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

had, as a friend, offered to give Fenton this lot at the price which was to be paid by the consignees, in order to make up the cargo to the amount promised to the captain, and that Fenton accepted the offer,—Fenton thus making no profit on the lot, but being saved the loss consequent on not filling the ship. The only evidence to the contrary was that Hall, in his correspondence with various persons, spoke of the whole cargo as his own.

The Sheriff-Substitute sustained the claim of Fenton to a portion of the fund corresponding to the Kingennie lot, and, *quoad ultra*, in respect that the action of Graham against Hall was still in dependence, superseded further consideration till the determination of that action.

In his Note the Sheriff-Substitute, while stating his belief in the honesty of both Fenton and Hall, expressed his opinion that the transaction between Fenton and Hall in regard to the Carnoustie lot did not amount to a sale, and that in regard to this lot, Fenton had acted as the agent of Hall, just as Hall had acted as agent for Fenton in regard to the larger lot.

Fenton appealed.

The Sheriff (MAITLAND HERIOT) recalled the interlocutor of the Sheriff-Substitute, and found that the 'Carnoustie lot' was also the property of Fenton at the date of the arrestment, and remitted to the Sheriff-Substitute to proceed further, who accordingly sustained the claim of Fenton to the whole fund *in medio*.

Graham appealed to the Court of Session.

ASHER for him.

SHAND and J. P. B. ROBERTSON for Fenton.

The Court refused the appeal, holding that, unless Fenton and Hall were to be held as carrying out a fraudulent conspiracy, and maintaining it by perjury, the Carnoustie lot had been sold by Hall to Fenton. Nothing whatever was adduced to shake that evidence, except that Hall, like many other agents, spoke of a transaction which he was managing as his own. Hall's letters in fact proved too much for the appellant, for, if they proved anything, they proved that the whole cargo was his, whereas it was now admitted that the larger part was Fenton's.

Agents for Appellant—M'Lachlan & Rodger, W.S.

Agents for Respondent—H. & A. Inglis, W.S.

Thursday, June 27.

SECOND DIVISION.

SPECIAL CASE—WALLACE'S TRUSTEES, &c. *v.* WALKINSHAW, &c.

Trust—Power of Sale.

Trustees under a testamentary trust-deed, which disposed of the *universitas* of the testator's estate, were directed to divide the residue of the estate among certain beneficiaries.

Held that this direction implied a power in the trustees to sell heritable property which the testator had acquired after the date of the disposition.

This Special Case was presented by—(1) the trustees of the late Andrew Wallace; (2) Alexander Innes, and (3) Janet Wallace or Walkinshaw, and her brother and sisters interested in the succession of Andrew Wallace.

The late Andrew Wallace, sometime rope manufacturer in Leith, died on the 11th November 1869, leaving a trust-disposition and settlement dated 19th August 1862, and registered 17th November 1869. The purposes of the trust were —(1) payment of debts, &c., and the expense of executing the trust; (2) payment of a weekly allowance to the truster's wife, Isabella Dickson or Wallace, should she survive him; (3) that the trustees should make over certain articles to Andrew Wallace, one of the truster's nephews; (4) that the trustees should, as soon as convenient after the truster's death, sell and dispose of his shop in Bernard Street, Leith, and the stock therein; and (5) that, on the death of his wife, the trustees should divide the residue of his means and estate equally, share and share alike, between Andrew Wallace, &c., his nephews and nieces, and their heirs and assignees; and in regard to his household furniture and effects, he directed that the trustees might allow his wife the use thereof as long as she occupied a house of her own, but that in case of her being resident in the House of Refuge, or in a public or private Asylum, that the said household furniture and effects should be sold, and form part of the residue of his estate, to be divided as mentioned in the fifth purpose of the trust. The truster was survived by his wife, and also by all his nephews and nieces. His moveable estate at the date of his death amounted to £437, 14s. 7d., and his heritable property consisted of some small dwelling-houses in Leith, which yielded a gross annual rental of about £33, 15s. At the date of the execution of the said trust-deed, the only heritable property possessed by the truster was a lease of a shop in Bernard Street, Leith, which is mentioned in the trust-deed as "my shop in Bernard Street." This lease was assigned by the truster himself some years before his death, and the houses in Baltic Street above mentioned were acquired by him subsequently to the execution of the trust-deed. The truster's niece, Elizabeth Wallace, mentioned in the trust-deed, was married to Alexander Innes, junior, house-carpenter, Aberdeen, on 10th June 1870. She died on the 21st May 1871, without issue, and intestate. The parties were agreed that a right to a seventh part of the residue of the trust-estate vested in Mrs Innes on the truster's death. The parties were further agreed that under an antenuptial-contract of marriage, Mr Alexander Innes, the second party, was entitled to all the moveable property which vested in his wife during the subsistence of the marriage; but that he was not entitled to the heritage in which she had vested right. The heir of conquest of Mrs Elizabeth Wallace or Innes was her immediate elder brother, James Wallace. The truster's widow died on the 13th August 1871, and the trust should be wound up in terms of the fifth purpose.

The questions of law which the parties submitted for the opinion and judgment of the Court, were—

"1. Are the first parties entitled or bound under the trust-deed to sell the subjects in Baltic Street?

"2. Does the share of the said subjects, or of the price thereof, which vested in Mrs Innes, fall as moveable estate to her husband, the second party?

H. J. MONCRIEFF for the first and second parties.

BALFOUR for the third parties.