views upon which they form their judgment, and this in view both of the re-hearing and of further proceedings under a reclaiming-note.

Lord NEAVES—The issue in this case has been very fairly dealt with by the Lord Ordinary. Although in point of form it put only one question, in point of fact it involved several. As I take it, the cases of Hood and others settle that the Lord Ordinary ought not to determine the case by a general verdict, but make, as the Lord Ordinary has done here, specific findings in fact. In this case, after the Lord Ordinary has done so, he "finds on the issue for the defenders," which I take to be a finding in law, meaning that the facts being so, the defenders are entitled to a verdict. The Lord Ordinary has added a note to his interlocutor. Now, it does not by any means follow that because he has done so, incidental remarks made therein are to be taken as formal findings. It is given for the information of parties. With regard to the law which it has been attempted to introduce into the interlocutors under review, the reclaimers had two opportunities of raising it before coming here—once in their speech upon the evidence, and again in their note for a re-hearing. Whether it is fatal to an after-attempt to raise it that it has been omitted in that note I do not say, but I think a party should raise it there, and say here is a question of law upon which I ask a finding. If it is essential to the case, and the Lord Ordinary gives no deliverance upon it, or an erroneous one, it might perhaps be dealt with here like a question of law raised upon a bill of exceptions. The Lord Ordinary has an opportunity, in pronouncing his second interlocutor, of giving a deliverance upon any point specially raised in the note for re-hearing, or of refusing to make any finding with regard to it. In this case, what reason is there to consider the right construction of the trust-deed the determining element in Lord Ordinary's mind? The question was what the parties meant to do and did, and not whether they proceeded upon a sound or unsound view of the clauses of the deed. The Lord Ordinary has obviously proceeded upon a view of the facts put in evidence. This is shown by the wording of the finding complained of. His Lordship finds that the pursuers have failed to prove that the business was carried on for, and by authority of, the defenders. The pursuers have not satisfied me that any of the findings of the Lord Ordinary proceeded on an erroneous view of law.

The Court, therefore, refused the prayer of the reclaiming-note as incompetent, and found the pursuers liable in expenses since the date of the last of the interlocutors of the Lord Ordinary.

Agent for Pursuers—James Somerville, S.S.C.
Agent for Defenders—Alex. Morison, S.S.C.

Wednesday, June 27.

FIRST DIVISION.

STEVEN *v.* M'DOWALL'S TRUSTEES.

Process—Conjoined Actions—Application of Verdict. A person having raised an action of count and reckoning against the representatives of his deceased partner, was met by a defence founded on the fact that a balance-sheet had been made out and signed by the partners. He then alleged that his signature had been obtained by fraud, and raised an action to reduce it. The actions were conjoined and an issue adjusted to try the question of fraud. The jury found for the defenders. Held that in applying the verdict the defenders were entitled to absolvitor from both actions.

Prior to 1st January 1850, the now deceased John M'Dowall was proprietor of the Milton Iron Works, Corn Street, Glasgow, and carried on the business of an ironfounder there. About that date he assumed his nephew, the present pursuer, as a partner. This arrangement subsisted till 1st January 1861, at which date the partnership was dissolved; and by contract of copartnery, dated the 21st and 22d August 1861, a new firm was established under the name of M'Dowall, Steven, & Co., the partners of which were Mr M'Dowall, the pursuer Thomas Steven, and his brothers Hugh Steven and James Steven. This contract provided, *inter alia*, that the capital stock of the new company should consist of the Milton Iron Works, and the machinery and other effects therein, together with "the whole outstanding debts and whole other assets of the late company, but subject to and burdened with the whole liabilities of that company, which works and assets were valued at the nett sum of £42,000 sterling." In connection with this contract a balance-sheet of the affairs of the old company of M'Dowall & Co., as at 1st January 1861, was made out, and a docquet in the following terms appended thereto:—

"The foregoing is the balance-sheet of the firm of M'Dowall and Co., at the 1st day of January last, the valuations and assets and liabilities of which are adopted by the new firm of M'Dowall, Steven, & Company, and the capital taken to be the sum of Forty-two thousand pounds, as per the contract of copartnership executed by us, the partners thereof.

(Signed) JOHN M'DOWALL. JAMES STEVEN.
THOMAS STEVEN. HUGH STEVEN.

Glasgow, 22d August 1861."

Mr M'Dowall died on 9th September 1861, and the defenders were confirmed as his executors. On 16th May 1863 the pursuers brought an action of count and reckoning against them as trustees and executors of Mr M'Dowall, concluding for an accounting in regard to the whole intromissions of the deceased Mr M'Dowall with the funds of the old firm of M'Dowall & Co., betwixt 1st January 1850 and 1st January 1861, and for payment to to the pursuer of the sum of £15,000 as his share in the funds of the said firm, on the ground that the late Mr M'Dowall had appropriated a large amount of the company's funds to his own private purposes. To this action the defenders pleaded that the pursuer and the late Mr M'Dowall, having adjusted their respective interests in the firm of M'Dowall & Company by the signed balance-sheet and the contract of copartnery of August 1861, the whole conclusions of this action were thereby excluded. The pursuer accordingly, on the 7th June 1864, raised an action of reduction of these documents, on the grounds (1) that he signed the said balance-sheet and contract under essential error; and (2) that his signature thereto was obtained by fraud on the part of the said John M'Dowall. On the 2d February 1865 these actions were conjoined, and issues ordered. The pursuer proposed two issues, one on the head of error, and another on that of fraud. The former was subsequently withdrawn, and the case went to trial upon the latter. The trial took place before Lord Mure in April last (*ante*, vol. i. p. 260), and resulted in a verdict for the defenders. The case now came before the Court on a motion by the

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