legacy of £5000? 2. Does the depreciation in the investments appropriated by the trustees to the second party's legacy of £5000 fall to be borne by the second party?"

Argued for first parties — The trustees were entitled to make the appropriation in question, for it was consistent with proper trust administration to do so—*Robinson* v. *Fraser's Trustees*, August 3, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740. Where, as here, the trust estate was exposed to the risks of a fluctuating business the trustees would not have been in safety to leave the second party's legacy so invested. That being so, the depreciation on the trust securities in which they invested it fell to be borne by the second party.

Argued for the second party—The second party was entitled to a legacy of £5000, and not to investments which might be worthless. Where, as here, there was no direction, express or implied, to appropriate investments to the legacy, and where, as here, there was no necessity for an immediate realisation or division, the trustees were not entitled to set aside specific investments to meet it—*Scott's Trustees* v. *Scott*, November 1, 1895, 23 R. 52, at p. 59 foot, 33 S.L.R. 65; *Vans Dunlop's Trustees* v. *Pollok*, 1912 S.C. 10, 49 S.L.R. 7. That was especially so where, as here, the business in which the estate was invested was a prosperous one.

At advising—

LORD PRESIDENT — The questions submitted for our judgment in this case relate to the succession of the late Mr John Colville. He died in August 1901, survived by Mrs Colville, by one son, and by one daughter. The scheme of his settlement in so far as relates to the son and daughter, with whose interest alone we are concerned in this case, is simple. To the daughter he bequeathed a legacy of £5000 and a liferent of £20,000. This is her testamentary provision. To the son he bequeathed the residue of his estate, and, of course, the income. That is his testamentary provision. These provisions, "including" (to use the words of the settlement) "the legacy of £5000," he declared to vest not at the date of the testator's death but on his children respectively attaining twenty-five years of age, or, in the case of the daughter, being married. The daughter is unmarried and has attained twenty-five years of age. Her testamentary provisions have vested and are now payable. Accordingly she claims payment of her £5000 legacy. The trustees reply that they are ready to give her, not the £5000 which was bequeathed to her by her father, but certain railway debenture stock in which they say they invested the £5000 legacy in November 1902. That railway debenture stock, it is agreed, has now considerably depreciated in capital value.

It is certain that the trustees were not expressly authorised to sever the legacy of £5000 and place the money upon separate investments. It is equally certain that they were not impliedly authorised to do so, because it is agreed that they were "not constrained thereto by any necessity for immediate distribution of the trust estate" or any part thereof. They came to the resolution to make an appropriation merely because they considered it expedient so to set aside and secure in such investments a sum to meet the legacy."

In these circumstances I am very clearly of opinion that, there being no expressed or implied power to set aside specific investments to meet this legacy, the daughter is entitled to have her £5000, and her claim cannot be legally met by an offer to give her something different and something less.

LORD MACKENZIE—I agree in the result at which your Lordship has arrived.

As regards the first and second questions, I think that the trustees were not warranted in making an appropriation to meet the legacy of £5000. The direction to pay that legacy to the daughter on her attaining the age of twenty-five, or earlier in the event of her marriage, I do not think can be satisfied by tendering to her depreciated investments. It is clear that there is no express direction to appropriate. It is also clear that there may be in certain cases an implied direction to make an appropriation, and the case of *Robinson*, 8 R. (H.L.) 127, was said to be similar to the present. But I think that case is plainly not applicable, because the direction there was to make provision, first, for the payment of two specific legacies, which were to be held in liferent and in fee, and then for a division of the residue. The terms of that settlement indicate that in order that there might be no delay in dividing the residue it was necessary to appropriate. In the present case there is no ground for any such implication, and the statement set out in article 8 of the Special Case makes that point perfectly clear.

LORD SKERRINGTON — I concur with both your Lordships.

LORD JOHNSTON was not present.

The Court answered the first and second questions of law in the negative.

Counsel for the First and Third Parties—Clyde, K.C.—Watson, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Second Party—Chree, K.C. —Christie, K.C. — Hedderwick. Agents — Graham, Johnston, & Fleming, W.S.

Friday, January 16.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MENZIES *v.* M'KENNA AND OTHERS.

Jurisdiction—Court of Session—Declarator —Declarator of Heirship without Executorial Conclusions—Competency.

An action of declarator that the pursuer was the nearest lawful heir of line of A, brought in order that the pursuer might obtain such evidence of descent as would assist him in a claim to have his name inserted in an official roll of baronets instituted by Royal Warrant,

held incompetent, in respect that (1) the Court of Chancery is alone entitled to declare propinquity when no question of heritable right is involved, and (2) the Court of Session will not investigate disputed questions of fact for the mere purpose of aiding a pursuer to maintain a claim elsewhere and not with a view of their decree being operative.

David Prentice Menzies, Plean Castle, Menzieston, Stirlingshire, *pursuer*, brought an action against the Right Honourable Reginald M'Kenna, His Majesty's Secretary of State for the Home Department, and others, *defenders*, the officials nominated under Royal Warrant dated 8th February 1910, for the purpose of preparing an official roll of baronets, for declarator that the pursuer was "the nearest lawful heir-male of line of Captain James Menzies of Comrie, Perthshire, who was born at Castle Menzies, in the parish of Weem and county of Perth, in or about the year 1663, and died at Comrie Castle, formerly in the parish of Weem and now in the parish of Dull and county of Perth, in or about the year 1748."

The pursuer averred—"(Cond. 2) The pursuer is the nearest lawful heir-male of line of the said Captain James Menzies of Comrie by the following chain of descent:—". . . [*The pursuer then narrated the chain of descent.*] . . ."

The defenders pleaded, *inter alia*—"(1) The action is incompetent and ought to be dismissed."

On 23rd January 1913 the Lord Ordinary (ORMIDALE) sustained the first plea-in-law for the defenders and dismissed the action."

Opinion.—"This is an interesting point, and one which is of importance to the pursuer, and if I had any doubt on the matter I would have taken time to consider my judgment. But dealing only with the point of competency, and leaving out of view entirely the second question argued, whether there being but a bare declarator the action is incompetent on that ground, I think the question is already decided by the case that was cited by the defenders, namely, the case of *Bosville* v. *Lord Macdonald*, S.C. 1910, p. 597. In the observations made by Lord Skerrington in that case I entirely concur, and it seems to me, therefore, that this case is ruled by the judgment which he pronounced. Besides, while it is said in the rubric to have been acquiesced in, an argument is reported to have been submitted for and against it, although there is an observation by the Lord President which seems to show that the reclaimers did not press their contention, but agreed finally that the question was one for the Sheriff of Chancery.

"The only ground which Mr Menzies suggests distinguishes the present case from the case of *Bosville* is that a Royal Warrant dealing with the preparation and keeping of a roll of baronets, and providing for the procedure to be followed by any person desiring to be enrolled, was issued subsequent to the decision in *Bosville's* case, but it seems to me that while that is historically quite correct, the warrant has not made any real difference in the course that a person in the position of the present pursuer ought to follow in the initial stages of his endeavour to prove his propinquity. I do not adjudicate upon the matter at all, but it seems to me that the point stated in the letter of the Lyon King-of-Arms of 24th January 1911 and the question he raises there might be answered—I do not say that it would, but as at present advised I am inclined to think that it might be answered—by the pursuer presenting to the Secretary of State through the Lyon King a service obtained in the Court of Chancery showing that he was what he wants this Court in the present action to declare him to be, namely, the nearest lawful heir-male of line of Captain James Menzies.

"Accordingly, following the decision of *Bosville* v. *Lord Macdonald*, so far as it deals with the question here raised, I must hold the present action incompetent, and dismiss it."

The pursuer reclaimed, and argued—The present action was competent—*Stewart & Company* v. *Sillars*, January 27, 1906, 13 S.L.T. 800. This was the only case where a pure declarator of fact without an executorial conclusion had been held competent. The authority set up by Royal Warrant was the equivalent of the arbiter in that case. The Royal Warrant altered the situation, and made the case of *Bosville* v. *Lord Macdonald*, 1910 S.C. 597, 47 S.L.R. 328, founded on by the Lord Ordinary, no longer applicable. The object of the present action was to obtain a proof of the pursuer's descent which would be accepted by the Home Secretary and by the Privy Council, who had exclusive jurisdiction as to admissions to the roll. A service in Chancery would not serve that purpose, as it would be obtained on an *ex parte* statement and in the absence of proper contractors, and would not be accepted as proof of descent—*Sir Hugh Mitchell's Claim*, *The Times*, March 12, 1912. A judgment obtained in the Court of Session, on the other hand, though not binding, would be treated with respect, because it would be a judgment obtained against the proper contradictor. The Court of Session had allowed a proof of propinquity in the case of the *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237, 45 S.L.R. 949, and *per* Lord M'Laren at pp. 1250 and 1251, on the true construction of the case of *Officers of State* v. *Alexander*, May 25, 1866, 4 Macph. 741, 2 S.L.R. 34.

Argued for the defenders—The action was incompetent. The Court of Session had no jurisdiction in the first instance in actions of this character. Such actions could only be originated in the Court of Chancery, and the Royal Warrant founded on by the pursuers could not alter the law of Scotland in this matter—Stair, iv, 1, 43; Mackay's Manual of Practice, p. 118; *Bosville* v. *Lord Macdonald* (*cit.*); *Officers of State* v. *Alexander* (*cit. sup.*); *Moncreiff* v. *Lord Moncreiff*, July 20, 1904, 6 F. 1021, 41 S.L.R. 850. The Court would not, in any event, grant declarator without executorial conclusions — *Allgemeine Deutsche Credit Anstalt* v. *Scottish Amicable Life Assurance Society*, 1908 S.C. 33, 45 S.L.R. 29. The defender also referred to *Norris* v. *Gilchrist*,

January 14, 1847, 9 D. 466 (*per* Lord Justice-Clerk Hope at p. 474), on the value of services as evidence.

LORD SALVESEN — This case raises an interesting question as to whether an action concluding only for declarator that the pursuer is the nearest lawful heir-male of line to Captain James Menzies of Comrie, Perthshire, who was born in the year 1663, is competent in the Court of Session. The action is admittedly brought for the purpose of furthering the pursuer's claim to a baronetcy which is said to have lapsed in 1910 on the death of Sir Neil Menzies, the last holder of the title. I think it has been settled that this Court is not entitled in an action such as the present to declare the propinquity of one person to another, and that the proper court for a person who wishes to serve as heir-male of line or on any other footing to a deceased person is the Court of Chancery. The first proposition was, I think, conclusively established by the decision of the Court in *Officers of State* v. *Alexander*, (1866) 4 Macph. 741, where it was held incompetent for one to bring a declarator that another is not the heir of a person deceased. No doubt it was a negative declarator which was there held to be incompetent, but if a negative declarator is incompetent, it appears to me that a positive declarator must be equally incompetent. That was a decision of the Second Division, over which at that time Lord Justice-Clerk Inglis presided, and, so far as I am aware, there has never been any challenge of that decision, which in any case is binding upon us. We were referred by Mr Menzies to some observations made by Lord M'Laren in the case of the *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237, at p. 1251, but all that was decided there was that the Court of Session had jurisdiction to determine a claim to the office of Hereditary Standard-Bearer of Scotland, that office being a hereditary office and not a mere title of honour. Now a baronetcy is a mere title of honour. It confers no privileges except those that are social, and the pursuer here does not allege that there is any question of heritable right depending upon the success of his declaratory conclusion.

Mr Menzies has practically conceded that such is the law, but he says that a change has been effected by the Royal Warrant which was published in the *London Gazette* of 15th February 1910, the object of which is to institute a roll of baronets. Whatever be the effect of the warrant, it seems to me that, so far from assisting the pursuer, it supplies an additional reason for holding that this Court cannot entertain the present action because it provides machinery for carrying out its purpose in which the Court of Session has no place. It provides that the claimant may apply by petition to the Secretary of State, and the Secretary of State has the power of remitting the matter, where a Scottish baronetcy is concerned, to the Lord Advocate, and upon his advice, if he thinks fit, of directing the matter to be referred to the Privy Council for examination. The pursuer does not maintain that a decree of the Court of Session would place him on that roll, but so far as I understand his position he is anxious to get a decree in this Court in order that he may present it to the Secretary of State as *prima facie* evidence in support of his claim to be put on the roll. Now we are not in the habit of granting decrees simply that they may be evidence in some other court or tribunal. We decide matters of fact finally between parties who are interested in the settlement of these particular matters. But I do not think there is any instance, and none has been cited to us, in which the Court of Session investigated a disputed question of fact, not with the view of their decree being operative, but with the view of aiding the person in whose favour the decree was sought to obtain a claim elsewhere.

I do not think we need say how the position of this pursuer may be improved. It may be that if he obtained a service from the Sheriff of Chancery, after an inquiry made by the Sheriff into his claim, that that might assist him in establishing it in the proper quarter. Certainly, as he has pointed out, it would not be conclusive, because jurisdiction is not vested in the Sheriff of Chancery, but at all events it would be competent for him to serve before the Sheriff of Chancery, whatever the value of such a service might be. All that we have to decide is whether this action is competent, and on that point I have no difficulty in reaching the same conclusion as the Lord Ordinary.

LORD GUTHRIE—I am of the same opinion. Evidently this is a test case, and the defenders were right in appearing, but I doubt whether they should have gone beyond tabling their position as they had done in regard to the preliminary pleas, and whether it was their duty to raise any question on the merits of the case. The pursuer does not ask us to serve him heir to the individual to whom your Lordship has referred, who was born in 1663 and died in 1748, but the result would be practically the same. I agree with your Lordship that the case is ruled by the case of *Alexander*, 4 Macph. 741. It further appears to me that what the pursuer asks here we cannot grant, because it would be useless. If the defenders opposed the application on the merits, the Privy Council could say that they were not the proper contradictors. If the defenders did not appear, the pursuer would only get a decree in absence, to which the Privy Council would attach little importance, especially in view of the fact that to obtain service from the Sheriff of Chancery the pursuer would at least have required to produce sufficient evidence to satisfy the Sheriff that he had a *prima facie* case. I agree with your Lordship on the further ground that it would be against the practice of this Court to grant a decree which is not going to settle anything finally so far as the pursuer is concerned, but merely aid him to maintain a claim elsewhere. We are not bound to advise the pursuer here; and it appears from the correspondence that he is not in the position which has been repre-

sented, namely, helpless and unable to take any further step. It is quite clear from the documents referred to on record that if he served he would at all events be in a position to make renewed application, and that his services, if tendered, would certainly be considered by the Secretary of State in the first instance, who might refer it to the Privy Council. If the pursuer wants to take any further step he has this course clearly open to him. Whether it would advantage him or not in the end it is not for us to say.

LORD DEWAR concurred.

The LORD JUSTICE-CLERK was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer and Reclaimer—A. J. P. Menzies—Maclaren. Agents—Bruce & Black, W.S.

Counsel for the Defenders and Respondents — Lyon Mackenzie, K.C. — Gillon. Agent—Sir W. S. Haldane, W.S.

Saturday, January 17.

SECOND DIVISION.

[Lord Anderson, Ordinary.

EDGAR *v.* LAMONT.

Reparation — Negligence — Title to Sue — Husband and Wife — Medical Man — Action by Married Woman against Medical Man Called in by Husband to Attend to her.

In an action at the instance of a married woman, against a medical man who had been called in by her husband to attend to her, in which she claimed damages for the loss of a finger, which she averred was due to improper professional treatment, *held* that as the action arose *ex delicto* and not *ex contractu* the pursuer had a title to sue.

Mrs Jessie M'Intosh or Edgar, wife of Peter Edgar, J.P., property agent and valuator, Glasgow, with the consent and concurrence of her husband as her curator and administrator-in-law, *pursuer*, brought an action against Alexander Lamont, M.B., C.M., Chryston, Lanarkshire, *defender*, in which she claimed payment of £500 damages for the loss of a finger through the failure of the defender to render proper professional treatment.

The pursuer pleaded — "(1) The pursuer having suffered loss, injury, and damage in the manner condescended on, through the gross fault of the defender, is entitled to reparation therefor from the defender. (2) The loss of the pursuer's finger having been caused by the gross fault, incompetence, and negligence of the defender, in consequence of his failure to afford proper and sufficient professional treatment and attention, the defender is liable in reparation therefor to the pursuer."

The defender pleaded — "(1) No title to sue."

The *facts* of the case appear from the opinion of the Lord Ordinary (ANDERSON), who on 17th December 1913 approved of the issue proposed by the pursuer as amended as the issue for the trial of the cause.

Opinion.—"This is an action of damages which is brought at the instance of a lady named Mrs Edgar, who is the wife of Mr Peter Edgar, J.P., property agent and valuator in Glasgow, and the defender is a medical gentleman, Mr Alexander Lamont, M.B., C.M., who resides at Chryston and practises there. The basis of the claim which the lady makes against the defender is to be gathered from the terms of the issue which has been submitted by her, and which is in the following terms:—'Whether the defender, in violation of his duty to the pursuer, by negligence and incompetence, failed to give sufficient and proper care and skill to the pursuer as his patient, in consequence of which the pursuer suffered much pain, her left hand was injured, and one finger had to be amputated, to the loss, injury, and damage of the pursuer?'

"The ground of the action accordingly is that the defender was professionally negligent and unskilful when the pursuer was his patient. I shall have to examine the averments of the pursuer in some detail when I come to consider the second point which was debated before me. But at the outset I deal with the first point that was argued, namely, whether or not the lady has a title to sue the action. It was maintained by Mr Wilson for the defender that she had no title to sue the action, inasmuch that it was not she who made the contract with the defender, and it was contended that as the contract was the husband's he alone had the title to sue under the contract for any remissness on the part of the defender in executing that contract. I was referred to a number of cases in different branches of the law, such as the case of *Cameron* v. *Young*, 1907 S.C. 475, and in the House of Lords, 1908 S.C. 7, and the case of *Kennedy* v. *Bruce*, 1907 S.C. 845, which were cases of landlord and tenant. I was also referred to the cases of *Raes* v. *Meek*, 16 R. (H.L.) 31, and *Tully* v. *Ingram*, 19 R. 65, which are cases where the conduct of a law agent was involved, and I was asked on these authorities to hold that the pursuer had no title to sue the action. On the other hand, Mr M'Laren for the pursuer referred me to a number of English cases, such as the case of *Pippin* v. *Sheppard*, 1822, 11 Price, Exch. 400, where it was decided that the wife alone, who had been injured by the negligence of the medical man, was entitled to sue him for damages, and the case of *Gladwell* v. *Steggall*, 1839, 5 Bing. (new cases), 733, where the injured individual was a young girl of the age of ten years, and where the doctor had been instructed to attend her by the mother, but where nevertheless the Court held that the injured girl was the proper person to sue the action, and Chief-Justice Tindell laid it down as the law of England that in a case like that the claim of the injured person was not *ex contractu* but *ex delicto*—*Longmeid* v. *Holliday*, 1851, 6 Exch. 761, and in our own Courts *Far-*