

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to the Kingennie lot, and, *quoad ultra*, in respect that the action of Graham against Hall was still in dependence, superseded further consideration till the determination of that action.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 Walkin-

shaw, 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.

At advising—

LORD COWAN—Trust-deeds containing power to sell heritage, but not a direction to trustees to do so, may or may not have the effect of converting the subjects into personalty in succession. This will depend on the necessity of acting on the power for the due and proper administration of the trust. But, in general, trustees, although they have power by the deed, cannot sell, if their doing so is not for the interest of the beneficiaries, or if this effect would be to alter the character of their right in a question of succession. Here there is no express direction to sell the heritage, but the testator directs the whole of his heritable and moveable estate to be disposed of in the same way. Both are to form residue and be divided. The special provision which the trustees are bound to implement is—"On the death of my said wife, I hereby direct and appoint my trustees to divide the residue of my means and estate equally, share and share alike," between the seven parties interested. There is not to be any division of the heritable from the moveable estate, but both are to be included in one division. In order to carry out this provision, the amount must be ascertained, and this cannot be accomplished without a sale. Then there will be a fund, which may be divided. I cannot doubt therefore that the trustees have power under the deed to deal with the heritage as they propose. I am therefore of opinion that the first question must be answered in the affirmative.

The Court accordingly answered both questions in the affirmative.

Agent for the First and Second Parties—A. D. Murphy, S.S.C.

Agents for the Third Parties—M'Ewen & Carment, W.S.

Friday, June 28.

FIRST DIVISION.

MAGISTRATES OF PERTH v. LORD KINNOULL.
Superior and Vassal—Fief-Contract—Reddendo—Implement—Change of Circumstances.

In 1459 certain lands were granted for the consideration that the grantee and his successors should maintain and repair certain causeways. This obligation was inserted in all subsequent investitures of the estate, and was implemented by subsequent proprietors. But in 1865 the then proprietor refused any longer to fulfil the obligation, on account of the change in the circumstances and in the subjects. The superior brought an action against the proprietor to compel implement of the obligation; and also against a Railway Company, which had considerably altered the roads, to compel it to maintain the portions so altered. The Court assailed the Railway Company; and, in regard to the proprietor, held, that although the obligation was not extinguished, it could not, under the altered circumstances, be enforced, but should be converted into a money equivalent.

This was an action at the instance of the Lord Provost, Magistrates, and Town Council of Perth, against the Earl of Kinnoull and the Caledonian Railway Company, to compel the defenders to maintain and repair certain roads at Perth. The

circumstances which led to the raising of the action were as follows:—

In 1459 the pursuers' predecessors, as representing the community of the burgh of Perth, made over to Robert Kinglassie, an ancestor of the defender Lord Kinnoull, lands called Gildherbar or Calsey Lands, of which they were the superiors. This grant was made upon certain conditions, specified in indentures entered into between the parties, and dated 8th May 1459. These indentures set forth that the honourable men, council, and community of Perth had set in fee and heritage to the said Robert Kinglassie their Gildherbar, with the pertinents, the boundaries of which were therein described,—the south boundary being the King's Calsey. There was reserved of the Gildherbar lands 4 ells in breadth, measuring from the north side of the said King's Calsey, and extending in length so far as the Gildherbar lay, so that the Gait and the King's Calsey might be made together for carts' load and common passage. The said Robert Kinglassie was also, as a condition of the grant to him, taken bound to uphold for ever, for passage for man and horse, the Calsey stretching from the Charterhouse gate to the burn of Craigie, now called St Leonard's Causeway, sufficiently as should effeir, with stone and sand; as also to uphold the Cow Calsey, now called Kinnoull Calsey, passing to Stirling, stretching to the strip and bridge lying at the calsey, for men, horse, and common passage; and to uphold in like manner the calsey passing to Methven, as it stretches from the east corner of St Paul's Chapel until it comes to the burn above Whitefriars, now called the Long Causeway. The indentures further stipulated and provided that these calseys should be upholden perpetually of the same breadth "as they now ar breader," on the said Robert Kinglassie's cost. These various stipulations and conditions were fortified by a clause of irritancy, to the effect that if the said Robert Kinglassie, his heirs or successors, should fail in all or any of the points foresaid, it should be lawful to the said aldermen, council, and community to have regress to the said Gildherbar, with the pertinents, at their own hands without any process of law,—the said Robert Kinglassie or his heirs getting previous warning to repair the calseys, as mentioned in said indentures; and that not being done, it was provided that the said aldermen, council, and community were to have recourse to the Gildherbar, with the pertinents. It was also stipulated that the said Robert Kinglassie and his heirs should give yearly to St John the Baptist's light a pound of wax on the feast of his nativity. The said aldermen, council, and community also granted absolute warrandice to the said Robert and his heirs, he and they "keepand all conditionis foirspoken." Robert Kinglassie thus acquired right to the lands of Gildherbar, which have now come to belong to the defender Lord Kinnoull; and the conditions contained in the foresaid indentures, upon which the lands were granted, have been regularly inserted in all the subsequent titles. Owing to change of circumstances, the causeways mentioned in the indentures gradually became totally changed in their character; and owing to railways being brought into Perth at that point, were also very materially altered, both in position and length; new roads being substituted for a great portion of the old causeways, and the new roads being five or six hundred yards longer than the old causeways. The predecessors of the defender, the