LORD TRAYNER—The prayer of the petition before us consists of two parts—the first craves interdict against the respondent entering upon the foreshore with a dog, and the second craves interdict against the respondent shooting, catching, or killing birds, hares, rabbits, or other animals *on* the foreshore, or trying to do so. I am of opinion that no such interdict can be granted.

As regards the first part of the prayer, it is to be observed that while the authorities are not quite at one as to the extent or limits of the public's right in and on the foreshore, they are all of opinion that the public have right to be there at all times if there in connection with the rights of navigation and fishing. The petitioner, however, craves interdict against the respondent being there at all—a crave clearly in excess of anything to which the petitioner can lay claim, and contrary to the undoubted right of the respondent as one of the public. That part of the prayer therefore cannot be granted.

The second part of the prayer is not supported by any relevant statement. It craves, as I have said, interdict against the respondent killing rabbits, hares, birds, or other animals on the foreshore, or trying to do so. But there is no averment that the respondent ever did, or threatened to do, or maintained his right to do, the things which he is sought to be interdicted from doing. There is, therefore, no reason or ground for granting interdict against him. The respondent admits having shot wild fowl on the foreshore, but in doing so he invaded no right belonging exclusively to the petitioner.

Although I have come to the same conclusion as the Sheriff-Substitute, I do not think it necessary to express any concurrence in or dissent from the ground set forth in his note. I think the better course would be to recal the interlocutor of the Sheriff-Substitute, sustain the respondent's third plea, and dismiss the petition.

LORD MONCREIFF, who was present at advising but had been absent at the hearing, gave no opinion.

The Court sustained the third plea-in-law for the respondent and dismissed the action.

Counsel for the Pursuer and Appellant—C. N. Johnston, K.C.—Blackburn. Agent—David Campbell, S.S.C.

Counsel for the Respondent—Mackenzie, K.C.—Macmillan. Agents—Simpson & Marwick, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

GRAHAM *v.* GRAHAM'S TRUSTEES.

Public-House — Goodwill — Heritable or Moveable—Legitim.

In a claim by a son against the trustees of his deceased father for legitim from the estate of his father, who at the date of his death carried on business in different licensed houses in Glasgow which he occupied as tenant, *held*, after a proof which established that the value of the business in the licensed houses in question was dependent on the nature and locality of the premises and on the subsistence of the licences, that the goodwill was heritable, and therefore that the price received by the trustees for goodwill was not a fund from which legitim was payable.

Peter Macpherson Graham, gunner in the 15th Company of the Royal Artillery, son of the late Alexander Graham, wine and spirit merchant, Glasgow, brought this action in the Sheriff Court of Lanarkshire at Glasgow against Alexander Lang, distiller and wine merchant in Glasgow, and others, trustees of the said Alexander Graham, Terregles Avenue, Pollokshields praying the Court to ordain the defenders to produce full accounts of their intromissions as trustees aforesaid with the moveable estate of the said Alexander Graham and to pay to the pursuer £2000 with interest thereon from the date of the said Alexander Graham's death.

The pursuer was the eldest son of the late Alexander Graham. Alexander Graham died on April 27, 1900, leaving a trust-disposition and settlement and relative codicil, whereby he directed his trustees to pay the pursuer his legitim.

At the date of his death Alexander Graham carried on business in several licensed public-houses in Glasgow, held by him on lease, and the pursuer averred that the valuations placed on these public-houses by the defenders in the statement of legitim fund furnished to him by them were wholly inadequate, and that the defenders refused to allow him facilities for making up correct inventories for himself.

The pursuer pleaded, *inter alia*—that he being entitled to payment of his legitim, the defenders were bound to give an accounting and to make payment of his share of legitim.

The defenders pleaded, *inter alia*—"(1) The action is irrelevant. (2) The pursuer having no interest in the goodwills which follow the leases, and there being no estate otherwise available for legitim, the defenders should be assoilzied."

On July 6, 1901, the Sheriff-Substitute (BOYD) found that the goodwills of the premises could not be regarded as forming part of the moveable estate of the deceased,

and therefore so far sustained the defences and assoilzied the defenders.

Quoad ultra he allowed a proof.

The pursuer appealed to the Court of Session.

On January 31, 1902, the First Division appointed the defenders (respondents) to lodge a full inventory of the estate of the deceased Alexander Graham, specifying what portions thereof they considered should be taken into account in ascertaining the legitim fund, and allowed the pursuer to lodge answers thereto.

In the inventory of the estate of the deceased Alexander Graham lodged by the defenders, it was stated that the deceased Alexander Graham was at the date of his death tenant of three licensed public-houses at (1) 259a Argyle Street, Glasgow, the goodwill of which was entered as *nil*, (2) 8 and 10 Cathedral Street, Glasgow, the goodwill of which was valued at £1200, (3) 188 Oxford Street, Glasgow, the goodwill of which was valued at £900, and that the defenders considered that the value of the goodwills of these public-houses should, before fixing the account of the legitim fund, be deducted, and, in a question with a child claiming legitim, be treated as heritable estate.

With regard to the licensed premises at 259a Argyle Street, Glasgow, the defenders stated that Alexander Graham, at the date of his death occupied the premises on a lease which was to terminate at Whitsunday 1900, and that the landlord of the premises had received notice from the Caledonian Railway Company that they were to acquire the property under compulsory powers. After Mr Graham's death, his trustees having obtained a transfer of the licence to one of their own number for behoof of the trust-estate, occupied the premises until the termination of the lease at Whitsunday 1900, and thereafter, under a special arrangement with the Caledonian Railway Company that they would remove upon three months' notice, and subsequently with the contractors, to whom the Railway Company let the contract for taking down the buildings, that they would remove at a week's notice, until Whitsunday 1901, when they were turned out of the premises without any compensation. In view of the notice which they had received to remove at that term, the defenders, thinking it a pity for the sake of the younger members of the deceased's family, who consist of two young girls, one of whom is likely to be a cripple for life, and although they were under no obligation to do so, set about endeavouring to find other premises in the same neighbourhood on the chance that the magistrates might be induced to grant a new licence. Early in April 1901, and before the April Licensing Court, they, upon their own responsibility, and at their own personal risk, after negotiation, entered into an agreement with the proprietors and the tenants of No. 271 Argyle Street, Glasgow, under which for an onerous consideration, and conditional upon their obtaining a licence for these new premises, the respondents were to become tenants, and the former tenants were to grant a renunciation of the unexpired portion of their tenure. A new licence was accordingly thereafter applied for and obtained by John Macaulay, one of their number, and it was duly confirmed by the Confirmation Court, and is now held by him for behoof of the trust estate. After obtaining this licence, the defenders, who had been taken bound, incurred the whole expense of altering, fitting up, and adapting the new premises for the purpose of carrying on the business of a wine and spirit menchant.

With regard to the licensed premises in 188 Oxford Street, Glasgow, the defenders stated—"The deceased Alexander Graham was tenant of these premises under a lease for five years from Whitsunday 1896, expiring at Whitsunday 1901. The rent was £65 per annum. These premises are no longer in the occupation of the defenders. After Mr Graham's death, viz., on or about 13th April 1901, they sold the goodwill and fittings attaching to said premises for the sum of £1500. Before making his offer the purchaser arranged with the landlord for a new lease."

With regard to the licensed premises at 8 and 10 Cathedral Street, Glasgow, "the deceased Alexander Graham originally became tenant of these premises at Whitsunday 1885, he taking over a then current lease for the unexpired term thereof, which was five years. He continued tenant for a further period of seven years, under missives dated 1st November 1889, his date of entry being Whitsunday 1890, and the rent £120 per annum. The late Mr Graham continued to occupy the premises, and in March 1900 he again arranged to take them for a further period of seven years. These premises are still in the hands of the defenders, who are carrying on the business for behoof of the trust in terms of the authority to that effect contained in Mr Graham's trust-disposition and settlement—conform to excerpt therefrom appended hereto. No formal lease has yet been entered into, the defenders being in right of the deceased in possession under said missives."

The pursuer lodged objections to the inventory of the defenders, in so far as it omitted from the legitim fund the value of the goodwills of the aforesaid licensed business carried on by the deceased Alexander Graham at the date of his death. He stated—"These goodwills were moveable, not heritable, estate. The businesses were carried on in crowded thoroughfares where there are a number of other licensed spirit shops within a very short radius. The value of the goodwills did not depend upon the custom of resorting to particular premises, but upon the reputation of the businesses which had been built up by the personal skill and industry of the deceased. It is the practice in Glasgow for the magistrates, when desired, to transfer the licence for such a business to other suitable premises in the locality, where there has been no misconduct on the part of the holder,

and in no case would a landlord obtain a licence for premises in opposition to a former tenant's application for a transfer. It was in consequence of the goodwill so vested in the truster at the date of his death that his trustees were enabled to obtain the licence for No. 271 Argyle Street. The same conditions in regard to the character of the goodwill applied to the business carried on at Nos. 8 to 10 Cathedral Street. The goodwill attaching to the business carried on at No. 188 Oxford Street at the truster's death was also moveable estate, and the same considerations as those above stated apply to it also."

On 4th June 1902 the First Division allowed the parties a proof of their respective averments on record and in the inventory and objections, and remitted to the Sheriff-Substitute to take the proof and to proceed as might be just.

The proof was concerned mainly with the question of the value of the goodwills of the several public-houses, which question is not pertinent to this report. It was clear on the accounts and proof that there was no legitim fund unless the goodwills of the licensed houses or part thereof was reckoned as moveable estate belonging to the deceased Alexander Graham.

On 9th November 1903 the Sheriff-Substitute (BOYD), having considered the proof, found "in law that the value of the goodwill fell to be treated as heritable estate, and therefore must be deducted from the value of the estate before fixing the legitim fund, and that as such deduction resulted in a deficit of £1289, 3s. 1d. there was no fund available out of which legitim could be paid; therefore assoilzied the defenders from the conclusions of the action."

Note.—"The first question is whether the goodwills of the businesses must be regarded as heritable or moveable. I think that in every case this must be a question of circumstances, but taking it as such I think I must regard them as heritable. The testator dismissed his son from the position of a beneficiary and relegated him to the position of a creditor. The testator was a tenant, he bequeathed his whole estate to his trustees, his leases excluded assignees except with the landlord's consent, but the landlord tacitly accepted the trustees in his place. I think that the goodwills enured to the premises to which the licences were given. I again refer to *Bell's Trustees* v. *Bell*, 12 R. 85, and *Philp's Executor* v. *Philp's Executor*, 21 R. 482. I have also had before me a case decided in this Court by Sheriff Guthrie and on appeal by Sheriff Berry—*Foulis* v. *M'Gibbon*, May 11, 1889 (not reported), and a judgment of Lord Low in *Ross* v. *Ross's Trustees*, July 20, 1901 (not reported), which support the view that the goodwills in this case are heritable.

"If I am right in the opinion I have expressed it is unnecessary to consider the question of the value of the goodwills, but as I heard the proof and have since read the notes, I think I should state shortly what I think is the result of the evidence."

[*The rest of the Sheriff-Substitute's note consisted of an analysis of the evidence as to the value of the goodwills.*]

The pursuer appealed, and argued—The goodwill of the several public-houses here in question was moveable estate of the deceased Alexander Graham, now held by the defenders, his trustees. The goodwill of the businesses was certainly not wholly connected with the premises, but was to a large extent of a personal character, dependent upon the reputation of the businesses which had been built up by the personal skill and industry of the deceased. The question whether the goodwill of a public-house was heritable or moveable had been considered in a series of valuation cases, and had been determined to be in large part moveable—*Macfarlane & Dailly* v. *Dundee Assessor*, June 13, 1891, 18 R. 939, 28 S.L.R. 621: *Hughes* v. *Assessor of Stirling*, June 7, 1892, 19 R. 840, 29 S.L.R. 625; *Stewart's Trustees* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R. 570; *Brown* v. *Robertson*, July 29, 1896, 34 S.L.R. 570 (the sequel to *Stewart's* case); *Murray's Trustees* v. *M'Intyre*, March 12, 1904, 6 F. 588, 41 S.L.R. 398; *Ross* v. *Ross' Trustees*, November 28, 1901, 9 S.L.T. No. 286. The same principles were applicable in determining whether the goodwill was heritable or moveable in a question as to the amount of legitim. The cases referred to by the Sheriff-Substitute did not apply. *Bell's Trustees* v. *Bell*, November 8, 1884, 12 R. 85, 22 S.L.R. 59, was the case of the sale of a pottery belonging to an intestate estate, and it was merely held that the goodwill was included in the enhanced price which the subjects brought from being sold as a going business. Similarly, the case of *Philp's Executor* v. *Philp's Trustees*, February 1, 1894, 21 R. 482, *sub nom. Philp* v. *Martin*, 31 S.L.R. 384, was very special. The real value to the estate of these licences lay in the probability of renewal, and this value was moveable in its character. In the case of the Argyle Street licences there was a "transfer" not a "new grant"—Licensing (Scotland) Act 1903, sec. 31, and Sched. 9—which clearly pointed to the personal character of the business. Accordingly the goodwill of an hotel was not merely an enhancement of the value of the leasehold premises, but was capable of being sold independently from the premises—*West London Syndicate* v. *Commissioners of Inland Revenue* [1898], 2 Q.B. 507; *Inland Revenue Commissioners* v. *Muller & Company's Margerine, Limited* [1901], A.C. 217. The cases in which the question was as to the estate of the owner of licensed premises were distinguishable from the present case, in which they were concerned solely with a tenant and a tenant's right.

Argued for the defenders and respondents—Legitim was a debt to be measured by the amount of the fund at the date of the father's death, and an increase in value taking place after his death did not affect legitim—*M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Gilchrist* v. *Gilchrist's Trustees*, July 19, 1889, 16 R. 1118, 26 S.L.R. 639; *Stewart's Executor* v. *Stewart's Trustees*, May 21, 1896, 23 R. 739,

sub nom. Brown v. *Robertson*, 33 S.L.R. 570. This principle excluded any claim in respect to the premises at Argyle Street, where the defenders took unlicensed premises and succeeded in getting a licence after the truster's death on their own responsibility. In a question of a tenant's estate the goodwill of a public-house was heritable. It accrued to the premises. The intending purchaser would go to the heir and not to the executor. In English law a leasehold was itself a moveable right, except where it extended for life or longer — Williams on Executors, i. 595; therefore English cases quoted did not apply. Similarly the valuation cases quoted were inapplicable, as in them a totally different set of considerations came into force. Yet even in valuation cases the goodwill of public-houses had frequently been regarded as heritable—*Hughes* v. *Assessor of Stirling*, June 7, 1892, 19 R. 840, 29 S.L.R. 625, *per* Lord Wellwood and Lord Kyllachy; *Bell's Trustees* v. *Bell*, November 8, 1884, 12 R. 85, 22 S.L.R. 59, which was a dispute on intestacy between heirs and executors, was valuable as showing that there was no separate *pretium* distinguishable as goodwill apart from the selling value of the subjects. *Philp's Executor* v. *Philp's Trustees*, *supra*, was a direct authority to the effect that the goodwill of a public-house attached to the premises, and was heritable. The same rule was illustrated in *Ross* v. *Ross's Trustees*, *supra*; *ex parte Punnett*, *in re Kitchin*, 1880, 16 Ch. Div. 226, *per* Sir Geo. Jessel, M.R., p. 233; *Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. Div. 472, *per* Cotton, L.J., at p. 479; *Chissum* v. *Dewes*, 1828, 5 Russell's Reports, 29. The indorsation of a licence certificate by the person in whose name it had been issued, or by his executors, was of no value to a new tenant applying to the magistrates for a transfer of the licence—*Hawick Heritable Investment Bank, Limited* v. *Huggan*, November 6, 1902, 5 F. 75, 40 S.L.R. 33.

At advising—

LORD M'LAREN—In this case the pursuer claims legitim from his father's estate. The father carried on business in different licensed houses in Glasgow, and at his death his available means were no more than sufficient to clear the estate of debt, and it is conceded, or at least is clear on the face of the accounts, that there will be no legitim fund unless the goodwill of the licensed houses, or part thereof, is brought into the personal estate.

When the case was formerly before us we allowed a proof and remitted the case to the Sheriff Court, where a proof was taken by the Sheriff-Substitute. The case is now under appeal from the Sheriff-Substitute's interlocutor assoilzieing the defenders from the action.

In the note to his interlocutor the Sheriff-Substitute states the question whether the goodwills of the three licensed houses are heritable or moveable, adding, as I think correctly, that in every case this must be a question of circumstances. This is in fact the decisive element in the present case, because if it is a question of fact, the evidence in the present case all points to the value of the goodwill being dependent on the possession of the premises as licensed houses, and not to any reputation of the business depending on the name of the occupier.

It is easy to see that in the case of an ordinary public-house business in a city or town a purchaser would in general only be willing to pay for the possession of the licensed premises, because what he purchases is the custom of people who frequent the house, and who are likely to continue to frequent it under changed conditions as to ownership. The right of using the name of the licensee in premises situated elsewhere, and for which the transferee would have to secure a licence, is in the case supposed of no appreciable value, because if a new house has to be started the success of the business will depend on the ability of the transferee to attract customers to the new house, and not at all on the name in which the licensed business is carried on.

There are, of course, cases in which there is personal goodwill in licensed premises. A country inn would probably be able to retain a large part of its custom notwithstanding the removal of the inn to near and (it might be) more commodious premises. In such a case the purchase-money paid to executors might fairly be regarded as money paid for the use of the name and the recommendation of the family, and therefore as personal estate. In any case, a sale of goodwill of this kind has a substantial personal element in it. It is only necessary to contrast the two cases which I have put in order to see that the heritable or moveable character of the goodwill is a question of fact.

In the present case I find no facts distinguishing the case of any of the three licensed houses in question from the ordinary case of a public-house in a large town, where the value of the business depends on the locality and on the subsistence of the licence which is necessary to enable the trade to be carried on. Supposing the defenders had offered the goodwill of any one of these to a purchaser without including the lease of the premises, the supposed purchaser would have had to find new premises and to endeavour to get a licence for the shop. It is matter of common knowledge, and is proved in this case, that the licensing authority in Glasgow are extremely unwilling to increase the number of licensed houses, and it is perfectly clear that the goodwill would be valueless when separated from the licensed premises in which the business had been carried on. This is just another way of stating that the value of such a business depends entirely on the premises and the licence taken together. The purchaser of such a business usually makes the purchase conditional on his being able to get the licence transferred to himself, and this implies that apart from the right of possession of the premises the goodwill is of no value to him.

Taking the three houses in their order, and first with respect to the Argyle Street business, when the testator died he was under notice from the Caledonian Railway Company that they were to take the property in virtue of compulsory powers. The defenders were able to secure a lease of premises in the neighbourhood, unlicensed, and they succeeded in getting a licence for the new premises on the representation that they acted for the truster's daughters, who were unprovided for, and that the new shop would take the place of the old one which was to be pulled down. This was, as I think, a speculation on the part of the trustees for the benefit of the truster's family. But for their personal intervention the goodwill was absolutely valueless, because the premises had to be vacated within a month. That there is a substantial goodwill in the new business I do not doubt, but this was no part of the testator's estate, nor was the place acquired and fitted up by the use of his money.

The business carried on in Oxford Street was sold in April 1901 for £1500, and in explanation of this apparently high price, it is said that the purchasers had arranged with the landlord for a new lease of the premises. This is a very clear case of the goodwill being of a heritable character. It is a sum paid for the remainder of a lease by a purchaser who has arranged with the landlord that if he gets the current lease transferred to him he will be treated as an old tenant and have the option of renewal.

The licensed premises in Cathedral Street are still in the possession of the respondents, who are carrying on the business under an authority to that effect contained in Mr Graham's will. I presume that the business is carried on by a salaried manager, because trustees are not bound to give their personal attendance to carry on the truster's trade. This does not look like a case in which the prosperity of the business depended on the personal talent, connection, and skill of the tradesman. It suggests, on the contrary, that the business depends on the fact that this is a licensed house in a particular locality, and that under an honest foreman-shopkeeper the business will take care of itself. Any goodwill which may attach to this house is in my opinion heritable.

I do not enter particularly on the very debateable subject of the true value of the goodwill in the respective cases, because whatever the values may be, they do not in my opinion enter into the legitim fund.

The Sheriff-Substitute has very properly given his opinion on the question of value in each case, in case this Court might take a different view on the question of heritable or moveable. The question of value resolves into weighing the conflicting opinions of experts as to what the licences were worth at the testator's death. If it were necessary to consider this branch of the case I should be disposed to agree with the Sheriff-Substitute on all the points.

I accordingly move your Lordships that the appeal be dismissed and the judgment of the Sheriff Court affirmed.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT having been absent at the discussion gave no opinion.

The Court dismissed the appeal.

Counsel for the Pursuer and Appellant—C. K. Mackenzie, K.C.—Lyon Mackenzie. Agent—Harry H. Macbean, W.S.

Counsel for the Defenders and Respondents — Hunter — Hon. Wm. Watson. Agent—James Reid, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Chancery.

SIR A. MONCREIFF *v.* BARON MONCREIFF.

Service of Heirs—Service of Heirs-Male in General—Competency—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 29.

The Titles to Land Consolidation Act 1868 enacts, sec. 29—repeating a provision in sec. 4 of the Service of Heirs Act 1847 (10 and 11 Vict. c. 47)—"In every case in which the petitioner claims to be served heir of provision or of taillie and provision, whether in general or special, the deed or deeds under which he claims shall be distinctly specified." *Held* that this enactment did not abolish the right, recognised prior to the Act of 1847, to obtain service as nearest and lawful heir-male in general without specifying the deed under which service is claimed.

Service of Heirs—Process—Proof—Objector to Petition without a Competing Petition.

In an appeal from the Sheriff of Chancery, *held* that it was competent in a petition to be served nearest and lawful heir-male in general to allow an objector, who averred that the status claimed was his but had not presented a competing petition, a proof of his averments along with the petition, and cause *remitted* to a Lord Ordinary.

Administration of Justice—Jurisdiction—Declinature—Affinity—Acts 1594, *c.* 216, *and* 1681, *c.* 13.

Affinity as well as consanguinity is a good ground for declinature of jurisdiction.

On December 4th 1903 Sir Alexander Moncreiff of Culfargie, K.C.B., presented a petition to the Sheriff of Chancery in which he asked to be served nearest and lawful heir-male in general to William Moncreiff, younger of Moncreiff, eldest son of Sir William Moncreiff of Moncreiff, Knight, who had died in or about the year 1570.

The Right Honourable Sir Henry James Moncreiff, Baronet, Baron Moncreiff of