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

Tullibole, in the county of Kinross, lodged objections, in which he stated that he was the nearest and lawful heir-male in general of the said William Moncreiff. He submitted that the petition should be dismissed on, *inter alia*, the following grounds:—"(First) The petitioner craves to be served as nearest and lawful heir-male in general to the said William Moncreiff, younger of Moncreiff. He does not ask to be served as nearest lawful heir in general or heir *ab intestato* of the said William Moncreiff. On the other hand, the petition is incompetent and irrelevant as a petition for service as heir of provision, in respect that it does not specify any deed or deeds under which the petitioner claims. . . . The petitioner accordingly asks for a decree declaring that he stands in a particular degree of relationship to the said deceased William Moncreiff other than that of an heir having a right of succession either by law or by deed. It is submitted that such a petition is not conform to law." . . .

On 19th January 1904 the Sheriff (CHISHOLM) repelled this ground of objection and allowed parties a proof of their averments.

Note. — "The petitioner craves to be served nearest and lawful heir-male in general to William Moncreiff, younger of Moncreiff. Objection is taken to the competency of a petition for service in such a character.

"The objector founds on the concluding part of section 29 of the Titles to Land Consolidation Act 1868, . . . and he contends that the result of that enactment is that where a person does not ask to be served heir of provision, the only character in which he can competently claim is that of nearest lawful heir or heir of line. In other words, where a petitioner does not claim as heir of provision, he can only competently claim to be served in a character in which he would be entitled to succeed to the deceased *provisione legis*. Although with some difficulty, I have reached the conclusion that the statute does not have the effect contended for. Prior to the corresponding provision in the Service of Heirs Act 1847, a claim to be served heir-male by a general service was competent and usual (see Bankton, bk. iii, title v., sec. 14). I cannot read the enactment in question as rendering this no longer competent. The provision in the Act deals only with cases where the petitioner is claiming to be served heir of provision. That is not the case here. What the petitioner's ulterior purpose may be, or whether he has any ulterior purpose, in asking to be served in this now unusual character is not disclosed. With such purpose, if any, or with the use he may intend to make of the service if granted, I do not think this Court is concerned. The fact that the character of heir-male is commonly associated with succession to some person *provisione hominis* is not enough, I think, to make good the objection. In the present petition at least the claim to be served heir-male is dissociated from any deed or *provisio hominis*. It must, I think, be dealt with in the form in which it is presented—a form competent under the earlier law, and which is therefore in my opinion still competent."

The objector appealed to the First Division of the Court of Session.

Upon the appeal being called the Lord President proposed a declinature of his jurisdiction in terms of the Acts 1594, cap. 216, and 1681, cap. 13, in respect that he was brother-in-law of the appellant. Lord Adam moved, Lord M'Laren and Lord Kinnear concurring, that the declinature be sustained. The Lord President thereupon withdrew, and Lord Adam took the chair.

The appellant, while appealing against the Sheriff's interlocutor inasmuch as it repelled his ground of objection, if he were wrong on that point, supported it inasmuch as it allowed him a proof.

The respondent upheld the Sheriff's interlocutor inasmuch as it repelled the ground of objection, but contended that it erred in allowing the appellant a proof without his having a competing petition.

Argued for the appellant—(1) *Competency of the Petition* —The petition should have been dismissed. It was not for service as heir of line, and did not meet the statutory requirements if for service as heir of provision (1868 Act, sec. 29). There were only two classes of heirs known to the law—heirs of line and heirs of provision. An heir-male if not heir of line was heir of provision. In old practice it had been common to serve such heir of provision as heir-male simply without specifying any deeds, and to use such service to take up all property destined to heirs-male, but that privilege had been abrogated by statute (Service of Heirs Act 1847, sec. 4, and 1868 Act, sec. 29). The Act at present in force (1868 Act) supplied a code which regulated the matter of service, and its provisions were quite general, dealing with all competent services (1868 Act, sec. 27). It made provision for the two classes of service only (1868 Act, secs. 28 and 29, and Sched. 1 and 2), for though it spoke of an heir of taillie that was merely an heir of provision (Ersk. Inst. iii. 8, 21). If therefore there ever had been a competent service as heir-male without being heir of provision it had been abolished. (2) *Right to Proof.*—Everyone who under the old practice had a right to appear and oppose had still that right (1868 Act, sec. 40), and having competently appeared he was in no way tied by the old practice, but was entitled to oppose in every way (1868 Act, sec. 41). The statutes made regulations for the service being in certain cases *res judicata* (1868 Act, secs. 43, 44), and that implied that parties were to meet on the merits and not through a mere technical appearance.

Argued for the respondent—(1) *Competency of Petition.*—Service as heir-male was a well-known proceeding recognised by all the institutional writers—*Cathcart* v. *Cassilis*, November 24, 1807; Ross's L. C. Land Rights, ii. 525, at p. 533. The Service of Heirs Act 1847 and the Titles to Land Consolidation Act 1868, which now took its

place, were not intended to affect rights, but merely in the case of the former to establish a new jurisdiction and procedure, and in the case of the latter to consolidate the various provisions (1847 Act, sec. 2) —Duff on Recent Statutes, 1848; *Graham's Guardians* v. *Graham*, November 23, 1850, 13 D. 125, at p. 130. It was impossible that they could by implication take away the right to this service. But there was no room for this implication, for the statute was not exhaustive in its enumeration of heirs. Heirs were not limited to two classes Stair, iii. 4, 33; 1868 Act, sec. 29; Ersk. Inst. iii, 8, 74). If the Act of 1868 differed from that of 1847, the respondent was entitled to look to the earlier, for the later safeguarded any rights existing at its passing (1868 Act, sec. 4), and he was alive then. The 1847 Act allowed for services "in whatsoever character" (sec. 2), and expressly recognised service as heir-male (sec. 24). The value and objects of such a service were well known—*Cathcart* v. *Cassilis*, *cit. sup.*; *Anderson* v. *Anderson*, June 22, 1833, 10 S. 696, at 699; M'Laren on Wills, 3rd ed., vol. i. p. 566, s. 1021. (2) *Right to Proof.*—The right to appear and oppose was now as under the old practice (1868, sec. 40), and by the old practice an objector had no right in a general service to go to proof unless he had a competing brieve in the same character—Duff, Feudal Conveyancing, sections 337 and 356 (2); *Forbes* v. *Hunter*, July 3, 1810, F.C.; *Cochrane* v. *Ramsay*, June 28, 1821, F.C., 1 S. 91; *Graham* v. *Graham*, *cit. sup.*

(As to subsequent procedure if petition were held competent, *Maitland* v. *Maitland*, March 20, 1885, 12 R. 899, 22 S.L.R. 418, was referred to.)

At advising—

LORD KINNEAR—The first question—and it is one of some difficulty—is whether the objection to the competency of this petition has been rightly repelled. The petitioner claims to be served heir-male of William Moncreiff, who died in 1570. He does not allege that this William Moncreiff died vested in any heritable right which he now desires to take up, and it does not seem probable that any such right is still to be found, after more than 330 years, in his *hereditas jacens*. It was suggested in argument that the service might be used to support a claim to a baronetcy presently held by the respondent. But this is not put forward as a ground of claim by the petitioner himself; and it is obvious to remark in the first place that titles and dignities are not taken up by service, and further that if they were, the title to a baronetcy could not be completed by service to a gentleman who died in 1570, more than forty years before the earliest baronetcy was created. The petitioner's case therefore must be that he is entitled to the service he seeks without disclosing any particular interest to obtain it, excepting such interest, whatever it be, as may be involved in the establishment of the *jus sanguinis*.

The difficulty arises from an enactment in the 29th section of the Titles to Lands Act 1868, that 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 so claims shall be distinctly specified. It is said—and I think correctly—that an heir-male if he takes anything by inheritance in that character is necessarily an heir of provision; and therefore it is argued that service as heir-male is no longer competent unless the petitioner can specify a deed by which an heritable estate is destined to the heir-male of an ancestor more or less remote. The principle on which the appellant relies is stated by Lord Meadowbank in *Cathcart* v. *Cassilis*—"As there are no male fees at common law, so service as *hæres masculus* implies *hæres masculus provisionis*;" and this is no doubt sound doctrine in so far as it means only that as the law then stood an heir-male could take up in that character a succession specially destined to heirs-male, and no other succession. The cases of *Edgar* v. *Maxwell* and *Cathcart* v. *Cassilis* are authorities for the proposition that a general service as heir-male will carry no right not specially conceived in favour of heirs-male. The appellant's argument is therefore right in so far as it maintains that an heir-male can take no inheritance except as heir of provision. But it does not follow that a service as heir-male is necessarily a service as heir of provision also; and indeed the contrary is decided in *Cathcart* v. *Cassilis*. Certain lands were conveyed by Thomas Earl of Cassilis to himself and the heirs-male of his body, whom failing to David Kennedy his only brother-german and the heirs-male of his body. On his death his brother David expede a general service to him as nearest heir-male and of line; and after several different judgments had been pronounced, it was ultimately held on a remit from the House of Lords that the personal right under the deed just mentioned was not carried by the service as heir-male, notwithstanding an argument, which found favour with some of the judges, that service in that character proved that Earl David was in fact heir of provision under the deed because it proved that Earl Thomas had not left heirs-male of his body. The ground of judgment, as I understand it, was that a service in one character cannot carry rights descending to heirs otherwise described, although it should be manifest from the service itself that the same person served must be heir apparent in both characters. Lord President Campbell in a very learned opinion points out the distinction between services merely general as nearest heir of line, nearest heir-male, or nearest heir of conquest which have no reference to any particular subject, and service as heir of provision which depends of necessity upon the terms of a certain deed. As to the former class he says—"All these are distinctly marked and known, and the object of the service is to vest one or other of these general characters in the

heir;" and of the latter he says—'The law does not know any such heir unless arising out of the provisions of some particular deed. He is not an heir-at-law but an *hæres factus*, and therefore a service as heir of provision ought regularly to refer to some particular deed or subject, and for the most part does so, as the jury cannot answer to the brieve without some evidence being laid before them by production of a deed and reference to a subject thereby conveyed." I think this a conclusive authority that service as heir-male is not not necessarily equivalent to service as heir of provision. The distinction is clear. Sir Ilay Campbell says again—"A person may have in him the technical character of heir-male to such a person without any provision in his favour at all. Heir-male is a designation which birth alone bestows, and which cannot be conferred by any deed, so that *qua* such he is clearly an *hæres natus* and not an *hæres factus*." The result is that service as heir-male will not vest an heritable right, unless the person served is heir of provision also under a deed which specially destines the right to the heirs-male of the person to whom he serves; but it is not tantamount to service as heir of provision, because under the law in force before the passing of the Service of Heirs Act there can be no question that one who was in fact heir-male was entitled to serve in that character, although he had no right as heir of provision under any deed whatever. He was so entitled, because, as Lord President Campbell puts it, he had in him the technical character of heir-male. The question therefore comes to be, whether this undoubted right is abolished by the Titles to Lands Act of 1868; and I am of opinion that it is not. If it had been intended to take away a right recognised and established by centuries of practice, this must have been done directly and in plain words. But I cannot find in the statute even an implication to the effect alleged. All that the statute does is to make imperative what according to Sir Ilay Campbell was always the regular course, and to require the petitioner for service as heir of provision to set out in his petition the deed which he must in any case have produced in order to establish his right. This is not an enactment that no one shall henceforth be entitled to serve as heir-male in general who is not in a position to bring forward a deed destining some particular succession to heirs-male. If anyone claims to be served as heir-male and of provision, he must comply with the statute, and specify the deed under which he claims. If he does not claim to be an heir of provision, the statute does not prevent his being served as heir-male.

The legal effect of the service, if the petitioner obtains it, is a different matter. It may be valid or inept as a proceeding for taking up an heritable estate. The statute, while it does not affect the competency of a service as heir-male in general, may or may not prevent such service being used to establish the right of an heir of provision if a deed creating that right has not been specified. But that is a question which has not been raised, and is not before us at present; and I desire to express no opinion upon a point which cannot be decided in this process.

The second question is, whether the Sheriff is right in allowing a proof to the objector. There can be no dispute that under the former law an objector was not allowed to impede the progress of a service by opposing a proof, or by offering a counter proof, unless he was prepared to sue out a competing brieve, and I see no reason to doubt that a similar rule should obtain under the new procedure before the Sheriff. But it has no application to the present case. The rule is that the entrance of an heir-apparent on the possession and management of property to which he has an immediate title must not be indefinitely delayed by litigation at the instance of one who does not undertake to exclude him by proving a better right. But there is no such urgency in the case of a technical service which has stood unclaimed since 1570. The appellant on the other hand has put forward an undoubted title and interest to oppose, since he avers that he and his lineal ancestors have been in possession of the status claimed by the petitioner since 1744, and it would not be reasonable to require that he should expede a service as a condition of being heard, since there is no heritable right in controversy for the vesting of which service is necessary. For these reasons I am of opinion that the Sheriff's interlocutor should be affirmed.

LORD ADAM and LORD M'LAREN concurred.

The Court affirmed the interlocutor of the Sheriff and remitted the cause to Lord Kyllachy.

Counsel for the Appellants—Campbell, K.C.—Cullen. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent—Mackenzie, K.C.—Macphail. Agents—Scott-Moncrieff & Traill, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, July 19.

MACINTYRE *v.* CARMICHAEL.

Justiciary Cases — Small Debt Appeal — Oppression — Wrong Procedure by Sheriff — Refusal to Allow Proof — Remit to Reporter.

Circumstances in which the action of a Sheriff-Substitute, who, sitting in the Small Debt Court, refused to allow a proof in ordinary form and decided the case upon a report made under a remit, was *held* to amount to constructive oppression and to invalidate the proceedings.