"The petitioner now demands re-delivery of his disposition, and the respondents decline to part with it until they are paid the composition due on his entry. The Sheriff is of opinion that this is a claim to which the superiors and their agents are not entitled. The *jus in re*, the right of property in the document, is undoubtedly in the petitioner; the respondents have no lien over it of any kind, except for the fees connected with the preparation of the confirming writ at his request. The claim preferred practically implies that after a proprietor has asked an entry, he is irrevocably bound to take it, even although he should subsequently discover that the lands are not in non-entry at all, or that a different person altogether is the proper party to be entered, or (as is alleged in this case) that a larger sum is claimed as composition than is truly due. If a vassal wrongfully refuses to be entered, the superior's remedy is not, as the Sheriff-Substitute has found, to keep the vassal out of his titles, so as to force him to bring an action in the Supreme Court to determine the questions which have arisen as to the terms of the entry, but himself to bring a declarator of non-entry. This is the course which was taken in the analogous case of *Stewart* v. *Cunningham*, Dec. 11, 1841, 4 D. 249; and there the right of the vassal to refuse to accept a charter of confirmation after it had been prepared at his own request, does not seem to have been doubted on either side. At the time of the above decision the confirmation was contained in a separate deed—now it is a mere endorsement on the disposition; but this cannot alter the legal rights of the parties, as the writ of confirmation can easily be deleted and rendered inoperative before the disposition is delivered up. But in accordance with the above case, the petitioner must indemnify the superior's agents for the expenses which he has caused, and which, by his change of mind, have been thrown away. Matters will thus be restored to the *status quo*, and the various questions between the parties as to the terms of the entry will be determined in the Supreme Court, in a declarator of non-entry at the superior's instance."

The respondents appealed.

FRASER and DUNCAN for them.

MAIR, for the petitioner, was not called upon.

At advising—

LORD PRESIDENT—I think the Sheriff has taken the true view of the case. If the vassal is entered, then the superior is in the position of having entered his vassal without payment of the casualties. On the other hand, if the vassal is not entered, it is open to the superior to bring a declarator of non-entry. One sees why the superior is not desirous of bringing such an action, for then the question would be raised, whether the heir of the last vassal is not entitled to come forward and demand an entry. There is no help for that. It is just one of the accidents to which a superior is subject. The only plausible plea is that the purchaser had so far committed himself that he was not entitled to draw back—in fact, that he had contracted to take an untaxed entry. But I am not inclined to take that view. He had not accepted the writ of confirmation, and I think he is entitled to get back his titles.

LORD DEAS—There are two pleas for the respondents—(1) that the action was incompetent in the Sheriff-court, as involving matter of heritable right; (2) that there was a transaction between the parties by which the vassal agreed to take an untaxed entry. I do not think there is anything in either. It was perfectly competent to present a petition in the Sheriff-court to get back the document, if he was entitled to it. The question whether there was a concluded transaction between the parties was perfectly competent in the Sheriff-court. It is not a question of heritable right at all. When the deed is got back, so far as heritable right is concerned, matters will be left just where they are. The other question is, whether the purchaser is excluded from claiming the document by having sent in his titles in the way he did. It is by no means unusual for an entry to be granted to a singular successor upon terms far less than a year's rent, when he is in a position to present the heir of the last vassal to the superior. Is the mere fact of his having made this application to entitle the superior to a year's rent to which otherwise he would have no right?

LORD ARDMILLAN—I concur. I consider a summary petition very applicable to getting back a document which has been handed to a party on an uncompleted agreement.

LORD KINLOCH concurred.

The Court refused the appeal, with expenses, and remitted to the Sheriff to proceed further.

Agent for Appellants—Wm. Skinner, W.S.
Agent for Respondent (Petitioner)—Wm. Officer, S.S.C.

Tuesday, June 25.

SECOND DIVISION.

M'KERSIE *v.* MITCHELL AND OTHERS.

Succession—Executors—Mora.

One of the next of kin of a deceased, who owned one-half of a distillery, *held* not entitled to insist that the business should be sold in order that the true value of his share might be ascertained, while a majority of the next of kin agreed that their respective shares should be ascertained by arbitration. *Held* also, barred by *mora* from challenging the proceedings of the executors, which had taken place about seven years before any active step was taken to set them aside.

Archibald Mitchell, distiller in Campbeltown, died, intestate and unmarried, on 2d March 1863. He was survived by two brothers and three sisters, viz., the defenders John Mitchell and William Mitchell, and by Mrs Mary Mitchell or Sheddan, Mrs Isabella Mitchell or Campbell, and the pursuer, Mrs Jean Mitchell or M'Kersie, who were his surviving next of kin, and who, along with Archibald Mitchell (a nephew of the deceased), residing at Iowa, in the United States, were the whole parties among whom his moveable estate fell to be distributed. The pursuer, William M'Kersie, was the husband of the said Mrs Jean Mitchell or M'Kersie.

Some time after Mr Mitchell's death the defenders John and William Mitchell, on a petition to the Commissary of the county of Argyll, were decerned executors-dative *qua* two of the next of kin to the deceased, and afterwards gave up and recorded an inventory of the deceased's personal estate. The testament-dative by the Commissary in their favour was dated 19th September 1863. They then took possession of and administered the

whole estate of the deceased, who at the time of his death was possessed of considerable means, heritable and moveable. In particular, he was the principal partner of the firm of Wylie, Mitchell, & Co., distillers and maltsters at the Rieclachan Distillery, Campbeltown. Five-tenths, or one-half, of the concern belonged to him; two-tenths to the defender Mrs Jean Harvey; two-tenths to her son, the defender James Harvey; and one-tenth to the defender John Mitchell. There was no written contract of copartnery between the partners of the distillery company, and by Mr Mitchell's death the company was dissolved.

Shortly after his death, the pursuer M'Kersie, for himself and his wife, intimated to the defenders John and William Mitchell that he wished the deceased's estate, and particularly the distillery business, to be publicly sold, in order that the full value might be realised. The other defenders were also informed that this was the wish of the pursuers. On 9th August 1863, M'Kersie received a letter from the agent of John and William Mitchell requesting him to attend a meeting of the next of kin of the deceased, for the purpose of making arrangements for ascertaining the value of the deceased's interest as a partner of Wylie, Mitchell, & Co. The pursuers declined to attend the meeting. On 11th August 1863, M'Kersie received a letter from the executors' agent, with a copy of a minute of the meeting, bearing, *inter alia*, that the parties present had resolved to ascertain the value of the deceased's interest in the distillery by arbitration; and had authorised the executors John Mitchell and William Mitchell to nominate an arbiter for them. The parties present at the meeting were the defenders John and William Mitchell, Mrs Hugh Mitchell, for her son Archibald Mitchell, and Mrs Campbell. M'Kersie protested against these proceedings. On 29th September 1863, he received a letter from the defenders' agent, intimating that another meeting of the next of kin of the deceased would be held on the evening of that day, for the purpose of choosing a referee in room of one previously appointed, who had declined to act. M'Kersie declined to attend this meeting also. At the meeting it was agreed to nominate William M'Nair as a valuator for the executors.

The surviving partners of Wylie, Mitchell, & Co. having named James Stewart as referee on their behalf, a reference was entered into on 30th September 1863, by the said James Harvey on behalf of the surviving partners of Wylie, Mitchell, & Co., and by William Mitchell on behalf of the executors of the deceased, with a view to ascertain the value of the deceased's interest in the distillery. This reference was the deed first sought to be reduced. On 30th September 1863, the day on which the reference was entered into, the arbiters issued a deliverance which bore that the value of the deceased's interest in the late firm of Wylie, Mitchell & Co. amounted to £3645, 11s. 9d. This deliverance was the second document of which reduction was sought. On 2d October 1863, two days after the reference had been entered into and the deliverance issued, the arbiters pronounced a decreet-arbitral, finding that the said sum of £3645, 11s. 9d. was the value of the deceased's interest in the firm as at 9th July 1863. This award was the third document sought to be reduced.

On the 2d of October 1863, M'Kersie received another letter from the defenders, intimating that a meeting of the next of kin of the deceased would be held that evening, for the purpose of fixing their proportions of the deceased's interest in the firm, as fixed by the arbitrators; but he declined to attend this meeting, or to be bound by the valuation of the arbiters, and insisted that the executors were bound to realise the whole property of the deceased by bringing it to public sale.

Notwithstanding the remonstrances of the pursuer, a new copartnery, under the name of Wylie, Mitchell, & Co., was formed, the partners being the defenders, John Mitchell, William Mitchell, Mrs Jean Ferguson or Harvey, James Harvey, the firm of J. & W. Mitchell & Co., and the said John Mitchell and William Mitchell, the individual partners of J. & W. Mitchell & Co., and Mrs Campbell, who allowed her share of the executry estate to remain in the business of Wylie, Mitchell, & Co. In the new company the whole stock, &c., of the former firm were taken as a part of the capital stock of the new firm, the share of the deceased being taken at the price put upon it by the award.

The pursuers, on 9th September 1870, raised an action against the defenders John Mitchell and William Mitchell, as executors, calling them to account for their actings and intromissions, and objecting again to the business being taken over under the said valuation or reference, and demanding that they should have a share of the profits of the business until it should be sold as it ought to have been.

That action was, however, dismissed by the Second Division, on the ground that it was not sufficient to call the executors as defenders, but that the new firm must also be called for its interest. They accordingly raised the present action, concluding for a declarator that the executors were bound to have disposed of the distillery business by public sale, in order to ascertain the true value of the pursuer's interest in it; for a decree that the business should be sold; and for reduction of the above reference, deliverance, and award.

The Lord Ordinary (JERVISWOODE), after a proof, pronounced the following interlocutor:—

"*Edinburgh, 21st March*, 1872.—The Lord Ordinary . . . . . finds as matter of fact, 1st, that a public sale of the business of the firm of Wylie, Mitchell, & Co., including the whole stock, property, good-will, and other assets thereof, the right and duty of the defenders, the executors of the late Archibald Mitchell, in regard to which sale is now sought to be established under the first declaratory conclusion of the summons, could not have been carried out on the death of the said Archibald Mitchell otherwise than subject to a serious risk of loss, and of detriment to the interests of the several persons representing him, and to the interests of the partners of the said firm other than the said Archibald Mitchell; and 2d, that a public sale of the business which is now carried on under the said firm, such as is contemplated under the second conclusion of the summons, would (assuming that the pursuers had right or title to insist on such a sale) be hazardous to, and involve serious risk of loss and injury to, the partners in the said present company; and, with reference to the preceding findings, finds as matters of law that the pursuers have failed to instruct by evidence any facts averred on their behalf which are relevant and sufficient to support or warrant the conclusions of the summons, or any of them: therefore assoilzies the defenders from the whole conclusions of the summons, and decerns," &c.

The pursuers reclaimed.

SHAND and ORPHOOT for the pursuers.

FRASER for the defenders, the executors.

MUNRO for the defenders, the new firm.

At advising—

LORD JUSTICE-CLERK—(*After stating the facts*)—The action presents one feature of peculiarity which has not occurred in any of the prior cases. It is supported in argument by the principles supposed to be established by the cases of *Crawshay* v. *Collins* (15 Vesey, 218), *Featherstonehaugh* v. *Fenwick* (17 Vesey, 298), and *Brown* v. *De Tastet* (Jac. 284). These cases established three propositions in relation to mercantile companies constituted without articles or special contract—First, that they were dissolved by the death, and were dissoluble at the will, of any partner; secondly, that, on dissolution, any partner, or the representative of a deceasing partner, was entitled to insist on a sale of the company's stock, and was not bound to accept a valuation; thirdly, that any partner who continued to trade on the joint property was liable to account for the joint profits. These principles are well settled, but they have no application to the present case. The surviving partners, and the representatives of the deceasing partners in this case, settled accounts in 1863. On the one hand, the executors of the deceasing partner accepted certain payments and considerations in full of the claims of the estate on the joint property, and discharged, or became bound to discharge, the surviving partners. On the other hand, the surviving partners, by the settlement acquired absolute right to the stock of the old company, which was thus brought to an end, and formed a new company with new partners and new stock. The present challenge is brought neither by a partner nor by the representatives of a partner of the old company, but by one of the next of kin, under the succession of the deceased partner, who has, or says he has, an unsettled claim against his executors. I can find nothing in these cases to support such a demand. I find the very reverse. In *Crawshay's* case, Lord Chancellor Eldon puts the case of a settlement with the executor as the counterpart of the case before him. He says:—"If the surviving partners think proper to make that which is in equity the joint property of the deceased and them the foundation and plant of increased profit, if they do not think proper to settle with the executor, and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner." In short, these cases did decide that a surviving partner could not insist on a valuation, and was bound to submit to a sale; but they did not decide that the surviving partner, on the one hand, and the representative of a deceasing partner on the other, could not settle accounts on the footing they thought mutually advantageous; nor was there any principle on which such a doctrine could rest, provided the settlement were one not liable to challenge on the ground of collusion or manifest and known inequality and injustice, amounting to fraud.

Two elements were suggested in this case as substantially vitiating the agreement, and impugning its good faith. The first was, that John Mitchell, who was one of the executors, was also one of the surviving partners. If John Mitchell had been sole partner, and also sole executor, the objection might be formidable. But he was neither. The Harveys held the greater part of the remaining stock, and had no interest in the share of the deceased; and William Mitchell, the other executor, had no individual interest whatever in the estate. The surviving partners were therefore quite in a position to deal at arms-length with the executors, and were entitled to do so.

The other objection, as far as the surviving partners are concerned, is, that they were privately aware of Mr M'Kersie's letter of the 3d of October. I do not think they were bound to take any notice of it. No steps were taken to interpel them, and the demand made in that letter we have found to be one entirely inadmissible.

I am therefore of opinion that, as far as the surviving partners were concerned, the old concern was effectually brought to an end, and the interest of the partners validly ascertained and discharged, as between the survivors and the representatives of the deceasing partners. As the new concern, therefore, is distinct from the old, and never traded on the assets which belonged to it, the primary and leading conclusion of the action is untenable.

The only question which remains, and the only one which in my opinion the pursuers can in the circumstances raise, is a question of due administration on the part of the executor. But I can find no ground on which such a plea can be maintained.

In the first place, it is as well proved as in such a case it could be, that the settlement was perfectly reasonable. The valuators were examined, and gave their reasons for the valuation, and nothing is proved which can lead us to suppose that it was not fairly carried out. It is said the goodwill was not valued. It was doubted seriously, in *Crawshay* v. *Collins*, whether an expired partnership could be said to have any goodwill; and if it were to be wound up by a sale, it plainly could have none. A goodwill only applies to a going concern, but if stock and premises are disposed of, the goodwill perishes in the process—(*See the Lord Chancellor's remarks*). As it was, the estate of the deceased partner got the benefit of valuation of a lease which in reality, as we now find, did not exist. The valuators, however, say that they valued the stock as belonging to a going concern, which, of course, included the goodwill.

But I do not think the executors can in any view be called upon now to enter into any such enquiry. The whole stock has perished long ago. A revaluation is impossible. A sale is equally so. The pursuers deliberately refrained from interposing while they could do so with effect, and kept absolute silence for five years, while they knew that the agreement was being carried out and acted on. Their threats of legal proceedings add force to their delay; for they show that they intentionally refrained from proceeding, while in perfect knowledge of such rights as they had. It would be contrary to every principle of justice and reason to sustain such a claim now.

I propose, therefore, to place our judgment on a somewhat wider ground than the Lord Ordinary has adopted. I do not say that if that ground had been the only one, it was not sufficient. The proposal is, that the stock of the new firm should be sold in order to ascertain the difference between the sum consigned for the pursuers, and what a

sale would have brought in 1863, and also the amount of profit which that excess has yielded since 1863. I doubt if, for such a fractional interest, we should have thought of granting such an order. In the case of *Blyth* v. *Blyth*, reported in the *Law Times* in January 1861, Lord Campbell refused to order a sale, and confirmed a valuation, notwithstanding the resistance of the executors of a deceasing partner, and that on the ground of the true interests of those concerned. But I think our judgment should proceed on the broader ground.

The other Judges concurred.

Agents for Pursuers and Reclaimers—Morton, Neilson, & Smart, W.S.
Agent for Defenders—John Galletly, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

MRS ANNIE LAWSON OR SURTEES *v.* ROBERT WOTHERSPOON.

(*Ante*, p. 230.)

Process—Proof—Judicial Examination—Declarator of Marriage—Penuria testium. The pursuer of a declarator of marriage, before a proof was taken, moved for a judicial examination of the defender, which was refused. After a proof had been taken, she renewed her motion, which was again *refused*, on the ground that there was nothing so exceptional in the circumstances as to make a judicial examination essential to the justice of the case.

Observations on the term *penuria testium.*

In accordance with the interlocutor of the Court, pronounced January 20, 1872, a proof was taken before the Lord Ordinary (MACKENZIE). After the proof was taken the pursuer again moved for a judicial examination of the defender.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 4th June* 1872.— . . . . Allows the defender to be judicially examined, *first*, in regard to the carnal connection of the defender with the pursuer, set forth in the record; and *second*, in regard to the defender's knowledge, during the period between the month of January 1865 and the 5th of July 1871, of and concerning the action at the pursuer's instance against Francis Dewar, and the procedure therein; and appoints the said judicial examination to take place before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—It appears from the report of the decision of the Court (Jan. 20, 1872, 9 Scot. Law Rep., 230), recalling the interlocutor of the Lord Ordinary, dated 23d Dec. 1871, in which the judicial examination of the defender, to the effect set forth in the preceding interlocutor, was allowed, before proof had been led that such examination should only be allowed where there is a *penuria testium*, or undue concealment or suspicion, and where it is essential to the justice of the case. The case of the pursuer on record is, that she is the widow of an officer in the East India Company's Service; that she became acquainted with the defender in 1865; that he paid his addresses to her; that on 20th November 1867 he gave her the promise of marriage, No. 6 of process, in which he promised to marry her, and provide for her according to his means, until circumstances warranted such marriage, always providing that in the interim she continued to lead a virtuous and exemplary life, and that, relying upon this promise, she was prevailed upon to allow the defender to have carnal connection with her during the period between 20th November and 1st December 1867, and also in the months of December 1867 and January and February 1868, and subsequently.

"It is, in the opinion of the Lord Ordinary, clearly proved that the pursuer is not the widow of an officer; that in and for several years after 1855 she was a prostitute in Edinburgh; that from 1857 to 1859 she kept a brothel in St James' Square, Edinburgh; and that before going there she kept a brothel in St David Street, Edinburgh; that she thereafter went to Glasgow, where she accidentally met the defender in 1865, and that he, after visiting her from time to time, at last took her into keeping as his mistress in 1866.

"It was in such circumstances that the promise of marriage, dated 20th November 1867, No. 6 of process, was granted by the defender. The only witness adduced by the pursuer in support of her averments of connection after 20th November 1867, on the faith of that promise, was Jane Bird, her servant in Glasgow from the end of April until the end of December 1867. She deponed that during this time the defender very frequently visited the pursuer at night, and remained a considerable time alone with her, but she never saw any familiarity between them, except upon one occasion, a few days after he had granted her the foresaid promise of marriage. She states that he then called about 11 o'clock at night, and that, as the pursuer was unwell and in bed, he was shown into her bedroom. She further states that, about 1 o'clock in the morning, she went into the bedroom to gather the fire, thinking that the defender had left, and found him in bed with the pursuer. That is the only evidence adduced by the pursuer in support of her averments of repeated carnal connection between the defender and her on the faith of the said promise. The only other inmate of the house, according to Jane Bird, was the pursuer's son, aged twenty-one or twenty-two years, who she states usually went to bed about 10 or 11 o'clock. One other witness, Christina Lang, who was servant to the pursuer for nearly two months after 3d January 1868, was adduced by the defender. She deponed that the defender called two or three times a-week, and remained an hour, and sometimes two or three hours, but that she never saw anything like familiarity between them, and had no idea that there was anything of the kind.

"It is in these circumstances that, at the close of the proof, the pursuer renewed her motion for the judicial examination of the defender. The Lord Ordinary's interlocutor of 23d December last was recalled, and the pursuer's motion for the judicial examination of the defender was refused, as he understands, because there was no undue concealment or suspicion attaching to the defender, and no apparent probability of a *penuria testium* in regard to the matters on which the defender's judicial examination was sought,—the Lord President remarking that "It is quite possible—I do not say it will be the case, but merely that it is quite possible, that the facts of the case, when proved, may ultimately render judicial examination necessary." Since the decision in the Inner House was pronounced, a proof has been led, on consideration of which the Lord Ordinary is satisfied that there is a *penuria testium* in regard