residence in England, and leave to his brother the local management of the affairs of the firm. It was in connection with the said resolution that the said deeds were signed by the pursuer (in so far as they were signed) but it was arranged and understood and agreed to between the parties that all such conveyance of property, though on the face of the deeds onerous, was really gratuitous, and was purely and wholly a conveyance in trust by the pursuer to the defender for the pursuer's behoof and benefit, and this was the true nature of the deeds and transaction. The procuring and acceptance of the said deeds by the defender, and the acceptance and retention by him of the said property, were fraudulent on his part, both in respect of the use to be made by him of the deeds, with third parties and the public, and in respect of his intention towards the pursuer, as now disclosed." Now, this is just the sort of case to which the statute was meant to apply. The statute was introduced to prevent the property of one person from appearing to be the property of another. I am clearly of opinion that this trust can only be proved by the writ or oath of the defender.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for the Pursuer—Lindsay, Paterson, & Hall, W.S.

Agents for the Defender—Wormald & Anderson, W.S.

Tuesday, June 25.

M'INTOSH *v.* SKINNER & WILSONE AND OTHERS.

Superior and Vassal—Confirmation—Writ—Process—Summary Petition.

A purchaser of heritable subjects sent in his titles to the superior's agents to have a writ of confirmation prepared. Differences having subsequently arisen as to the sum payable as casualty to the superior, the purchaser withdrew his request to be confirmed. *Held* that the purchaser was entitled to recover his titles from the superior's agents on payment of the expenses incurred, and that a summary petition in the Sheriff-court was a proper process for recovering the titles.

Observed that the proper remedy of the superior was to bring a declarator of non-entry.

This was an appeal from the Sheriff-court of Aberdeen.

The proceedings were commenced by a summary petition presented by Daniel M'Intosh, butcher, Aberdeen, against Skinner & Wilsone, advocates, Aberdeen, in which the petitioner set forth, that on 11th December 1865 he transmitted to the respondents the titles of certain heritable subjects in Aberdeen which he had purchased, in order that a writ of confirmation from the superior might be prepared. After the writ of confirmation was prepared, but before it was delivered, the petitioner and the respondents, as acting for the superior, differed about the casualties payable by the petitioner, and the petitioner declined to proceed further with the transaction, and intimated this to the respondents. The respondents notwithstanding refused to deliver up the title deeds. The petitioner prayed the Court to ordain the respondents to deliver up the deeds.

The petitioner subsequently presented a supplemental petition against the marriage-contract trustees of Captain and Mrs Fisher, the superiors of the subjects.

The defence was that the superiors or their agents were entitled to retain the title deeds till the composition was paid, viz., a year's rent of the subjects. By applying for a writ of confirmation the petitioner had agreed to pay the composition, and he was not entitled subsequently to draw back, and offer to present the heir of the last vassal for an entry, as he had done. The respondents also stated a preliminary plea that the petition was incompetent, as involving a question of heritable right.

The Sheriff-Substitute (DOVE WILSON) sustained this plea, and sisted the petition for three months, in order that the petitioner might institute proceedings in the Court of Session to determine the question of heritable right between him and the respondents.

The petitioner appealed.

The Sheriff (GUTHRIE SMITH) pronounced the following interlocutor:—

"*Edinburgh, 1st February* 1872.— . . . . Sustains the appeal, recalls the interlocutor appealed against: Finds that the document called for in the petition, to wit, a disposition of certain heritable subjects in Hutcheon Street, Aberdeen, in favour of the petitioner, is his property, and was delivered to the respondents, Messrs Skinner & Wilsone, as agents for the superiors, the other respondents, in order that a writ of confirmation by them might be written thereon, but differences having arisen as to the sums payable by the petitioner in respect of said confirmation, he withdrew his request to be confirmed, after the writ had been prepared and executed: Finds that, as the writ had not been delivered, he was entitled so to do, but is liable to the respondents, Messrs Skinner & Wilsone, in the costs and charges connected with the preparation and execution of said writ; appoints an account thereof to be given in and taxed; remits the case to the Sheriff-Substitute to ordain the respondents to give delivery to the petitioner of said disposition on payment of the taxed account; to dispose of the question of expenses, and *quoad ultra*, to refuse the prayer of the petition, and decerns.

"*Note.*—It appears from the correspondence in process that the superiors of the subjects in question, belonging to the petitioner, having, in the month of December 1865, called on him to enter, he transmitted his titles to their agents, with a request that a writ of confirmation by the superior should be prepared in his favour. A draft of the writ prepared by the superiors' agents was thereafter received by the petitioner's agent and sent back for execution, on the understanding, he says, that the dues of the entry were to be double of the feu-duty. This, however, was not agreed to; and, on 19th January 1866, the petitioner intimated to the superior that he declined to enter at all, and refused to take up the writ of confirmation, which by this time had been endorsed on his disposition and signed by the superiors. Some further correspondence took place, and in February 1871 the superiors intimated that, as he had never entered, they intended to raise an action of declarator of non-entry against him. The petitioner replied that he was ready to enter the heir of the former vassal, and to pay the dues chargeable under the charter on the entry of heirs.

"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