Thursday, May 21.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BROWN *v.* ROBERTSON.

Executor—Liability to Creditors of Deceased—Business Carried on by Executrix—Profits Made Subsequently to Death of Debtor—Enhanced Value of Goodwill.

There is no fiduciary relation between an executor, whether dative or nominate, and the creditors of a deceased person, and the former is not bound to administer the executry estate for behoof of the latter, but must merely account for it as at the date of the deceased's death. *Globe Insurance Co.* v. *Mackenzie* (7 Bell's App. 296), *followed.*

The widow of a publican having been appointed his executrix-dative, continued his business, and obtained a transfer of the licence in her own name and a renewal of the lease. No steps were taken at that time by the creditors of the deceased to vindicate their rights, and no arrangement was made by them with the executrix as to the terms upon which she was to carry on the business. Eighteen months after the creditors sequestrated the estate of the deceased, and the trustee subsequently raised an action against the executrix, concluding, *inter alia*, for the profits which she had made in the business, and for the enhanced value of the goodwill. *Held* that the executrix was bound to account only for the value of the estate, including the goodwill, as at the death of her husband.

Mr John Stewart, wine and spirit merchant, Greenock, died in 1893, leaving debts which considerably exceeded the assets. His widow Mrs Catherine Stewart, now Robertson, was appointed his executrix, and she gave up an inventory and obtained confirmation. The estate as given up by her amounted to only £70, including £50 for "goodwill, furniture, and fittings." No steps were taken at that time by the deceased's creditors to vindicate their claims, and the widow continued his business. She obtained a transfer of the licence, and at the next and succeeding licensing courts obtained renewals. She also made arrangements with the landlord by which she continued in possession of the shop, and ultimately obtained from him a five years' lease in her own favour. No agreement was entered into between Mrs Robertson and the creditors, but she made certain payments to them from time to time in extinction of her husband's debt.

In March 1895 the creditors of Mr Stewart obtained sequestration of his estate, and in October 1895 the trustee on the sequestrated estate raised the present action against Mrs Robertson. The summons concluded for declarator that the defender had entered on the premises and carried on the business as the executrix of the deceased, and solely for behoof of persons "legally interested in his estate;" and further, for delivery of the licence, removal from the shop, and accounting for all the profits made in the business. There was an alternative conclusion for payment of a certain sum as the alleged value of the deceased's estate at the time of his death.

The pursuer pleaded—"1. The pursuer is entitled to decree in terms of the declaratory conclusions and also in terms of the conclusions for removing and delivery, in respect that (1) The defender Mrs Robertson, in breach of her duty as executrix of John Stewart, failed to realise the assets of his estate and appropriated said assets and applied them in a hazardous trade; (2) The business carried on by said defender by means of said assets constitutes a trust in her person for behoof of those legally interested in John Stewart's estate; (3) The existing assets of the said business now belong to the pursuer as trustee on John Stewart's sequestrated estates. 2. Alternatively, the said assets of John Stewart's estate, or the assets now coming in place thereof, being still realisable, the defender Mrs Robertson is bound forthwith to realise the same, and to account to the pursuer as trustee foresaid for the proceeds to be realised therefrom. 3. The said defender Mrs Robertson having, in breach of her duty as executrix of John Stewart, employed the assets of his executry estate in trade, is liable to account to the pursuer for the profits realised from the employment of said assets in such trade; and, failing an accounting, decree should be pronounced in terms of the alternative conclusions thereanent."

The defender pleaded—"(6) The defender being only bound to account for the value of the estate of her late husband as at the date of his death, and she having been all along, and still being, willing so to account, and having so accounted, the action was unnecessary and ought to be dismissed."

The Lord Ordinary (KYLLACHY) on 20th March repelled the first and third of the pursuer's pleas, and allowed the parties a proof before answer as to the value and disposal of the deceased's estate.

Opinion.—"The defender in this case is the widow of a public-house keeper in Greenock who died in 1893. At his death the defender was appointed his executrix-dative, and gave up an inventory and obtained confirmation. The estate as given up by her amounted to only £70, including £50 for 'goodwill, furniture, and fittings.' The debts seem to have considerably exceeded the assets, but the creditors took no steps and the widow continued the deceased's business. She obtained a transfer of the licence into her own name, and at the next and succeeding licensing courts she obtained renewals. She also made arrangements with the landlord by which she continued in possession of the shop, and she ultimately obtained from him a five years' lease in her own favour. She is still in possession, and still carrying on the business. It is not alleged that any agree-

ment was made between her and the creditors. She made some payments, but she has not hitherto been asked to account. In other words, she has been allowed, without any special arrangement, to continue in possession of what there is or was of her husband's estate.

"The creditors have now, however, moved apparently by the defender's success in the business, which, as I have said, she still conducts, taken steps to enforce payment of their debts. They have had the estate of their deceased debtor sequestrated, and the trustee in the sequestration now brings the present action against the defender. Had it been an ordinary action of accounting for the defender's intromissions with the executry estate, there could have been no doubt of its relevancy, although there might, in view of the defender's attitude, have been a question as to its necessity. But the question I have to decide is whether, taking the facts as I have stated them, and as set forth by the pursuer on record, there is any room for, at all events, the leading conclusions of the action.

"Having considered the argument which I lately heard in the procedure roll, I have come to the conclusion that in its leading conclusions the action cannot be supported. It proceeds, as it seems to me, on a view of the defender's position in relation to her husband's creditors, which is not tenable in point of law. It assumes that the defender has all along acted and carried on her business substantially as trustee for the creditors, that any profits made by her are theirs, and that the successive licences, as also the lease of the shop, have been obtained for their benefit. Accordingly, its conclusions are (1) for delivery of the licences, (2) for removal from the shop, and (3) for accounting for all profits made in the business. There is an alternative conclusion for payment of a certain sum as the alleged value of the deceased's estate at the time of his death, but on this matter there is no dispute. The pursuer denies the amount, but is quite willing that there should be inquiry.

"Now, it is not, I think, necessary to consider what is the defender's position as executrix-dative with respect to her children — the next-of-kin. It may be that towards them she stands in a special position. I do not desire to express any opinion on that question. But towards the creditors of the deceased it appears to me that she is simply *eadem persona cum defuncto*, standing to the creditors in no other relation than the deceased stood, except that she is a debtor with limited liability, viz., a liability limited by the amount of the deceased's estate. An executor is not a trustee for the deceased's creditors. He is no more so than an heir entering *cum beneficio inventarii*. He is, in a question with creditors, the proprietor of the estate under burden of payment of their debts. He is not a depositary. He is a debtor; and the equities which result from the position of a depositary—that is to say, of a trustee—are wholly inapplicable. The law on this subject is, I think I must hold, fixed by the opinions and judgment of this Court and of the House of Lords in the case of the *Globe Insurance Company* v. *Mackenzie*, 11 D. 618, 7 Bell's App, 296, where, although in a different connection, the rights and liabilities of executors were fully discussed and considered.

"On the whole matter, I consider that I must repel the pursuer's first and third pleas, and allow, unless parties can arrange for admissions or for a remit, a proof as to the value and disposal of the deceased's estate."

The pursuer reclaimed, and argued—The defender as executrix-dative was really no more than a creditor herself, and accordingly occupied a fiduciary relation towards the other creditors. It was her duty to keep the estate for the benefit of those interested, and to realise it—including the goodwill of the business — within six months — Ersk. iii. 9, 42; Bell's Prins. secs. 1899-1900. Instead of doing so she had appropriated the estate to herself, and accordingly, having committed a breach of her fiduciary relations, she was bound to account for all her subsequent intromissions with the estate, and the benefits which she had obtained thereby, and to deliver over the estate in its present condition—*Donald* v. *Hodgart's Trustees*, December 8, 1893, 21 R. 246. The case of *The Globe Insurance Company* v. *Mackenzie*, quoted by the Lord Ordinary, only settled the question whether a testamentary trustee could be considered to act as trustee for creditors. The present case was that of an executor-dative, who occupied a different position from that of a testamentary trustee. It was held in the cases of *Farquhar* v. *Paton*, 1709, M. 3833, and *Elphinston* v. *Paton*, 1710, M. 3835, that an executor-dative was bound to account to a creditor for profits made by him out of the deceased's estate — *Bee* v. *Wallace's Executors*, 1745, M. 6008. An analogous case was that of a partner taking advantage of his position to take in his own name a lease held by the partners till the end of their partnership. A partner so acting was held bound to communicate the profits to his co-partner —*M'Niven* v. *Peffers*, December 2, 1868, 7 Macph. 181. Similarly in the case of a tutor—*George, &c.*, *Wilsons* v. *Wilson*, 1789, M. 16,376; and of an agent — *Macadam* v. *Martin's Trustee*, November 5, 1872, 11 Macph. 33. The fact of the defender having obtained a transfer of the licence in her own name did not prevent her from holding it on behalf of the creditors—*Selkirk* v. *Coupland*, January 6, 1886, 23 S.L.R. 456; *Philp's Executor* v. *Philp's Executor*, February 1, 1894, 21 R. 482, at 483. In any view, it was undesirable to limit the proof at this stage, and evidence ought to be led as to the cirumstances under which the defender had acquired the business, and the rise in its capital value.

Counsel for the respondent were not called upon.

LORD M'LAREN—It is often a matter of discretion requiring much discrimination to determine in the Outer House whether

proof should be allowed upon the whole case before answer, subject to reconsideration as to the relevancy of part of the allegations, or whether proof should be limited to those averments which amount to a relevant statement of legal liability, to the exclusion of averments not of that character. Now, where the Lord Ordinary has been able to separate the relevant from the irrelevant averments, and to limit the proof to certain parts of the case, thereby carrying out his powers under the Court of Session Act 1868, I think that, unless the principles of law on which the Lord Ordinary has proceeded can be shown to be erroneous, we ought to adhere to his decision. I do not say that if a proof at large had been allowed, we should have interfered, but we are dealing with a case as to which the Lord Ordinary has thought one part, namely, the 1st and 3rd pleas, and relative averments, clearly separable from the rest, and capable of being disposed of on the ground that no legal liability on the part of the defender is disclosed. Considering the case in this light, I am bound to say that I entirely agree with the Lord Ordinary.

The material facts are, that the widow and executrix of a licensed victualler, who had carried on his business apparently on very slender means, entered into the management of her husband's business, and, with the assistance of friends, succeeded in carrying it on and making a living out of it. The creditors of the deceased, being unable to get payment of their debts from the executrix, have obtained sequestration—which perhaps they might have applied for with advantage at an earlier period. The trustee is by his appointment fully vested in everything which belonged to the deceased, and no legal process is necessary to make his right effectual, unless the property is wilfully withheld. But the theory of this action is not that the estate is extant in such a form that it can be delivered to the trustee, but that the money which Mrs Stewart has made by carrying on the business of her deceased husband, and the existing stock and furniture of her business, are to be treated as a *surrogatum* for the goodwill, stock, and furniture left by her husband. I am unable to see how such a claim can be substantiated. It would be necessary to show that an executor is a trustee for the creditors of the deceased, and is subject to all the equities to which a trustee is subject. It is not said that Mrs Stewart ever agreed to administer the executry estate for the creditors. They were anxious that she should come under some obligation to them, but it is conceded that she refused to enter into any contractual relation with her husband's creditors, and took up the estate for her own benefit, leaving the creditors to their legal remedies. Just as little should I be disposed to admit that the position of a trustee for creditors devolved upon the executrix by operation of law. If such were the position of an executor, it would be difficult to see what advantage would accrue to creditors from using diligence or obtaining sequestration. It is just because an executor is not a trustee for creditors, and because creditors are at a disadvantage in obtaining payment through a person who does not hold for them, that the remedy of sequestration of a deceased debtor's estate was given them by the Bankruptcy Act of 1856. But it is needless to specify reasons for not accepting the opposite view, because I agree with the Lord Ordinary that the decision of the House of Lords in the case of *The Globe Insurance Company* v. *Mackenzie* (7 Bell's App. 296) is a clear authority against it. No doubt the question in that case was whether an executor was justified, after the lapse of six months, in paying to a creditor who had used arrestments, but the ground on which the validity of the payment was disputed, and a rateable distribution contended for, was that an executor—it was an executor-nominate in that case, but there is no difference in this respect between an executor-nominate and executor-dative—was bound to deal with creditors precisely in the same manner as with beneficiaries, and if he was in doubt as to the rights of creditors, to bring a multiplepoinding. Now, the concurring judgments of the Court of Session and House of Lords negatived that proposition, and decided that each creditor acts for his own interest against the trust estate. In coming to that conclusion, Lord Brougham was explicit in stating that there is no fiduciary relation between an executor and a creditor; that the executor is in the shoes of the defunct, and represents him, and not the creditors at all; and I think Lord Brougham is at pains to point out that the only expression of doubt in the Court of Session fell from Lord Jeffrey, and that this expression of doubt was eventually withdrawn by Lord Jeffrey, who expressed his formal concurrence in the judgment of the Court. The result is that an executor is not bound in any segregation of the executry estate for behoof of creditors. It is sufficient if he retain funds of the value of the defunct's estate at the date of his death and is ready to pay claims to the extent of the value. If he is not bound to segregate the estate, he can incur no liability for the profits which he may make from the use of the estate.

My opinion then is, that while the inventory lodged by an executor is not a conclusive limitation of the executor's obligation, that obligation is limited to the value of the estate of the defunct as at the date of his death, and this is the view of the Lord Ordinary.

LORD ADAM—I am of the same opinion. The pursuer claims that the executrix-dative is *prima facie* bound to pay the debts of her deceased husband. Her answer to this claim is that she is only statutorily liable to account for the value of the estate belonging to the deceased at his death. I agree that an executor-dative or nominate is in one sense a trustee, that is, for beneficiaries, but I am unable to see that he is so for creditors, who are in a totally different position with reference to the estate, and

who should take their own measures to protect their interests. In this case the executrix is bound to produce, or account for the value of, the estate as at the death of her husband. It is said, without being disputed—and I see no reason to dispute it—that part of that estate consists of the goodwill of the deceased's business, and accordingly I think that the pursuer may well be entitled, in order to ascertain the value of the estate, to inquire how the goodwill has been disposed of, and that we should follow the Lord Ordinary in allowing the pursuer a proof with that object in view.

But I agree with his Lordship that the pursuer is not entitled to anything more. It has been argued that where an executor does not pay creditors in full and fails to account for particular assets, if such exist in *forma specifica*, the creditor is not bound to take the executor's account, but may follow up and vindicate them from him. I am not aware that the authorities go beyond this, but in any view it is not the case here. The claim made is not for the value of the goodwill as it existed at the death of the deceased, but for a very different thing, viz., for the value of the profits of the business which has been carried on by the executrix. I agree with your Lordship that the proof allowed by the Lord Ordinary is sufficient to enable the pursuer to get everything to which he is entitled.

LORD KINNEAR—I agree that there is no reason for interfering with the interlocutor of the Lord Ordinary.

He has done no more than repel the first and third pleas-in-law for the pursuer, and allow the parties, before answer as to the remaining pleas, a limited proof. The pleas, which have been repelled are intended to impose upon an executrix the equities and liabilities of a trustee, to make her responsible for the profits earned in a business which it is said she has carried on wrongfully, inasmuch as she has made use for that purpose of a part of the assets belonging to the deceased's estate.

The pleas are based upon two propositions —that the executrix, in breach of trust, is using the assets of the deceased in carrying on a precarious business, and that having so used them, she is bound, as a trustee in default, to account for the profits which she has made in that business. I agree that the propositions are untenable, unless we disregard the judgments of the House of Lords in the case of *The Globe Insurance Company*.

But having repelled these pleas, the Lord Ordinary has not gone on to dispose of the conclusions of the summons, even of those which Mr Campbell admits he would not now maintain, nor has he assoilzied the defender, nor dismissed the action. He has allowed the parties "a proof of their respective averments as to the value and disposal of the deceased John Stewart's estate," and I agree that a proof in accordance with these terms will enable the pursuer to establish all the facts averred by him relating to the claims in his conclusions. The Lord Ordinary has allowed his second and fourth pleas, which are sufficient to allow the pursuer to maintain any views which Mr Campbell indicated his intention of maintaining, except those touching the two pleas repelled.

The LORD PRESIDENT concurred.

The Court adhered.

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

Counsel for Defender and Respondent—Guy. Agent—A. C. D. Vert, S.S.C.

Friday, May 22.

SECOND DIVISION.

[Sheriff Substitute of Stirling, &c.

CRAWFORD'S TRUSTEES *v.* LENNOX.

Trade Sign—Hotel—Exclusive Right to Sign—"Golden Lion"—Interdict—Relevancy—Averments Necessary in Action to Interdict Use of Sign.

The figure of a golden lion had for about 30 years stood over the porch of a hotel called the "Golden Lion Hotel." The figure belonged to the tenant of that hotel. Towards the close of his lease, having become proprietor of another hotel in the same town, he removed the figure to his new hotel and erected it upon the roof. He also used the figure of a lion on his bills of charges and advertising cards. The latter hotel bore in large and conspicuous letters on its front and side the words "Lennox's Station Hotel," and on the bills and cards these words were also conspicuously printed. In an action of interdict, removing, and declarator by the proprietors of the Golden Lion Hotel against the tenant, the pursuers averred that, in pursuance of a scheme for ruining the business of the Golden Lion Hotel, the defender had removed the figure of the lion to the Station Hotel with the purpose of misleading the public into the belief that they were going to the "Golden Lion." *Held* that interdict must be refused, and the action dismissed upon the ground (1) that the facts above stated being sufficiently established by admission, and by the documents and the photographs of the Station Hotel produced, there was nothing in the tenant's use of the figure of a lion or of the figure and sign of the golden lion which involved misrepresentation and consequent misleading of the public to the injury of the pursuers; and (2) that the averment above quoted was irrelevant, and could not be admitted to probation, there being no allegation that anyone had in fact been misled by what the defender had done.

Great North of Scotland Railway