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

that truly due. *Esto*, that the sums paid in name of stipend were of no greater amount than the sums stated by the defenders—as this was owing to violation of duty on the part of the defenders' predecessors in office, they cannot take advantage thereof, and the pursuer, as in a question with them, is entitled to recover the stipend on the footing that all was stipend which was actually paid by the defenders prior to the vacancies in 1843, and which cannot be shown to be in excess of the adequate and suitable stipends which the defenders and their predecessors were bound to pay. The defenders cannot take advantage of the conditions alleged to have been attached to a part of the annual payments, these being unlawful, and having been inserted by the Magistrates for the time being wrongfully, and for the purpose of representing as voluntary, payments which they were bound to make.

FRASER and SHAND, for the defenders, answered —Under the statutes libelled by the pursuer he is only entitled to payment in respect of the vacant stipends of the churches, of the portions of fixed stipends of the cure effeiring to the periods of vacancy, and is not entitled to any portion of the voluntary additions which were made to particular ministers in supplement thereof. In respect that no permanent legal stipend beyond £200 in the case of the minister of St David's, and £105 in the case of the ministers of the other churches, has ever been fixed by any competent authority or paid by the defenders, the pursuer, as collector of the Ministers' Widows' Fund, cannot successfully maintain that large stipends ought to have been allocated, and that he is now entitled to get the sums that ought to have been allocated now paid, and to draw such sums as vacant stipend. Further, the pursuer's claim is barred by the Agreement Act, 27 and 28 Vict., c. 14, which confirms the arrangement into which he entered with the defenders.

At advising—

LORD JUSTICE-CLERK—In this case it is not disputed that the collector of the Ministers' Widows' Fund is entitled to certain vacant stipends arising out of the benefices in the different churches mentioned in the 31st article of the condescendence. The only question is as to the rate at which he is to be paid this stipend, in other words, what was the proper stipend of each benefice when the vacancies occurred.

The Act of Parliament under which the title of the pursuer in this action is constituted, enacts—"That when any parish in the Church of Scotland becomes vacant by the death, translation, resignation, or deprivation of an incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend thereby arises subsequent to the crop and year One thousand eight hundred and thirteen, such vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes, shall thenceforth and in all time to come be levied in manner hereinafter mentioned, and paid to the said general collector, who is hereby authorised to levy and discharge the same, by himself, his deputies, or factors; and he is also hereby authorised and required to apply the produce thereof to the purposes of this Act, under the directions of the trustees appointed to manage the said fund, any law, statute, or custom to the contrary notwithstanding."

Now, in the case of Cheyne *v.* Hood, a case which related to the annual fruits of a benefice recently erected, one of those charges which go under the name of *quoad sacra* parishes, I had occasion to state, with the approbation of your Lordships, as the history of the patron's right in such cases, that vacant stipend, in the sense of the Widow's Fund Act, and indeed of all other statutes, includes the whole fruits of the benefice which accrue annually in the shape of money. But the question here is, whether the stipend of £275, one-half of which is claimed by the collector in respect of each half-year's vacancy, is truly the whole fruits of the benefice in the sense of the Act of Parliament, or in other words, the vacant stipend? Now, it appears to me that nothing can be stipend, or fruits of the benefice, except what is inalienably attached to the benefice, and of ascertained amount. I do not mean the precise value in money each year, but the extent of the obligation must be ascertained. Now, what is the condition of this stipend of £275? As regards two of these churches, they were erected by a decree of erection of the Teind Court in 1788, and in this decree, it was provided that the Magistrates and Council should fix the stipend for the minister, payable out of the ordinary revenue of the burgh, at not less than £105 per annum. In performance of that obligation, the town proceeded to fix the stipend at £105, and that they did without reserve or qualification, and there can be no doubt that, in point of law, they thus imposed a permanent burden upon the burgh of Dundee, and this revenue became part of the fruits of the benefice, and of the fixed stipend of the minister. So in the Church of St Davids, the Teind Court fixed the stipend at £200, and did not leave it to the discretion of the burgh to fix the amount, but obliged the town to provide a stipend of that amount out of the town funds. This is a common arrangement between the minister and the burgh, the legality of which has been placed beyond question by the decision in the case of Aitken. Additions have been made from time to time to these stipends by the Town Council of Dundee, by voluntary subscriptions or otherwise; and apart from the existence of the hospital fund, and the judgment of this Court which fixed that that fund is a source from which the ministers' stipends may be augmented, and out of which the Town Council are bound to augment them—apart from that, and looking at the terms of the minutes passed by the Town Council, there cannot be the smallest doubt that these additions were given and accepted as gratuities. But then it is said that though these additions were so given, there did exist a fund out of which these ministers were entitled to obtain augmentations. Now, I think that this may be considered in two points of view—first, without reference to the gratuitous additions; and secondly, on the supposition that they never had been made. Let us consider it in this way. It seems exactly analogous to the case of a country parish in which there existed a fund out of which the minister might claim an augmentation, but of the existence of which he did know; or to a case where the teinds of the parish were supposed to be exhausted, but suddenly the minister discovers that this is not the case, and a process of augmentation is raised. Surely, in such a case, it never could be said that the mere fact of that fund existing out of which teind might have been claimed, would make the amount of the stipend greater than it actually was? And so with regard to this hospital fund. It was not believed that this fund could be primarily devoted to providing augmentations to the stipends of the ministers until a period when their claim was tabled, and it was discovered that such a fund existed, and might be ascertained, and

out of which the ministers were entitled to augmentations. Now, in this case there is nothing but this, that before the rights of the ministers had been legally ascertained, the town, as administrators of the hospital fund, did in point of fact gratuitously give additions to the stipends for a certain time, which were afterwards withdrawn, but these were not given out of the hospital funds except to a small extent; they were given partly out of the funds of minor incorporations within the burgh of Dundee, partly out of other sources. Surely these gratuitously paid sums of money could not be said to be attached to the benefice, nor to be funds upon which the ministers had a legal claim. They were no parts of the fruits of the benefice which accrue annually in the shape of money, and on this plain ground I am for adhering to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agent for Pursuer—James Allan, S.S.C.

Agents for Defenders—Maclachlan, Ivory, & Rodger, W.S.

Friday, June 29.

EDIN. AND GLAS. RAILWAY CO. *v.* HALL

(*ante*, vol. i., p. 113).

Poor — Assessment — Deductions — Property and Income tax. Held (alt. Lord Kinloch), that property tax, paid under the Property and Income Tax Acts, is not one of the taxes for which deduction is to be made under section 37 of the Poor Law Amendment Act.

This was a suspension of a poinding executed by the inspector of poor for the city parish of Glasgow against the Edinburgh & Glasgow Railway Company for alleged arrears of poor-rates from 15th May 1857 till 14th May 1859. The point on which the case was now before the Court referred to the question whether the property tax payable under the Act 5 and 6 Vict., c. 35, and relative statutes, is to be included amongst the rates, taxes, and public charges, the amount of which is to be deducted in estimating the annual value of lands and heritages in respect of which poor-rates are payable, under section 37 of the Act 8 and 9 Vict., c. 83. The Lord Ordinary (Kinloch) held that it was, and explained the grounds of his opinion in the following.

Note.—The question at present raised is whether property tax is included in the rates, taxes, and public charges referred to in the 37th section of the Poor Law Amendment Act, which declares "That in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same."

The deductions here referred to are deductions to be made after ascertaining "the rent at which, one year with another, the lands and heritages might, in their actual state, be reasonably expected to let from year to year." This rent is first to be ascertained, and afterwards the deductions are to be made. There is here no question about "tenant's charges,"—the burdens which a tenant would estimate in fixing the rent, and would offer. The rent is to be first ascertained, and there then are to be deducted the sums which the proprietor would have to pay to maintain the lands in their existing state, "and all rates, taxes, and public charges payable in respect of the same." What appears to be the object of ascertainment is the amount of net receipts which the proprietor will draw from the subjects; which is the sum on which it is intended he should be rated to the poor.

It appears to the Lord Ordinary that the property tax is one of these charges. It is, by the express terms of the Act imposing it, payable "in respect of the property," and is reasonably deducted by the the proprietor before he comes to an estimate of his net receipts from the subjects. It seems to the Lord Ordinary to fall directly under the principle of the enactment.

It has been said that property tax is not levied on property, but on the profits of property, and is rightly to be called a personal tax. This is scarcely consistent with the terms of the Property Tax Act, which draws (sec. 1) a marked distinction between the charges on "property" and "profits." Besides, every yearly tax payable in respect of property is truly a burden on the rents, which are just the profits of land; and, in this respect, the tax in question does not seem different from other yearly taxes. It may be said of all these with equal propriety, that they are personal taxes imposed in respect of property. For instance, poor's rates themselves may be accurately so described; yet the Court have found that these must be deducted in a question like the present.—Glasgow Gas Company *v.* Adamson, 23d March 1863, 1 Macq. 727. All the taxes are alike contributions to the necessities of the State, imposed on proprietors in respect of property. The Lord Ordinary considers that all such are to be deducted, under the 37th clause of the Poor Law Act; and he does not perceive any essential difference between the property tax and the others. W. P.

The respondent reclaimed.

PATTON and W. M. THOMSON appeared for the Reclaimer, and

SOLICITOR-GENERAL and MACKENZIE for the Company.

At advising—

The LORD JUSTICE-CLERK—The question which we are called upon to decide is one of very general application, and regards the construction of certain words in the 37th section of the Poor Law Amendment Act—a clause which directs in what manner the annual value of lands and heritages is to be estimated for the purpose of rating. The direction of that clause is that the annual value is to be taken to be "the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges, payable in respect of the same." Now, that is a mode of estimating annual value which is very equitable in itself, and has been found in practice to be very just in its operation. It is precisely in accordance with what is very familiar to men of business in another department, estimating the annual value of an estate with a view to fix its price in the case of a sale. When you are considering what is the true value of an estate that is brought into the market for sale, you either take the actual rent, or what may be supposed to be the rent, that it would bring if