may be ascertained, and to decern the defender the said William M'Latchie to pay to the pursuer such sum as may be found to be the true balance on said account, with the interest which may be due thereon." In the condescendence he alleges —"(Cond. 5) The defender the said William M'Latchie has failed to obtemper the provisions of the said agreement, in particular he has failed to render an account of his management and pay over the drawings, and he has refused to render such account, although he has been frequently asked by the pursuer to do so. (Cond. 6) During the interval from 1st July to 10th August 1886 the pursuer on four separate occasions waited at the said premises with the view of obtaining from the defender the said William M'Latchie an account of his management, but on each occasion was informed that the defenders had gone from home." That petition was met by a counter petition dated 21st September, brought by M'Latchie for his wages of 35s. per week stipulated for by the agreement, and M'Latchie states in it that Gold was the keeper of the hotel. These actions were conjoined, and after that rather a singular proceeding took place of which no explanation is forthcoming. When actions are conjoined of course they cannot be taken out of Court except by the joint action of both parties. But a minute was lodged by Gold alone, in which he stated—"In respect of the failure of the said William M'Latchie to lodge an account of his intromissions, in pursuance of interlocutor pronounced of this date, the said John Gold respectfully moves the Court to dismiss the above mentioned conjoined actions, and to find neither party entitled to or liable for expenses." That minute was, oddly enough, given effect to by the Sheriff-Substitute. My object is to show what the nature of the agreement was. We find in the averments of both parties a concurrence in the statement that Gold was keeper, and M'Latchie was manager of this hotel. Now, surely it is too late for Gold to come forward in an action for goods delivered at the hotel and say that he was not the hotel-keeper to whom the goods were delivered. I am disposed to agree with the Sheriff, and propose that we adhere to his interlocutor.

Lord Mure—The Sheriffs held opposite views here, and I am not surprised at it, because at the first blush of the case it is clear that the pursuers looked to M'Latchie as the person to whom the goods were furnished. From the circumstances of the case the Sheriff-Substitute thought he could not look at the agreement because it had not been acted on by the parties. I regard his position as unsound in law. I think it is quite clear from the agreement that M'Latchie was the manager of this hotel. The agreement is dated in October 1886. It provides that the licence shall be transferred to Gold. That was done in the January following, and the greater part of the goods were furnished after the date of this agreement, and of the transfer of the licence. Now, in this the agreement was acted on, and therefore I cannot hold it to be the case that the parties have shaken themselves free from the terms of the agreement, simply because there have been disputes between them as to how this business was to be managed. Besides, in the counter actions in the Sheriff Court the agreement was founded on as subsisting. I see no reason to reject the view taken by the Sheriff. The position of the parties is clearly demonstrated by their own showing.

Lord Adam—I had a doubt as to whether we should not return to the interlocutor of the Sheriff-Substitute. That doubt was founded on the consideration whether the hotel business had been *de facto* carried on by Gold or not, and that again was founded on the question whether M'Latchie had not held Gold at arm's length and carried on the business as his own, meaning to do nothing else than use it for himself. But on further consideration I agree in your Lordships' views.

Lord Shand was absent from illness.

The Court refused the appeal with expenses.

Counsel for the Appellant—G. W. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—Guthrie—Wilson. Agents—Fodd, Simpson, & Marwick, W.S.

Wednesday, February 1.

FIRST DIVISION.

EARL OF STRATHMORE *v.* HERITORS OF RESCOBIE.

Church—Patronage Act 1874 (37 *and* 38 *Vict. cap.* 82), *secs.* 4 *and* 5—*Compensation—Delay of Patron to Claim—Bona fide Payment by Heritors—Personal Bar.*

In a petition presented under the 4th section of the Church Patronage Act of 1874, the Sheriff, in 1875, found that the patron would be entitled to receive from the heritors of the parish, on the occurrence of a vacancy, payment of a sum of money as compensation in respect of the operation of the Act, by four yearly instalments out of the first four years' stipend, which, but for the passing of the Act, would have been wholly payable by them to the minister appointed on the occurrence of the vacancy. Intimation of the petition was made, as provided by the Act, to the minister of the parish and the clerk of the presbytery of the bounds. There was no service of the petition upon the heritors. In 1880 a vacancy occurred. The heritors paid the first four years' stipends to the minister then appointed, and the patron made no application for payment of the compensation till 1887. *Held* that the patron was, in the circumstances, barred from claiming compensation, as he had made no intimation of his claim to the heritors, who had made the payments to the minister in good faith.

This was a special case to which the Earl of Strathmore was the party of the first part, and the heritors of the parish of Rescobie, in the county of Forfar, were the parties of the second part.

The case contained the following statement—Prior to the passing of the Act 37 and 38

Vict. cap. 82, entituled "An Act to alter and amend the Laws relating to the appointment of Ministers to Parishes in Scotland," the Earls of Strathmore and Kinghorne had been for a long period proprietors of the lands and estate of Glamis and others in the county of Forfar, and, as such, patrons of, *inter alia*, the parish of Rescobie in the said county.

The 4th and 5th sections of the Act are in the following terms, viz.—Sec. 4. "In all cases in which the patronage of a parish is held, either solely or jointly, by a private patron, or any guardian or trustee on his behalf, it shall be lawful for him, or for such guardian or trustee, at any time within six months after the passing of this Act, to present a petition to the sheriff of the county (and when the parish is partly in two or more counties, the petition may be presented to the sheriff of any one of such counties), praying him to determine the compensation to be paid to such patron in respect of the operation of this Act, but it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way. No compensation in respect of the operation of this Act shall be paid to Her Majesty or to any patron other than a private patron."

Sec. 5. "Upon any petition for the determination of the compensation payable under this Act being presented, the sheriff shall order it to be intimated to the minister of the parish to which the petition relates, and to the clerk of the presbytery of the bounds, and after the expiry of the *inducia* of twenty-one days, whether with or without answers, shall first inquire as to the title of the petitioner, and if he shall be satisfied thereof he shall proceed to determine the amount of such compensation, which shall be equal to one year's stipend of the parish to which the petition relates when the petitioner is sole patron, and such proportion thereof as to the sheriff shall seem just when the petitioner is a joint patron, and the sheriff shall pronounce an interlocutor finding and declaring that on the occurrence of a vacancy in the parish the petitioner, or those in his right, shall be entitled, unless the sum shall be otherwise provided, to receive from the heritors payment of the amount of compensation found due by four equal yearly instalments out of the first four years' stipend, which but for the passing of this Act would have been wholly payable by them to the minister to be appointed on the occurrence of said vacancy, or his successor in such parish, or in the case of the appointment of an assistant and successor, out of the first four years' stipend, which but for the passing of this Act would have been wholly payable after the date of such appointment to the minister of such parish; and the petitioner, or those in his right, shall have the same or the like remedy for recovery of said compensation which a minister has for the recovery of his stipend; provided that where the patron is himself an heritor of the parish he shall be entitled to retain and appropriate the sum or sums of stipend which, had he not been himself the patron, would, under the operation of this Act, have been payable by him to the patron of the parish."

"Within six months after the passing of the Act, viz., on 26th January 1875, a petition was presented to the Sheriff of Forfarshire by George Auldjo Jamieson, accountant in Edinburgh (with consent of the Earl of Strathmore), as then proprietor in trust of the estates of Glamis and others, and as such patron of the parish of Rescobie, craving to have the sum of compensation to which he was entitled as patron in respect of the operation of the Act determined, as provided by section 4 thereof, above quoted. After the statutory procedure had been gone through the Sheriff-Substitute on 18th March 1875 found and determined that the compensation to be paid to the said George Auldjo Jamieson, as trustee foresaid, or those in his right, in respect of the operation of the foresaid Act for the parish of Rescobie, was £233, 1s. sterling, being the sum which, on an average of the three years 1871, 1872, and 1873, the minister had received in name of stipend out of the teinds of the said parish of Rescobie, and therefore found and declared that on the occurrence of a vacancy in the said parish of Rescobie, the said George Auldjo Jamieson as trustee foresaid, or those in his right, should be entitled, unless the sum should be otherwise provided, to receive from the heritors of the said parish of Rescobie payment of the foresaid sum of £233, 1s. sterling, and that by four equal yearly instalments, out of the first four years' stipend, which but for the passing of the foresaid Act would have been wholly payable by them to the minister to be appointed on the occurrence of the said vacancy, or his successor in the said parish of Rescobie. There was no service of the petition upon the second parties, and after obtaining decree the first party made no intimation of the same to the second parties until the month of March 1887.

"In the year 1880 a new minister was appointed to the parish of Rescobie. In terms of section 5 of the Act quoted above, the first party hereto, being then in right of the said George Auldjo Jamieson under the said decree, was entitled to receive from the heritors payment of the said compensation, amounting to £233, 1s., by four equal yearly instalments, out of the next four years' stipends, being those for crops and years 1881, 1882, 1883, and 1884 respectively. No application for such payments, however, was made by the first party during the said years, the first application having been made in March 1887, and the heritors paid the full amount of the stipend to the minister, without making any deduction in respect of compensation payable to the patron under the said Act, and decree following thereon. The second parties to this case are heritors, or the representatives of heritors now deceased, of the parish of Rescobie, who became liable on the occurrence of the vacancy in 1880 in the said sums of compensation under the decree above set forth."

The first party maintained that he was entitled to demand payment from the second parties of

the sum of £233, 1s., in respect that the Act 37 and 38 Vict. c. 82, being a public one, they were bound to know that the legal obligation of paying compensation as provided by the Act rested upon them, and that not having fulfilled this obligation, they were, as in a question with the first party, bound to pay him the sum to which he was found entitled by the Sheriff.

The second parties declined to pay the first party any part of the sum, on the ground that no intimation of the decree was made to them by the first party until after the expiry of four years from the appointment of the new minister, and that they had *bona fide* paid the whole stipend to the incumbent. They maintained that it was the duty of the first party to intimate that he had availed himself of the option which he had under the Act, of applying for compensation, and so interpel them from paying the whole stipend to the minister.

The question of law for the opinion of the Court was, whether the first party was entitled to demand payment from the second parties of the sum of £233, 1s.?

Argued for the first party—There was no failure to comply with any statutory requirement in not serving the petition on the second parties. There was no ground for the defence of *bona fide* payment. The obligation on the heritors to pay compensation was imposed by a public statute, which the heritors were bound to know. They knew that if the petition were presented, and decree pronounced, the patron became their creditor. If the patron was abroad, or away and ignorant of the vacancy, was he to lose his right to recover compensation? [Lord President—There is no decree. Could the patron have used letters of horning?] It was admitted that he could not, but the Sheriff had found and declared that on the occurrence of a vacancy in the parish the petitioner should be entitled to payment of the sum of £233, 1s. *Bona fide* payment inferred a probable ground for believing that the payee was the only proper creditor—Ersk. iii. 4, 3. Assuming the Sheriff's finding to be equivalent to an unintimated assignation, the debtor was aware of it. The patron was in the same position in regard to the heritors as a minister who had got a decree of modification without a locality.

Argued for the second parties—The language of the Act as to the action of the patron was only permissive. No duty was put upon the heritors to inquire whether the patron intended to take action—*Collector of Vacant Stipends* v. *Parishioners of Maybole*, 1666, M. 1791; Stair, i. 18, 3; *University of Aberdeen*, 1679, M. 14,791.

At advising—

Lord President—This question depends on the two clauses of the statute set out in the special case. Section 4 enacts that "in all cases in which the patronage of a parish is held, either solely or jointly, by a private patron or any guardian or trustee on his behalf, it shall be lawful for him or for such guardian or trustee, at any time within six months after the passing of this Act, to present a petition to the sheriff of the county (and when the parish is partly in two or more counties, the petition may be presented to the sheriff of any one of such counties), praying him to determine the compensation to be paid to such patron in respect of the operation of this Act;" and then follows a provision which throws light on the general tone of the statute, that "it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail or other limited title, to present such petition." The right given, therefore, is a right left entirely in the discretion of the patron, and although he is an heir of entail, or a guardian, or a trustee, or possessing any other limited title, he is not put under any obligation. He is left to his own judgment, and if he does not exercise his right within six months he is to lose that right.

Section 5 provides how that right is to be worked out. The Sheriff is bound to order intimation of the petition to the minister of the parish and the clerk of the presbytery of the bounds, but to nobody else. It is not to be intimated to the heritors, and the reason is clear—there is no decree against them. If they were to be subjected to a new obligation in favour of a new creditor, no doubt the petition would have been appointed to be intimated to them. But the section goes to say that the Sheriff is to satisfy himself as to the title of the petitioner, and then he is "to proceed to determine the amount of such compensation which shall be equal to one year's stipend of the parish to which the petition relates when the petitioner is sole patron, and such proportion thereof as to the sheriff shall seem just when the petitioner is a joint patron;" and here are given the very terms in which the judgment is to be pronounced—"And the sheriff shall pronounce an interlocutor finding and declaring that on the occurrence of a vacancy in the parish, the petitioner, or those in his right, shall be entitled, unless the sum shall be otherwise provided, to receive from the heritors payment of the amount of compensation found due by four equal yearly instalments out of the first four years' stipend, which but for the passing of this Act would have been wholly payable by them to the minister." Now, in the first place, there is no authority to the Sheriff to pronounce decree of payment against the heritors. All that is given is authority to declare the right or privilege of the patron to intervene between the heritors and the minister, and to ask that a part of the stipend shall be assigned to him to pay off the compensation. Then the way in which the money is to be received is, that the patron is to be entitled to receive the sum by instalments out of the first four years' stipends. That means that he is to receive the first instalment out of the first year's stipend, and the second instalment out of the second year, and so on for the four years. So that his right attaches immediately on the first year's stipend becoming payable, to that year's stipend, and he is entitled then to come forward and demand it. But if he does not choose to ask payment he is neglecting his own interests very seriously; he is not following the statute, which provides that he must ask for his instalments. The heritors are not his debtors in any proper sense, because there is no decree against them. If there were, it would be their duty to go and make payment to their creditor, and not to expect the creditor to come

and ask for payment from them. But here the creditor—if we may call him so—is to come to the debtor and intimate that he means to ask for his instalment; he does not come to enforce a debt, he only intimates an intention of asking for his money. If he fails in that, and fails again when the second, third, and fourth instalments fall due, what is his position? His first instalment would have been for the year 1881, and he might have got his instalment out of that year's stipend, and so on; but it is a matter of ascertained fact that he never came to make a demand till March 1887. Now, while such was the conduct of the patron, what were the heritors doing? The Sheriff's determination was as far back as 1875. They had no intimation of the petition to the Sheriff, or of his determination, and none in 1880 that a vacancy had occurred, and that that gave rise to a claim on the part of the patron extending over the next four years. They never heard of all this till March 1887. Now, I do not say that there is any statutory obligation on the patron to make intimation to the heritors, but the question is, whether the patron has not barred himself from challenging the payments made in good faith by parties who had no cause to suppose that his claim would be enforced. My opinion is, that the payments by the heritors were made in good faith. I do not say they were not bound by the Act of Parliament, and that such an action might exist. But they were not bound to know the determination of the Sheriff, and that the patron in the exercise of his discretion was to act upon it. Even after the interlocutor of the Sheriff it is mere matter of will on the patron's part, and seeing that there was no movement by him for so many years, I have no doubt of the good faith of the heritors. There was very serious negligence on one side and good faith on the other, and these are together a good ground in law to prevent this claim being enforced.

Lord Mure concurred.

Lord Adam—I think, in the first place, that these payments were made in good faith, and in the second place, that the heritors had probable grounds for believing that they were paying to their true creditor, and if that be so, there is no ground for the present claim. I do not think that the presentation of the petition to the Sheriff in the least indicates that the patron intends to insist on his claim when it emerges. The object of the petition is to settle the amount of the patron's claim.

Again, the fund out of which the payment was to be made came into existence each year, and disappeared in each year, and it was the duty of the patron to claim it at once. It was not a common case of debt. It was a payment out of a particular fund. But if the fund is paid away by the heritors there is no other out of which payment can be claimed. It was the clear duty of the patron to have made the claim, and not having made the claim, the heritors were entitled to pay the minister his stipend in the usual way.

Lord Shand was absent from illness.

The Court found and declared that in the circumstances set forth in the special case the first party was not entitled to demand from the second parties the sum claimed, and found the second parties entitled to expenses.

Counsel for the First Party—Sol.-Gen. Robertson—Low. Agents—Dundas & Wilson, C.S.

Counsel for the Second Party—Sir C. Pearson—Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, February 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WALLS' TRUSTEES *v.* DRYNAN AND OTHERS.

Jurisdiction — Arrestments jurisdictionis fundandæ causa—Signeting of Summons.

Held that arrestments to found jurisdiction are effectual if executed before the service of a summons, though after the summons has been signeted.

This was an action of multiplepoinding for the distribution of the estate of the deceased John Walls, in which his testamentary trustees were the real raisers.

A share of the trust-estate went under the truster's settlement to his son Thomas Walls, for whom a claim was lodged. Creditors of Thomas Walls also lodged riders. Amongst these was a claim for John Drynan and mandatory, founded upon a decree obtained in the Court of Session on 23rd October 1886, in an action at the instance of Drynan against Thomas Walls. In that action letters of arrestment to found jurisdiction were signeted on 20th September 1886, the summons was signeted on 21st September, and the letters of arrestment were executed on 23rd September. The summons was served upon the defender personally on 24th September. Arrestments upon the dependence of the action were used in the hands of John Walls' trustees of the same date as the arrestments to found jurisdiction.

In the action of multiplepoinding it was pleaded against Drynan that the action and diligence on which his claim was founded were inept.

The Lord Ordinary (M'Laren) found, with reference to the claim of Drynan and his mandatory, "that when the summons at their instance, containing a warrant for arrestment, passed the signet, jurisdiction had not been founded against Thomas Walls, and consequently that the said warrant of arrestment, and the execution of arrestment following thereon, are null and ineffectual, &c.

"*Opinion.*— . . . . The third and only remaining question is, whether the arrestment which was used by the creditor Drynan to found jurisdiction is well laid on in view of the fact that the letters of arrestment were signeted before the signeting of the summons, but were not executed until after the signeting of the summons. The letters of arrestment were signeted 20th September, the summons was signeted 21st September, and the letters of arrestment were executed on the 23rd September. These are the material dates.

"In the argument before me it was not contended