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

to the alleged acts of connection subsequent to 20th November 1867, the date of the promise. In regard to the defender's knowledge of the action at the pursuer's instance against Francis Dewar, there is no evidence whatever, except what may be inferred from the fact that the defender's letters to the pursuer, the addresses of which are extant, are all addressed to her as Mrs Dewar, except one, which is addressed to her as Mrs Surtees Dewar. It is not unimportant also that none of the letters from the pursuer to the defender, prior to 1869, were produced by him, although such letters were written once a-week on an average, these having been destroyed soon after they were received.

"Further, the Lord Ordinary considers that it would not be satisfactory to decide the cause without the judicial examination of the defender, and that it is necessary for the justice of the case. For these reasons, he is of opinion that the judicial examination of the defender should be allowed on the two points set forth in the preceding interlocutor; and, in explanation thereof, he begs to refer to the note to his interlocutor of 23d December 1871."

The defender reclaimed.

SHAND and LANCASTER for him.

SOLICITOR-GENERAL and MACDONALD for the pursuer.

At advising—

LORD PRESIDENT—The only point before us is, whether, in the circumstances of the present case, and at this stage of the proceedings, a judicial examination should be allowed. I am of opinion that it ought not. I adhere to the view I formerly expressed in this case, that in consistorial causes a judicial examination is never in modern practice allowed unless there is something like fraudulent concealment by one of the parties of facts which can only be known by that party, or where there is a *penuria testium*. I think there is a good deal of confusion about what is meant by a *penuria testium*. It will not do for the pursuer to examine witnesses and then say there is not enough evidence, and ask for a judicial examination. A *penuria testium* arises only where it is not possible that there should be more evidence. A good example is found in the celebrated case of *Christie*, who was tried for murder in the last century. The defence was that he killed the deceased from the provocation of finding him in the act of adultery with his wife. No human being was present but the accused, the deceased, and the wife. In these circumstances the wife's evidence was admitted. That was a clear case of *penuria testium*. All that can be said of this case in either of the proposed branches of inquiry is, that there may be some difficulty in proving the facts. But they are facts of a kind proved by ordinary evidence in a multitude of cases. No reason is suggested why they should not be proved in the ordinary way, if they are facts. I am for refusing the motion of the pursuer, and for much the same reasons that induced me to refuse the same motion at a former stage.

LORD DEAS—I am of the same opinion. Without going into more technical grounds, as I said before, we must have grounds for saying that the procedure is essential to justice. No such grounds have been shown in this case.

LORD ARDMILLAN—I am not prepared to say that if a judicial examination had been essential to the justice of the case, it would be incompetent to allow it at this stage. I concur.

LORD KINLOCH—The rule is, that in consistorial causes the parties shall not be examined, unless in very exceptional cases. The present case is not at all exceptional. No doubt it deals with matters which may be said to be occult. But there is no occultness here which does not occur constantly in similar cases. I entirely agree with your Lordship as to the meaning of the term *penuria testium*. It does not mean insufficiency of evidence led. It refers to a case where, in fair construction, there is no other possible testimony.

The Court recalled the interlocutor of the Lord Ordinary; and refused the pursuer's motion for the judicial examination of the defender; reserving the question of expenses.

Agents for Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for Defender—J. & R. D. Ross, W.S.

Thursday, June 27.

GRAHAM *v.* FENTON.

Sale—Arrestment.

Circumstances in which it was *held* that a quantity of potatoes had been transferred by sale, and was not liable to arrestment used against the original owner.

This was an appeal from the Sheriff-court of Forfarshire (Dundee).

By letter, dated May 24, 1871, George Hall, potato-merchant, Montrose, agreed to send eighty or ninety tons of potatoes to be carried by ship 'Euphemia' from Dundee to Leven.

Thereafter, about eighty tons were sent to the ship's side by William Fenton, farmer, Kingennie, addressed "Mr Hall, p. ship 'Euphemia.'" While the potatoes were being shipped Fenton informed the shipmaster that the potatoes were his property, and that Hall was acting merely as his agent; and he then and there made an endorsation on the back of Hall's letter:—"*Dundee 26th May* 1871—The price of the cargo of potatoes to be paid to William Fenton, farmer, Kingennie, by Monifieth, at the office of J. & R. Guild, Dundee."—WILLIAM FENTON.

On 30th May an arrestment was used in the hands of the ship-master by Robert Graham, farmer, Pitskelly, on the dependence of an action against Hall.

The potatoes were sold by warrant of the Sheriff, and the ship-master raised a multiplepoinding, the proceeds of the cargo being the fund *in medio*.

Fenton claimed the whole fund, in respect that the potatoes were his property.

Graham also claimed the whole fund, alleging that the potatoes were the property of Hall, and attached by his arrestments.

The Sheriff-Substitute (CHEYNE) allowed a proof. From the proof it appeared that the larger part of the cargo, about sixty-two tons, came from Fenton's farm at Kingennie, and the remainder from a farm near Carnoustie. It was hardly disputed by Graham that the Kingennie lot was the property of Fenton. In regard to the Carnoustie lot, there was no doubt that it was originally the property of Hall. The account which both Hall and Fenton gave in their evidence was, that Hall