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and that the action do proceed in the Court below between the appellant and respondents. And it is further ordered, that an account be taken of all the dealings and transactions of the partnership, and in winding up the affairs thereof, in as far as necessary, to ascertain the loss of the concern generally, to which the copartners are obliged to contribute rateably. And also, what sums have been paid or contributed by individual partners beyond the rateable proportions of such individuals, and applied in diminution of the debts of the partnership; and that the appellant do pay what shall be found to be his proportion of the balance of loss upon the result of such account, rateably with those who had paid their proportions in relief, proportionably of what has been reasonably and properly paid or contributed by any of his copartners beyond their rateable proportions of the balance, so to be ascertained and applied towards diminution of what the whole partners were liable to pay. And with these instructions, the cause be remitted to the Court of Session to proceed accordingly.

For Appellant, *Sir J. Scott, Wm. Grant.*
For Respondents, *George Ferguson, Robert Dallas.*

DAVID LINDSAY, General Disponee of Mrs. Margaret Balneaves, his late Wife, Daughter of John Balneaves of Carnbaddie, ... } *Appellant;*

GEORGE KINLOCH of Kinloch, and JOHN NAIRN, *et e contra.* } *Respondents.*

House of Lords, 17th Feb. 1796.

EXECUTRY—TACITURNITY.—In a claim made for a daughter's share in the executry of her deceased father, thirty-six years after his death. Held, in the circumstances, that there was no free executry, and nothing due to her.

This was an action raised by the appellant, at the distance of thirty-six years, for his deceased wife's share of executry in her father's estate, which after a great deal of procedure

and accounting, ended in the Court pronouncing this interlocutor:—"Repel the objection to the title of the pursuer, "David Lindsay, as to Margaret Balneaves' share of the "executry of John Balneaves of Carnbaddie, her father, but "find no sufficient evidence that the said John Balneaves left "any free executry at his death, and therefore assoilzie the "defenders (respondents), but find no expenses due."

On reclaiming petition, the Court pronounced this interlocutor: "Find there is nothing due to the pursuer (ap-"pellant), and adhered." June 8.

Against these and former interlocutors, the present appeal was brought.

Pleaded for the Appellant.—1. The two judgments of the Court, of 19th May and 8th June 1790, seem to be at variance with each other, and to put the determination of the Court on perfectly different grounds. The first finds no sufficient evidence that the said John Balneaves left any free executry *at his death.* If your Lordships be of opinion that the 14,000 merks due by Inch Murray, went to the next of kin, and not to the heir, and that the respondents are not entitled to any allowance in name of board, for the period the appellant's wife lived with her grandmother, which two facts form the important part of this cause, then it is obvious that Mr. Balneaves left a very considerable personal estate. The last interlocutor on the 8th June, finds, "That there is nothing due to the appellant." There was nothing either in the petition or the previous procedure, to enable the Court to assume this *general ground*, or to go further than the interlocutor complained, which only found that there was no free executry left at his death. 2. The objection as to the delay in raising this action, is ill founded. The appellant's wife was just one year old at her father's death, in 1729. It was not till 1750 that she was called to maintain an action. At this period, and until her marriage in 1759, she resided with her brother, and acted as his house-keeper. It was not to be expected that she would during this period demand her claims from her brother. It was only when she got married that her separate rights of fortune behoved to be inquired into, and thus the taciturnity in a claim of succession of this nature ought not to be regarded.

Pleaded for the Respondents.—1. The interlocutors appealed from, were substantially right, and agreeable to law, and to the evidence. The pursuer's allegation was, That Carnbaddie, at his death, was possessed of an uncncumbered personal estate, amounting to £1500 sterling, to which his

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younger children were entitled, exclusive of the eldest son and heir. On the other hand, the defenders (respondents) maintained, 1st, That through the lapse of time, the allegation was inadmissible; 2d, That the evidence referred to by the pursuer (appellant), so far from establishing the facts which were to be proved, tended to show that Carnbaddie, after his debts were paid, had no personal estate to which his younger children were entitled; and these were the two grounds on which the judgment of the Court rested. 2. The objection on the ground of taciturnity is not taken away by the circumstances of the case. On the contrary, it is peculiarly applicable to questions with regard to the distribution of personal estate; and cases have occurred where the silence of the party for any considerable length of time, was fatal to the claim. Thus, a widow's claim for the legal share of the moveable effects of her deceased husband, was disallowed, after the lapse of twenty-six years. So also a claim made by younger children against their elder brother, was dismissed, not having been made until thirteen years after their father's death. In the present case, no less than thirty-six years have elapsed before any action had been brought, or any notice given to the defenders that a claim was to be made. The daughter's nonage is no answer, because this objection rests on the silence of her whole family, all of them older than her, and placed in different circumstances.

Tod *v.* Inglis, 2d Feb. 1770. This case is not reported; but is referred to in the case of the King's Advocate *v.* M'Allum. M'Laurin's Crim. Cases, p. 606. Wilson *v.* Wilson, 26th Nov. 1783. Fac. Coll.

After hearing counsel, on the 5th, 8th, 9th, 11th, and 12th days of this instant, February, and due consideration had of what was offered,

It was ordered and adjudged, that the interlocutor of the 8th June 1790, complained of in the appeal, be affirmed, and that the defenders be assoilzied.

For Appellant, *Wm. Adam, Tho. Macdonald.*
For Respondents, *W. Grant, J. Buchan Hepburn.*

MISS KATHERINE MERCER, eldest daughter of Colonel Wm. Mercer, . } *Appellant;*

SIR JOHN OGILVY, Bart., and Others, . *Respondents.*

House of Lords, 1st March 1796.

DEATHBED—SIXTY DAYS HOW COMPUTED—NOMINATION OF HEIR.—(1). In a reduction of deeds, executed on deathbed, by a person who lived fifty-nine days and two or three hours thereafter; Held, that the rule