I think the question whether the death of Sneddon was attributable within the meaning of the Act to his own misconduct is a proper question for the consideration of a court of appeal. It has been held in both Divisions of this Court, and also in the English judicatories, that every question of the construction of a statute is a proper subject of appeal to the higher court, and I think the question of law which the Sheriff here puts to us is neither more or less than this—What is included under the word "attributable?" I think that under that word there must be some causal relation between the misconduct of a workman and the injury which he suffers. It would not do to say that he was carrying a naked light on his person at the time when the stone came down, because although that would be a very serious act of misconduct in a mine where naked lights are not permitted, it has nothing to do with the accident or the consequent injury. It does not follow, however, that we are to interpret the word "attributable" as meaning that misconduct is the sole and only cause of the man's death or injury. It is enough that it is a material cause that in some way contributes to the unfortunate result. Therefore I think that the question to be considered under the word "attributable" is very much the same as we have to consider in cases at common law where there is fault on the part of the employer or his servant, and the question is, whether the word means that the injury was either caused solely by the workman's own fault, or was contributed to materially by his act or fault.

Now, in this case the Sheriff has come to the conclusion that the fall of the roof was not attributable to the miner's contravention of the rule by mounting the waggon, and it is, or at least includes, a question of fact, because I can well believe that there might be cases where if a considerable number of men, for example, got into a train of empty hutches, and in the opinion of experts the total weight upon the train of hutches and the consequent vibration was the cause of dislodging loose stones in the roof at the moment when the train was passing, if that were proved or inferred from sound scientific and technical evidence, then the conclusion would be irresistible that the injury was attributable to the contravention of the rule. But then in the present case the Sheriff has found that the fall of stone and the consequent death of the workman were not attributable to his having mounted the waggon, and apparently his view is that the man might have met his death just the same if he had been walking behind the waggon instead of lying on the top of it. In the absence of scientific evidence to establish that additional weight put on this waggon was the cause of the stone coming down I am unable to differ from the Sheriff. I do not know that on the matter of fact it would have signified whether I differed or not, for we are only a Court of Appeal as to matters of law, but so far as I understand the facts I think the Sheriff was perfectly justified in coming to the conclusion he did and if he was of opinion that there was no connection between the falling of the stone that caused the accident and the men mounting on the hutch, I think he rightly decided that this was an accident in the course of the workman's employment, and for which his wife and children are entitled to compensation.

LORD KYLLACHY—I entirely concur. As I read the case, the Sheriff has not found himself on the evidence able to affirm that the misconduct of the deceased was either the sole or a materially contributing cause of the accident. Upon the statement in the case I find myself in the same position; and therefore I am unable to hold that in the sense of the statute the deceased's death was "attributable" to his own misconduct.

LORD JUSTICE-CLERK—I am of the same opinion and having nothing to add.

The Court answered the question of law in the negative, and affirmed the award of the arbitrator.

Counsel for the Appellants—Wilson, K.C. —Horne. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—G. Watt, K.C.—A. Moncrieff. Agents — Simpson & Marwick, W.S.

Friday, February 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MUIRHEAD'S TRUSTEES *v.* MUIRHEAD.

Public-House — Goodwill — Heritable or Moveable—Terce—Jus Relictæ.

In a question between testamentary trustees and a widow claiming her legal rights in the estate of her deceased husband who at the date of his death carried on business in two licensed houses in Glasgow—occupying one of the houses as tenant and being the proprietor of the other—*held*, following *Graham* v. *Graham's Trustees*, July 20, 1904, 41 S.L.R. 846, that, for the purpose of fixing the widow's legal rights, the price received by the trustees for the goodwill of both businesses was to be regarded as heritable in its character.

James Muirhead, who carried on business as a wine and spirit merchant at 439-441 Keppochhill Road, and 380-382 Springburn Road, Glasgow, being tenant of the former premises and owner of the latter, died on 6th March 1900, leaving a trust-disposition and settlement dated 16th August 1898, and recorded in the Books of Council and Session 14th April 1900, by which he conveyed to William Honour, wine and spirit merchant in Glasgow, and others, as trustees, all his means and estate for certain purposes therein mentioned, and *inter alia*, as regards

residue for behoof of his wife Mrs Jessie Ballantyne or Muirhead and the children of the marriage. The estate consisted in part of the above-mentioned businesses at Keppochhill Road and Springburn Road.

The trustees carried on the business at Keppochhill Road and afterwards sold the "goodwill, fittings, and utensils" in February 1901 for a sum of £4350 to a purchaser, conditionally on the certificate being transferred to him and his being accepted by the proprietor as tenant. They also carried on the business at Springburn Road for two years from the testator's death, and afterwards sold the "goodwill, fittings, and utensils" to a purchaser for £11,600, who was granted a lease of the premises for ten years at a yearly rent of £190, conditional on the certificate being transferred to him.

The truster's widow having claimed her legal rights, the trustees brought this action of multiplepoinding to have it determined whether the sums paid for the goodwill of the two businesses above-mentioned were heritable or moveable.

The trustees maintained that the prices of the businesses were wholly heritable, and so not liable to *jus relictæ*.

The widow, as claimant and defender, maintained that the prices received for the businesses were moveable *quoad* succession, and alternatively, that if the price of the Springburn Road business was not moveable, then it fell to be dealt with as a grassum or added into the rental of the premises, and should be divided into ten equal parts, and one part added to each year's rent, and that she was entitled to payment of terce from the rent so ascertained.

The facts disclosed at the proof are fully set forth in the opinions of the Lord Ordinary and of Lord Adam, *infra*.

The Lord Ordinary (KYLLACHY) on 19th July 1904, pronounced the following interlocutor:—"Finds (1) That the value of the goodwill, utensils, fittings, &c., of the business in Keppochhill Road, Glasgow, which belonged to the deceased James Muirhead, was at the date of his death £4000, and that for the purpose of fixing the widow's legal rights it falls to be regarded as wholly moveable in its character; (2) That the sum of £11,600 obtained by the pursuers in March 1902 for the goodwill, utensils, fittings, &c., of the business in Springburn Road falls to be regarded for said purpose as moveable in its character to the extent of £5800, and as heritable to the extent of the like sum of £5800; (3) That for the purpose of fixing the widow's *jus relictæ*, the value of the goodwill of the Springburn Road business at the date of the death of the said James Muirhead is to be taken at £10,600, of which the sum of £5300 is to be taken as representing moveable estate; (4) That the said sum of £5300, part of the price of the Springburn Road business effeiring to the heritable estate, is of the nature of a grassum paid by the tenant, to whom the said premises have been let, and is subject to the widow's claim for terce; (5) That the defender and claimant Mrs Muirhead is entitled to payment in name of *jus relictæ* of one-third of the said sums of £4000 and £5300 respectively, effeiring to the deceased's moveable estate, with interest thereon at five per cent per annum from 6th March 1900 until payment; and (6) That the said sum of £5300, being the part of the value of the goodwill of the Springburn Road business effeiring to the deceased's heritable estate, falls to be divided into ten equal parts corresponding to the years of the lease granted by the pursuers to the purchaser of the Springburn Road business, and that accordingly for the purpose of fixing Mrs Muirhead's terce the rent for each year of said lease falls to be increased from £190, being the amount stipulated in the said lease, to £770; And, in respect of these findings, ranks and prefers the said defender Mrs Jessie Ballantyne or Muirhead on the fund *in medio*—(1) To the extent of the sum of £3100 in name of *jus relictæ*, with interest thereon at the rate of five per cent per annum from 6th March 1900 until payment; and (2) To the extent of £193, 6s. 8d. per annum in name of terce, payable half-yearly so long as she is in life, for the period of ten years from and after the term of Whitsunday 1902, commencing the first half-year's payment as at the term of Martinmas 1902 for the half-year preceding, and with interest on said half-yearly payments at the rate of five per cent. per annum, declaring, however, that the *jus relictæ* and terce are subject to deduction in respect of all debts which by law are deductible thereform as at the death of the said James Muirhead: Reserving to the said Mrs Jessie Ballantyne or Muirhead all her claims for *jus relictæ* and terce out of the estate of her deceased husband so far as not forming part of the fund *in medio* in this action, including all further claims for terce in respect of the property in Springburn Road after the expiry of the current lease thereof: Ranks and prefers the claimants the trustees of the said James Muirhead to the balance of the fund *in medio:* Finds the pursuers and real raisers entitled to the expenses of raising and bringing the action into Court out of the fund *in medio:* And finds the said pursuers as claimants, and the claimant the said Mrs Jessie Ballantyne or Muirhead, entitled to expenses out of the trust-estate of the said James Muirhead," &c.

Opinion.—"In this multiplepoinding the competing claimants are on the one hand the widow, and on the other hand the trustees, of the late Mr Muirhead, who died in March 1901, having for a number of years carried on a successful business in two public-houses in Glasgow. One of these public-houses was his own property. The other was held under a lease, which at his death had about two years to run, and which excluded assignees and subtenants. The widow having elected to claim her legal rights, questions have arisen as to how far she is entitled to participate in two sums—one of £11,600, and the other of £4350—obtained by the trustees for the goodwills of the two licensed businesses. These sums form the fund *in medio*. The widow claims that they both represented elements of goodwill which were entirely personal.

The trustees, on the other hand, claim that in each case the price obtained represented elements which were wholly heritable. They say in the one case that the £11,600, whatever it was called, was really a grassum paid over and above his rent by the tenant to whom they (the trustees) let, on a ten years' lease, the shop of which the deceased was owner. They say similarly in the other case that the £4350 was simply a large premium paid by the purchaser for the reversion, such as it was, of the lease which the deceased held of the public-house of which he was tenant.

"A proof has been led, and what I have now to consider is, what conclusions fall to be drawn from it? I say so, because it is important to keep in mind that we are here in a class of questions where we have to deal with facts and not with legal formulas, or even legal presumptions. Certain things, of course, require to be postulated. For example, nobody, I suppose, disputes that in connection with the business of a public-house, as of any other business, there is or may be something which is called goodwill —something which is of marketable value and is personal property. Nor is it, I suppose doubtful that this personal goodwill may survive the owner's death, may pass to his executors, may enter his inventory, may be the subject of taxation, and may generally and for all purposes form part of his moveable succession. All that is probably quite clear. But how far in any particular case such goodwill exists; how far it survives its owner and transmits as a marketable subject to his executors; how, if it has been sold *in cumulo* with other assets having a heritable character, the necessary apportionment of the *cumulo* price is to be made—all these are questions which depend necessarily upon the facts of the particular case, and which are questions not of law or of legal presumption, but of fact and of evidence.

"Keeping this in view, my conclusions upon the proof are shortly these:—

"In the first place I think it is clear that both goodwills were assets of the deceased at the time of his death. I see no reason to doubt that if he had during the last years of his life desired to do so, he might have obtained for them sums substantially the same as those subsequently obtained by his trustees. Nor do I see any reason to think (subject to what I shall say presently as to certain increases in the drawings after his death) that the sums in question were obtained by the trustees in respect of anything contributed by them (the trustees) or by the beneficiaries individually. The trustees held and sold simply as representatives of the deceased. The case of *Philp*, 21 R. 482, and cases of that kind, have, I think, obviously no application here.

"2. Further, I think it clear that (subject to the same qualification) the whole sum received for the goodwill of the smaller business—the Keppochhill business—must be held as moveable estate. In this case there was, so far as I see, no heritable element which entered into the price. The premises did not belong to the deceased; he had merely a lease which was nearly run out. It was, moreover, as I have said, a lease which was not assignable. Nor was it in fact assigned. Anything heritable—attaching to the premises—the purchaser got not from the trustees but from the landlord, with whom he directly transacted.

"3. I am next of opinion that (subject to the same qualification) the £11,600 paid for the goodwill of the larger business—the Springburn business—must be apportioned as between the heritable and moveable succession. It is, I think, proved that to a large extent, possibly the larger extent, the sum in question represented what is called heritable goodwill—goodwill inseparably attached to the premises, and the price of which was really and in substance grassum paid by the tenant. But, on the other hand, it is I think also proved that to a large extent the price represented those elements of goodwill which I have called personal—elements which did not attach to the premises, which were largely associated with the licence, and which I some time ago endeavoured to analyse in the case of *Hughes*, 19 R. 840. How in such circumstances the apportionment is to be made is always a matter of difficulty. It is a question which comes up frequently in the Valuation Courts; and there it has been found necessary to sanction, or at least accept, a certain rough and ready method commonly adopted in practice, and found generally to be not unfair, viz., to divide the total price in equal portions between the two kinds of goodwill. I do not think that in view of the figures disclosed by the other transaction—the Keppochhill transaction—that apportionment is unfair here. In saying so I have quite in view that the premises here are superior to, and in a better locality than the Keppochhill premises. But on the other hand I have also to keep in view that there was here in addition to the payment of goodwill a very substantial increase of rent. On the whole, therefore, I propose to apportion the goodwill on the principle I have mentioned.

"4. I have said, however, that there is a certain qualification applicable to both cases. It appears that the mode in which the goodwill was here estimated (a mode said to be the usual mode) is to take a certain average of the weekly drawings. That being so, it has to be considered what effect is to be given to a certain increase in the weekly drawings which occurred between the deceased's death and the sale, and while the trustees were themselves carrying on both businesses. The increase was not in either case very great. It was £10 a-week in the one case, and £3 in the other; and partly, at all events, it must have been merely a natural increment due in no way to the management of the trustees or their personal merits. But in a question of legitim or *jus relictæ* it is no doubt true that the moveable estate must be estimated as at the date of the death—the rule, I think, being that the children or widow receive interest from the date of the death, and not (at least in the general case) anything else. That being so, I think I

must for the present purpose make some deduction from the total price in each case. It is, of course, only possible to do so roughly; but it appears to me that, all things considered, £1000 may be fairly deducted in the one case, and £350 in the other. The net result therefore is, that the widow in name of *jus relictæ* gets in respect of personal goodwill, including fittings, &c., from the price of the Springburn business one-third of one half of £10,600, that is to say, £1766, 13s. 4d., and from the price of the Keppochhill business one-third of £4000, that is to say, £1333, 6s. 8d.

"5. The widow, however, in addition to her *jus relictæ* claims terce in respect of one half of the £11,600 which was received for the Springburn business; that half, if I am right, being really a grassum paid by the tenant of the shop in addition to the rent expressed in his lease. Now it appears to me that this claim is well founded. The widow cannot, I apprehend, repudiate the lease or rather the transaction of which the lease was a part. She had not served to her terce or otherwise interpelled the trustees when the lease was granted. In any case, she does not propose to repudiate. But having looked into the authorities, I see no reason why she should not as against the trustees have right to one-third of the additional rent which the grassum represents. In other words, the £5800, which was really a grassum, must be distributed over the ten years of the lease—the additional rent in which the widow is entitled to participate being thus £580.

"The net result is that the widow will receive out of the two funds *in medio* as *jus relictæ* the sum of £3100, with interest from the date of the testator's death. She will also receive out of the proceeds of the fund *in medio*, in name of terce, £193, 6s. 8d. per annum during the currency of the lease."

The pursuers reclaimed, and argued—The prices got for the goodwill were heritable. It had been decided in *Hughes* v. *Assessor for Stirling*, June 7, 1892, 19 R. 840, 29 S.L.R. 625, that there might be a personal element in goodwill, but that element was wanting here according to the test applied by Lord Rutherfurd Clark, in *Philp's Executor* v. *Philp's Trustees*, February 1, 1894, 21 R. 482, *sub nom. Philp* v. *Martin*, 31 S.L.R. 384. *Drummond* v. *Assessor for Leith*, February 5, 1886, 13 R. 540, 23 S.L.R. 385, showed goodwill in similar circumstances to this to be heritable. The decision in *Assessor for Kilmarnock* v. *Allan*, March 9, 1887, 14 R. 581, was not in point, since there the contract was between outgoing and incoming tenants. In *Assessor for Lanark* v. *Selkirk*, March 9, 1887, 14 R. 579, the contract contained an obligation not to compete. The system of dividing goodwill as half heritable half moveable was rough and ready, and not to be adopted where definite evidence was to hand as here, but only in the absence of such evidence. The English cases quoted (*West London Syndicate* v. *Inland Revenue Commissioners*, [1897] 2 Q.B. 509, and *Inland Revenue Commissioners* v. *Muller & Company's Margarine, Limited*, [1901] A.C. 217) were not in point, as they dealt with a different sort of subject. This case was ruled by the decision in *Graham* v. *Graham's Trustees*, July 20, 1904, 41 S.L.R. 846, which was one similar in its circumstances. *Hawick Heritable Investment Bank, Limited* v. *Huggan*, November 6, 1902, 5 F. 75, 40 S.L.R. 33, contradicted the view that acquiescence in transfer of certificate was of value.

Argued for the defender and respondent—Goodwill might be, and here was, wholly moveable. *Murray's Trustees* v. *M'Intyre*, March 12, 1904, 6 F. 589, 41 S.L.R. 398, gave a test of what is moveable in goodwill that should be applied here as on all fours with the present case. *Hughes* v. *Assessor for Stirling, supra*, also supported this contention. The case of *Philp's Executor* v. *Philp's Trustee, supra*, was very special, the question being to whom the business belonged. *Graham* v. *Graham's Trustees, supra*, decided that each case dealing with goodwill was dependent on its own circumstances. Here there was consent to transfer of certificate and no competition, so there was clearly a personal element. The goodwill lay in the probability of the renewal of the licence, and this was moveable in its character. In the case of *Drummond* v. *Assessor for Leith, supra*, the Court approved of a division into two parts, heritable and moveable, of a sum received for goodwill—see opinions by Lords Lee and Fraser. In the case of the *Assessor for Lanark* v. *Selkirk, supra*, a payment for goodwill had been imputed to rent as regards only half its amount; this had also been done in *Hughes* v. *Assessor for Stirling, supra*. The views of the English Judges were in favour of this view, and were to be found in *West London Syndicate* v. *Inland Revenue Commissioners, supra*, and *Inland Revenue Commissioners* v. *Muller & Company's Margarine, Limited, supra*, and also in *Trego* v. *Hunt*, [1896] A.C. 7. The view taken by the Lord Ordinary was the correct one.

At advising—

LORD ADAM—This multiplepoinding has been brought by the trustees of James Muirhead, who died on 6th March 1900. He had carried on business as a wine and spirit merchant at two shops in Glasgow, the one at Keppochhill Road and the other at Springburn Road. He was tenant of the premises at Keppochhill Road under a lease for seven years from Whitsunday 1896, and was proprietor of the premises at Springburn Road. His trustees continued his business at Keppochhill Road until February 1901, when they sold "the goodwill, fittings, and utensils" to Mr William Macintosh, Mr Muirhead's manager, for £4350, on the condition that the purchaser was accepted by the landlord as tenant. The trustees carried on the business at Springburn Road until March 1902, when they sold the "goodwill, fittings, and utensils" of the business for £11,600, on the condition that the purchaser should receive the

licence at the next April Licensing Court, that he should receive a lease of the premises for ten years after Whitsunday 1902 at a rent of £190, and that the purchaser would apply for a transfer of the licence certificate at the April Licensing Court.

In both cases the fittings were included in the sales, but no reference is made to them on record, nor were they referred to at the debate, which proceeded on the footing that the sums paid were paid for the goodwills of the respective businesses.

The question therefore in this case is whether the sums paid for the goodwill of these two businesses are to be treated as wholly heritable or as wholly moveable, or as partly heritable and partly moveable, and if the latter in what proportions.

I agree with the Lord Ordinary that this depends upon the facts and circumstances of the particular case. I agree with the definition or description of goodwill given by Lord Macnaghten in the case of *Trego* v. *Hunt* (1896, A. C. 7)—"What goodwill means," he says, "must depend on the character and nature of the business to which it is attached. Generally speaking it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell* v. *Lye* (17 Ves. 335, 346), where he says, 'The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Often it happens that the goodwill is the very sap and life of the business without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.'"

It appears to me that the goodwill of a business carried on in licensed premises is of a somewhat peculiar character. It is true that in Scotland it is the person who carries on the business who is licensed, and not the premises, but he is licensed to carry on the business only in particular premises, and hence it is that the licence attaches to the premises and enhances their value, and that such premises are generally known and spoken of as licensed premises.

If there were free trade in the sale of liquors—if a person could open a shop anywhere for their sale—the goodwill of an existing business in the centre of a populous city like Glasgow would be of little or no value. It is the known fact of the objections which the licensing authorities entertain to increasing the number of public-houses which gives to existing public-houses their enhanced value. It is the person who has a right to the possession of the licensed premises, whether as landlord or tenant at the date of the sale, who has a valuable asset to sell.

I further think that the goodwill in this case does not fall within the class of cases pictured by Lord Macnaghten, in which the goodwill consists in the advantage of the reputation and connection of a firm built up by years of honest work or lavish expenditure of money. In such a case the right to use the name, whether of a firm or individual, is a valuable asset, and in the sale of such a business is a matter of transaction or arrangement. But I think there is little of that element in this case. The right to use the name of the seller was not purchased, and both purchasers immediately proceeded to carry on the respective businesses they had acquired in their own names.

Although, as I have said, the nature of goodwill, whether heritable or moveable, depends on the circumstances of each case, yet the facts of this case and the facts of the case in *Graham's Trustees*, 41 S.L.R. 846, are so similar that I think this case is ruled by the principles affirmed by this Division of the Court in that case.

Take the case of the Keppochhill Road shop in this case and the Oxford Street shop in *Graham's* case.

In both cases the sale of the goodwill is of licensed premises in Glasgow.

In both cases the deceased Mr Muirhead and Mr Graham were tenants of the premises in which they carried on their businesses—in this case under a lease which had rather more than three years to run, and in *Graham's* case under a lease which had rather more than a year. In both cases the trustees carried on the business for a time. In this case the sale took place when the lease had rather more than two years to run; in *Graham's* case when it had about six weeks. In this case the sale was conditional on the purchaser being accepted by the landlord as tenant; in *Graham's* case the purchaser had already arranged with the landlord for a new lease. These being the essential facts bearing on this question of goodwill I cannot distinguish between the two cases, and as we held in *Graham's* case that the goodwill was heritable, so I think we must hold in this case that it also is heritable.

I am also of opinion that the goodwill of the business carried on at Springburn Road is wholly heritable. It was not disputed that the value of that goodwill was to be taken as £10,600.

These premises belonged to Mr Muirhead himself, and he carried on the business there. After his death his trustees carried on the business for about two years. In March 1902 they sold it to a Mr Murray for £11,600, on condition that a lease for ten years should be given to him at a rent of £190 per annum from Whitsunday 1902, and that he should obtain a transference of the licence. All this was duly carried through. Mr Murray paid the £11,600 and obtained the lease and the transfer of the licence. £1000 has been deducted from the £11,600 by the Lord Ordinary as representing the increased earnings of the shop during the trustee's management, and this, as I have said, is acquiesced in.

The Lord Ordinary has held that the sum of £10,600 representing the goodwill of the business is half heritable and half moveable, but if I am right in what I have already said, that the principles laid down in *Graham's* case apply to this case, it is clearly wholly heritable.

It will be observed from the purchaser Mr Murray's evidence that he attached no value to the name in which the business had been carried on.

I agree with the Lord Ordinary that the heritable goodwill effeiring to the Springburn Road premises, whatever its amount, is to be treated as a grassum and one-tenth of it added to the rent of each year. If this be so, then, taking the amount of the goodwill at £10,600, the claimant will be entitled to an additional annual payment of £160 to that allowed her by the Lord Ordinary, or in all to an annual payment of £353, 6s. 8d.

I am of opinion, accordingly, that we should recal the Lord Ordinary's interlocutor in so far as it finds the goodwill of the Keppochhill Road business to be moveable, and in so far as it finds one-half of the goodwill of the Springburn Road premises to be moveable and one-half heritable, and to find that the whole of it is heritable, and is to be divided into ten equal parts, and to be disposed of exactly as he has directed with regard to the one-half of it which he held to be heritable.

LORD KINNEAR—I agree with your Lordship. I only desire to add that I do not dissent from the view of the Lord Ordinary that there is no rule of our law which makes it impossible for the executors or heirs *in mobilibus* of a deceased publican to show that they have an interest in the goodwill of his business. But whether any of the elements which go to make a saleable goodwill are heritable or moveable is a question of fact which must be determined according to the circumstances of the particular case, and treating the question here raised as a question of fact, I agree with your Lordship, for the reasons you have given, that the goodwill of these two public-houses is heritable. I therefore concur.

LORD KINCAIRNEY—I have had the advantage of reading the opinion of your Lordship in the chair, and I concur with the views therein expressed. I think this case is ruled by the decision in *Graham's Trustees*, which was decided subsequently to the interlocutor of the Lord Ordinary, and that in accordance with the principles of that decision the values of both the goodwills here fall to be treated as heritable.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against Lord Kyllachy's interlocutor of 19th July 1904, and heard counsel for the parties, Recal the said interlocutor: Find (1) that the value of the goodwill, utensils, fittings, &c., of the business in Keppochhill, Road, Glasgow, which belonged to the deceased James Muirhead, was at the date of his death £4000, and that for the purpose of fixing the widow's legal rights the goodwill of said business falls to be regarded as wholly heritable in its character; (2) that the sum of £11,600 obtained by the pursuer in March 1902 for the goodwill, utensils, fittings, &c., of the business in Springburn Road falls to be regarded for said purpose, in so far as it consists of the value of goodwill, as wholly heritable in its character; (3) that the value of the goodwill of the said Springburn Road business as at the death of the said James Muirhead is to be taken at the sum of £10,600; (4) that the said sum of £10,600 is of the nature of a grassum paid by the tenant, to whom the said premises have been let, and is subject to the widow's claim for terce; and (5) that the said sum of £10,600, being part of the value of the goodwill of the Springburn Road business effeiring to the deceased's heritable estate falls to be divided into ten equal parts corresponding to the years of the lease granted by the pursuers to the purchaser of the Springburn Road business, and that accordingly, for the purpose of fixing Mrs Muirhead's terce, the rent for each year of the said lease falls to be increased from £190, being the amount stipulated in the said lease, to £1250; and in respect of these findings rank and prefer the defender Mrs Jessie Ballantyne or Muirhead on the fund *in medio* to the extent of £353, 6s. 8d. per annum (being one-third of one-tenth part of said sum of £10,600) in name of terce, payable half-yearly so long as she is in life, for the period of ten years from and after the term of Whitsunday 1902, commencing the first half-year's payment as at the term of Martinmas 1902 for the half year preceding, and with interest on said half-yearly payments at the rate of 5 per cent. per annum: Declaring, however, that the said terce is subject to deduction in respect of all debts which by law are deductible therefrom as at the death of the said James Muirhead: Reserving to the said Mrs Jessie Ballantyne or Muirhead all her claims to *jus relictæ* and terce out of the estate of her deceased husband so far as not forming part of the fund *in medio* in this action, including all further claims for terce in respect of the property in Springburn Road after the expiry of the current lease thereof: Rank and prefer the claimants, the trustees of the said James Muirhead, to the balance of the fund *in medio;* and decern," &c.

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