford Villas, Teddington-on-Thames, and Charles James Martin as her curator and administrator-in-law, with the concurrence of the testamentary trustees of the deceased James Mackenzie of Auchenheglish, Dumbarton, in which the petitioners craved the Court "to authorise and ordain the petitioners, the trustees acting under the trust-disposition and settlement of the said James Mackenzie, of Auchenheglish, to pay to the said Mary Elizabeth Theodora Martin and her said father, as her curator and administrator-in-law, the free income of her prospective share of the trust-estate held by them, and that until she shall attain the age of twenty-one years."

The petition stated, *inter alia*, as follows:—"That the said James Mackenzie of Auchenheglish died on 6th March 1873, leaving a trust-disposition and settlement by which he conveyed his whole estate in trust for the purposes therein mentioned. His trustees were thereby directed, after payment of debts, funeral charges, &c., to pay to his spouse Mrs Elizabeth Campbell or Mackenzie, in the event of her surviving him, the annual interest of the whole residue of his estate, and he directed them upon her death to hold, apply, pay, and convey the whole rest, residue, and remainder of his means and estate, and the interest and other annual produce thereof, to and for behoof of his whole lawful children, and that in the shares and proportions following, *videlicet*, . . . the shares falling to daughters in the event of their getting married before they had received payment thereof to be made over to marriage or other trustees for their behoof in liferent for their liferent use allenarly, exclusive always of the *jus mariti*, curatory, and right of administration of husbands, and their children equally among them *per stirpes* in fee; . . . and it was provided and declared that the interest of his grandchildren in the shares liferented by their mother as aforesaid should not vest in them until they should respectively attain the years of majority. Mrs Mackenzie enjoyed the liferent of her husband's estate until her death on 30th October 1903, when the trust estate became divisible in terms of his settlement above narrated. The said James Mackenzie was survived by two sons and by five daughters, one of them being Helen Mary Mackenzie, afterwards wife of the petitioner Charles James Martin. . . . The said Helen Mary Mackenzie or Martin died on 22nd June 1892 survived by one child—the petitioner Mary Elizabeth Theodora Martin, who was born on 14th June 1888. The trustees of the said James Mackenzie are in course of realising his trust-estate, so far as necessary, and distributing it. The amount of his trust-estate at the date of his widow's death was £50,335 or thereby. The share falling to the petitioner, as the only child of the said Helen Mary Mackenzie or Martin, on her attaining majority is thus, after deduction of duty, &c., £6000 or thereby; but in terms of the provision of the deed of settlement above quoted this sum does not vest in her until she attains the age of twenty-one, and the settlement does not contain any provision empowering the trustees to apply the income for her behoof. Said income is being accumulated by the trustees in the meantime. The petitioner, who is not in receipt of any income of her own, resides with her father at Teddington. Owing to political changes and troubles in the Philippine Islands, where his business has for many years been carried on, the petitioner's father has met with severe capital losses, and has found it all but impossible of late years to carry on business to profit. This has so affected his income that he cannot at present, without the addition of such a sum as the revenue of her said share would furnish, maintain and provide for the petitioner in a suitable manner, or afford to give her the educational advantages which are suitable and necessary at her age with a view to her worldly position on attaining majority. The petitioner is now in her sixteenth year. The concurring petitioners, Mr Mackenzie's trustees, are satisfied that it would be greatly for the advantage of the petitioner that the income of her prospective share