defenders to apply this verdict, and in terms thereof to assoilzie them from the conclusions of both actions.

SHAND (with him A. R. CLARK and BANNATYNE), for the pursuer, objected, and argued—The import of the verdict was merely to negative fraud on the part of the late Mr M'Dowall, and accordingly to assoilzie the defenders, his representatives, from the conclusions of the reduction. It was still open to the pursuer to proceed with his action of count and reckoning; for, even supposing the contract of copartnery and balance-sheet to be binding upon him, these could not be raised up as a bar to any claim of accounting on his part against the trusteees of the late Mr M'Dowall. Their object was not to strike a balance between Mr Steven and Mr M'Dowall for their partnership transactions between 1850 and 1861, but only to ascertain the amount of the capital stock of the new company. The balance-sheet did not fix the debts due to and by partners.

GORDON, for the defenders (with him the LORD ADVOCATE and GIFFORD), answered—When issues are given in, they ought to be addressed to all matters on which the pursuer wishes probation, or the points should be reserved on which he desires further proof. There had been no such reservation here, and the verdict of the jury must be held to have exhausted both actions as conjoined by the interlocutor of the Lord Ordinary on 21st February 1865. The balance-sheet and contract of copartnery were intended to settle all transactions between the partners of the old firm. This is shown by the nature of the division of profits in the contract.

At advising—

The LORD PRESIDENT—This case is now before us on a motion to apply the verdict of the jury and assoilzie the defenders. The actions are at the instance of Mr Steven against the trustees of Mr M'Dowall. In the first place, there is an action of count and reckoning; and, in the second place, one of reduction. The action of count and reckoning was for the purpose of making M'Dowall's trustees account for sums belonging to the former company, held back and retained by M'Dowall, and not brought forward when the old company was stopped. One defence against that action was that the balance-sheet bore on the face of it that it contained the whole assets of the old company, and that the contract of copartnery following on that was to the same effect and referred to the balance-sheet; that it stated that the capital of the new company was set forth therein, and that the balance of the old company was now transferred in certain proportions to the partners of the new company. The balance-sheet and contract of copartnery were set up as a defence. That was met by the answer (1) that the pursuer had put his name to it under essential error; and (2) that it was obtained from him by fraund on the part of Mr M'Dowall, and that therefore the balance-sheet was reducible. That is the import of the statements in the summons of reduction which was conjoined with the count and reckoning. The Lord Ordinary thought, and properly thought, that it was right to have the question of fact tried, and appointed issues to be lodged. The parties came here on an adjustment of the issues; and finally the case went to trial under an issue upon the question of fraud, and resulted in a verdict for the defenders. The defenders now ask us to apply that verdict, and to assoilzie them from the conclusions of both actions. The pursuer says, No. I have failed to proved fraud, but I still insist upon the count and reckoning. I think the balance-sheet and the new contract of copartnery, with the statements in them, and the statements in the record, were a sufficient answer to the count and reckoning, unless these could be set aside as improperly obtained; and whether they were improperly obtained was the question of fraud involved in the issue. That issue has been negatived by the jury, and therefore the balance-sheet and contract of copartnery stand. The partners are bound by that formal docquet. On these grounds I think the defenders are entitled to have their motion granted.

The other Judges concurred.

The verdict of the jury was accordingly applied, and the defenders assoilzied from the conclusions of both actions.

Agents for Pursuer— Hamilton & Kinnear, W.S.
Agents for Defenders—J. & A. Peddie, W.S.

DEWAR *v.* PEARSON (*ante*, vol. i. p. 217).

Appeal to House of Lords—Interim Execution. Circumstances in which, a Sheriff Court action having been advocated, and remitted by this Court to the Sheriff *simpliciter*, an application for *interim execution* pending appeal *refused*, except as regarded the expenses in the advocation.

This was a petition for interim execution pending appeal to the House of Lords. In an action before the Sheriff Court of Fifeshire, against Pearson & Jackson, and the partners of that firm, the Sheriff decerned against the defenders for the sum of £367, 11s. 6d., being salary claimed by the pursuer on account of services rendered by him to the firm of Pearson & Jackson, for the six years preceding 18th June 1852, and for expenses. The defender Pearson advocated, and the Court, after hearing counsel on the first and secoud pleas for him, which had reference to a sum of £180, part of the said sum of £367, 11s. 6d., and to which prescription applied, a third plea not being insisted on, repelled the reasons of advocation with expenses, and remitted the case *simpliciter* to the Sheriff. The pursuer now applied for interim execution, pending appeal, of the decree remitting *simpliciter* in order to his getting extract upon caution for £180, and for expenses. Answers were lodged by the defender, in which it was pleaded that the prayer of the petition was not warranted by section 17 of the Act 43 Geo. III. c. 151, and that generally there was no ground in equity or expediency for allowing interim execution in the present case.

The LORD PRESIDENT—The £180 is part of the sum of £367 which the Sheriff has given decree for; that is, the Sheriff has pronounced judgment, finding "that the sum due to the pursuer by the defenders amounts to £367, 11s. 6d. sterling, *salvo justo calculo*, for which decerns against the defenders: Finds the defenders also liable in expenses of process, but subject to modification: Allows an account thereof to be given in, and remits to the auditor to tax the same when lodged, and to report." Then there is an advocation, and the case comes before us, and our interlocutor is—"The Lords having heard counsel for the parties on the first and second additional pleas-in-law lodged for the advocator in this Court, and no other pleas being insisted in, repel the reasons of advocation, remit the cause *simpliciter* to the Sheriff, and decern: Find the advocator liable in expenses to the respondent in this Court: Allow an account thereof to be given in, and remit to the auditor to tax the same, and to report." And now there is an application for interim execution pending

appeal; and that is asked in this way, that we shall break in on the sum of £367, and allow extract to be got on caution for a certain portion of it, and the rest of the case which is not disposed of by our interlocutor is still to be matter of litigation in the Sheriff Court. I do not at present mean to express an opinion as to the competency of a petition for interim execution in the general case where there has been a decerniture in the Sheriff Court for a specific sum, and we have made a remit *simpliciter* to the Sheriff. But in this case, which involves complications of which neither party has said what the effect would be, I think it better to refuse to grant this interim execution, which would just lead to further litigation, unless it is limited to the expenses in this Court.

Lord CURRIEHILL—I am of the same opinion. At common law the party is not entitled to the remedy he here seeks. It is only by Act of Parliament, which gives power to the Court to regulate all matters of execution according to its sound discretion.

Lord DEAS—I concur. It is impossible not to see that the party who is objecting to the interim execution may be getting advantages which the statute did not contemplate. At the same time I think the safest way is not to grant the petition. If this had been a case of decerniture by the Sheriff, and there then had been an advocation here of the Sheriff's decree, and we had then remitted to the Sheriff who had already decerned, I don't see any difference between that and the ordinary form of interlocutor advocating and decerning. Here there has been £367 decerned for by the Sheriff, and the party requires execution on finding caution for only a portion of that sum, which there is no way of separating without intricate calculation.

Lord ARDMILLAN concurred.

The petition was accordingly refused, except in regard to the expenses of the advocation, and the petitioner was found liable in ten guineas of modified expenses.

Counsel for Petitioner—Thoms, Agent—W. Officer, S.S.C.

Counsel for Respondent—Scott. Agent—D. Crawford, S.S.C.

SECOND DIVISION.

CHEYNE *v.* MAGISTRATES OF DUNDEE.

Church—Ministers' Widows' Fund—Vacant Stipend.

Held, that the collector of the Widows' Fund has only a claim for vacant stipend in respect of the sum that is *de facto* paid to the incumbent, on whose death the claim emerges, and that the adequacy of the stipend and its subsequent increase are not elements by which the claim can be affected.

In 1851 the Presbytery of Dundee brought an action against the Magistrates and Council, for the purpose of having it found and declared that certain properties composing the hospital fund were held by the Magistrates for the purpose, *inter alia*, of affording adequate stipends to the ministers of Dundee, other than the first minister, who was paid from the teinds. The pursuers founded on a charter granted by Queen Mary in 1567, and certain other charters and Acts of Parliament. After a protracted litigation, the Court sustained the claim of the Presbytery, and this judgment, except as to certain specific funds, was adhered to by the House of Lords. An agreement was afterwards executed between the Presbytery and the Magistrates, whereby the stipend payable in future to each of the ministers was fixed at £275, the Magistrates agreeing to pay a certain amount of arrears at this rate to two of the incumbents. This agreement was confirmed by Act of Parliament. It appeared that in the case of two of the charges, the Town Council had, by minute of 18th September 1788, fixed the stipends at £105; another of the incumbents was provided with the same amount of stipend about the same time, and the stipend of the fourth was fixed at £200 in 1823. The collector of the Widows' Fund of the Church of Scotland now brought an action for payment of the vacant stipends alleged to be due to him on occurrence of the vacancies in these four churches from 1843 to 1860, on the footing of reckoning these stipends at £275, the amount payable in future, in terms of agreement and Act of Parliament. The defenders contended that they were not liable to pay more than the fixed stipends which were payable to the different incumbents by whose deaths the vacancies were created.

The Lord Ordinary (Kinloch) sustained the plea of the defenders. His Lordship was of opinion that, although it might be that the stipend was inadequate, and one or other of the incumbents succeeding to the cure might raise a process of augmentation, and so obtain an augmentation of stipend, it would not do to say that the benefit of the augmentation drew back to the representatives of the deceased incumbents, or to the Widows Fund, as coming in place of the deceased during the vacancy. The old stipend remained the stipend of the parish until increased by the decree of Court. So, in the present case, the old stipend must be considered the proper stipend until legally raised by the Act of Parliament. If the present claim were well founded, there was no reason why the representatives of all the deceased ministers, for at least forty years back, should not sue for the deficiency from £275 per annum, during the whole of the respective incumbencies. The pursuer had offered to prove that at the time of each vacancy occurring there were ample funds in the hands of the town to pay a stipend of £275, but this was answered by the Lord Ordinary in the same way. That there might be a sufficient fund for an augmentation would not afford ground for holding the stipend augmented until proceedings were taken for fixing the augmentation by judicial decree, and these proceedings must be taken by the incumbent, and none other, as the legal representative of this cure. As to the argument that on certain occasions voluntary payments were made by the Magistrates over the above fixed stipends, these being expressly gratuitous and personal to the recipients, were in no view part of the legal stipend.

The pursuer reclaimed.

A. R. CLARK and LEE for him argued—In respect of the Acts of Parliament relative to the Ministers' Widows' Fund, and of the vacancies condescended on, the defenders are liable to account for and pay to the pursuer the vacant stipends for the periods mentioned. In ascertaining the amount of the vacant stipends payable to the pursuer, they are bound to take into account the whole sums truly due by them as stipend to the ministers of the charges at the date of the vacancies, whether paid expressly in name of stipend or not. They are not entitled, for the purpose of restricting the amount, to found upon the terms of writs or documents prepared or produced by themselves, wrongfully setting forth the stipends as of less amount than