also in the circular issued by the trustee. But there is no mention of it in the offer of composition.

The other Judges concurred.

The Court adhered.

Agent for Pursuer—William Officer, S.S.C.
Agent for Defender—Lindsay Mackersy, W.S.

Wednesday, May 29.

SECOND DIVISION.

MARIANSKI *v.* JACKSON.

Landlord and Tenant.

Circumstances in which a tenant found entitled to have two rooms lathed and strapped for him by his landlord.

This was an appeal from a decision of the Sheriff and Sheriff-Substitute of Lanarkshire, in a question between a tenant of a dwelling-house and his landlord, as to what constituted necessary repairs to be made by the landlord. The question arose on a petition presented, on 5th April 1871, by D. O. Marianski, to the Sheriff of Lanarkshire, stating that by lease, dated the 12th day of November 1866, the respondent let to the petitioner the house of Greencroft with garden and park for 19 years, at a rent of £40 sterling per annum, from the term of Whitsunday 1868. That on or about said term of Whitsunday 1868, the petitioner entered into possession of said house, and had expended several hundred pounds in improving the grounds. That said house was neither wind nor water-tight, and generally was out of repair. That the petitioners during the last six months, had made repeated demands on the respondent to put the house in repair, so as to be habitable, but the respondent persistently refused to do so. That in January 1871 the petitioner raised a summons against the respondent in the Small-Debt Court at Hamilton, and got decree against him for £4 in name of damages; that still the respondent refused or delayed to make the necessary repairs. The petition prayed the Sheriff to ordain the respondent forthwith, and at the sight of a man of skill, to put the house in a tenantable and habitable condition.

The respondent put in two defences to this petition—(1st) That the present action had been already disposed of by the small-debt action in which the Sheriff decerned for £4 in name of damages, and which constituted *res judicata* in the case; and (2d) Supposing the action has not been already disposed of, the damp referred to in the petition as on the back wall of back sitting room, rises from the foundation of the house—the wall not being strapped and lathed; that the respondent was willing to make certain alterations, and that the petitioner occupied the house from Whitsunday 1868 till February 1870 without objection.

The Sheriff-Substitute (SPENS), by interlocutor of 28th April 1871, repelled the preliminary pleas, and remitted to J. Findlay, builder, to examine the premises, and report whether they are in a fit and proper state of repair, and, if in his opinion they are not, what repairs he would think it necessary should be done by the landlord to put them in a proper, habitable, and tenantable condition. Mr Findlay made three reports upon these premises. In the first and second reports he suggested that the walls of the front bed room and back sitting room should be lathed and strapped; and stated his opinion that without the lathing and strapping of the walls of the front bed room the house would not be in a good tenantable condition.

Upon consideration of this report, and after himself inspecting the premises, the Sheriff-Substitute, on 10th August 1871, pronounced an interlocutor, finding that the petitioner was not entitled to require the respondent to execute operations upon the premises other than repairs, and that he was not entitled to demand that alterations, amounting to material improvements, should be made.

In a Note the Sheriff explained that an expensive improvement, such as lathing and strapping the under flat, which had never been lathed and strapped, could not be held to come under the head of repairs, unless health were impaired.

The Sheriff (BELL) sustained this interlocutor.

The petitioner appealed.

SCOTT and ROBERTSON for him.

M'LAREN and ORPHOOT for respondents.

To-day the Court unanimously recalled the interlocutor, and remitted to the Sheriff to see that the strapping and lathing of the two rooms on the ground floor should be proceeded with. They also found expenses due in both courts to appellant.

LORD COWAN said—I think the Sheriff is in error. I think every tenant is entitled to have his house kept habitable during his tenancy, in the absence of any stipulation to the contrary. The fact that nearly two years elapsed before the complaint was made does not preclude him from his remedy.

LORD NEAVES—The point is, that when the object of a contract of lease is of such a kind as a house for human beings, it must be habitable. Call these alterations improvements or repairs, they are necessary to make the object of the contract what it ought to be—habitable.

Agent for Appellant—W. Livingstone, S.S.C.
Agents for Respondent—Jardine, Stodart, & Frasers, W.S.

Thursday, May 30.

FIRST DIVISION.

M'NEILL'S TRUSTEES *v.* CAMPBELL.

Teind—Interim Locality—Suspension.—A.S. 1809, § 5.

Note of suspension of a threatened charge by the minister on an interim decree of locality *refused.*

This was a suspension of a threatened charge upon an interim decree of locality. The suspenders were the trustees of the late John M'Neill of Ardnacross, and the respondent the Rev. Colin Campbell, minister of the united parishes of Kilninver and Kilmelford. The ground of suspension was that the stipend which the suspenders had been called upon to pay greatly exceeded the true amount of their teind, as determined by a valuation of the Sub-Commissioners in 1629. The suspenders averred that decree of approbation of the said subvaluation had been obtained by other heritors in so far as it referred to their lands. In 1866 the suspenders raised an action of approbation of the said sub-valuation, and obtained decree in absence. An error in the summons was afterwards discovered,

which rendered the decree disconform to the grounds on which it proceeded. The suspenders have consequently themselves raised an action for reduction of the said erroneous decree of approbation, and of new for approbation of the sub-valuation. The summons was executed shortly before the present note of suspension was presented.

The suspenders offered to consign the sum for which they were charged, and to find caution for expenses.

The Lord Ordinary on the Bills (MURE), on 6th April 1872, refused the note, with expenses.

"*Note.*—This is a suspension of a threatened charge upon a decree of interim locality, and proceeds upon the assumption that the complainers are possessed of a valuation of their teinds which has been disregarded in the preparation of the interim scheme; that they have in consequence been called upon to pay more than the true value of their teind; and that the decree is therefore to that extent invalid and inept, as involving an encroachment upon stock.

"The application is mainly rested upon the cases of *M'Cartney*, March 4, 1817, and *Oswald*, Nov. 21, 1835, in both of which suspensions of charges proceeding upon decrees of interim locality were sustained, notwithstanding the provision of the 5th section of the Act of Sederunt 1809. But these cases differed, in the opinion of the Lord Ordinary, in several material respects from the present. For in both of them there were decrees of approbation of the sub-valuation, which showed distinctly that the stipend which had been allocated exceeded the valued teind; while in the present case there is as yet no available approbation of the sub-valuation, for the complainers are only in the course of endeavouring to obtain one. In the case of *M'Cartney*, the decree, although produced with the heritors' rights, in terms of the Act of Sederunt 1809, but disregarded in preparing the interim scheme, had been given effect to in a final locality, in which the error made in the interim scheme had been corrected,—notwithstanding which, the minister, though aware of the correction, insisted upon charging upon the interim decree; and it was upon this ground mainly that the judgment in that case proceeded. In the case of *Oswald*, again, the minister was admittedly insolvent; and it was also taken as an admitted fact, in disposing of the case, that all the other teinds in the parish were exhausted; so that, in the event of the sum charged for being erroneously paid, no relief of overpayments could be got either from the heritors or minister. But here, on the other hand, there is no imputation against the solvency of the respondent; and parties are directly at issue as to whether the teinds of the other heritors are exhausted.

"In neither of these cases, moreover, does it appear that any payment of stipend had been made under the alleged erroneous interim scheme, while here payment has been made under the interim scheme for four years without objection, and without any attempt having been made to have the scheme rectified under the provisions of the Act of Sederunt of 20th June 1838; which provisions appear to the Lord Ordinary to be almost of themselves sufficient to take this case out of the rule applied in the cases of *Oswald* and of *M'Cartney*, because, at the time those cases were decided, it was not competent to obtain a rectification of an interim scheme in the manner provided by sec. 2 of the Act of Sederunt 1838.

"The 4th section of this Act of Sederent, no doubt, contemplates that a suspension may be brought after interim decree, with a view to a surrender of teinds. But this must, as the Lord Ordinary conceives, be intended to meet cases where the party bringing the suspension may have only very recently acquired materials to enable him to apply for a rectification of the interim scheme, or may not have had an opportunity of surrendering in the locality; and not such a case as the present, where the complainers have for some time been in possession of the materials on which the surrender is proposed to be made, and have been endeavouring to effect a surrender in the process of locality, but have hitherto failed in succeeding to satisfy the Lord Ordinary in that cause that they are in a position to do so.

"In these circumstances, it appears to the Lord Ordinary that, were he to pass the note with a view to a surrender, he would in effect be reviewing the judgment of Lord Gifford, refusing to allow the complainers to surrender on their alleged valuation; while he would at the same time be sustaining the competency of stopping payment of a charge upon an interim decree of locality in a case where the party is not in possession of a valid operative decree of valuation, but is merely in the course of endeavouring to obtain one, and which, having regard to the terms of the Acts of Sederunt of 1809 and 1838, he does not consider he would be warranted in doing."

The suspenders reclaimed.

G. H. PATTISON and WATSON for them.

MILLAR, Q.C., and DUNCAN, for the respondent, were not called upon.

At advising—

LORD PRESIDENT—This note of suspension is in my opinion indefensible. Looking to the provisions of sect. 5 of A. S., 1809, if we were on the grounds here alleged to refuse effect to the interim decree of locality, we should not only be setting at nought the Act of Sederunt, but inflicting a great hardship on the minister in recovering his stipend, which it was the object of the Act of Sederunt to prevent. It is said that if the heritor is compelled to pay according to the interim scheme of locality, he may be paying away not merely the teind, but part of the stock. I think that the Act of Sederunt contemplated such a result. It is not intended that where it is clear and proved by proper evidence that the teind is of a certain amount, and no more, the interim locality is in all cases to receive effect. But the interim locality establishes a strong presumption that the amount contained in the decree does not exceed the amount of the heritor's teind, The presumption is only temporary in its operation. If it shall turn out that the heritor is paying more than his share of stipend, or, it may be, more than his whole teind, he will not only obtain a remedy regulating future payments, but he will have a good claim against his brother heritors for the overpayments which he has made under the interim decree. We are all familiar with the process, engrafted on a locality, in which the Teind-Court redistributes the burden among the overpaying and underpaying heritors, both as to the future and the past. The case of *Weatherstone*, Nov. 12, 1833, 12 S. 1, was a remarkable example, where the over and underpayments had gone on for a very long time, and yet the whole matter was so wound up as to render perfect justice to the overpaying heritors.

The case of *M'Cartney*, referred to by the Lord Ordinary, was one in which the Second Division

was originally equally divided, and was ultimately decided by the casting vote of Lord Pitmilly. The ground of that judgment was that a decree of approbation was produced, which finally fixed that the amount of teind belonging to the heritor was less than what he was called upon to pay under the interim locality. The true amount of the teind was so conclusively proved as, in the opinion of the majority of the Court, to overcome the presumption arising from the interim locality. Even there two judges of great eminence were of a contrary opinion.

The other case, that of *Oswald*, was very peculiar. The minister was admitted to be hopelessly insolvent. There was no ground of relief against the other heritors, so that if Sir John Oswald had been compelled to pay more than what should be ascertained to be the true amount of his teind, he could not possibly have got any relief.

I cannot hold either of these cases to infringe upon the general rule, that the minister is entitled to immediate payment under the interim scheme of locality, until the final scheme is adjusted. The circumstances of this case are by no means strong. The heritor is perfectly safe if the other heritors have sufficient teinds to pay the augmentation. He has not alleged, far less proved, that there is not a surplus in the hands of the other heritors sufficient to meet any claims on his part for overpayments. An element, therefore, which might weigh with the Court, is entirely wanting.

The other Judges concurred.

The Court adhered, with additional expenses.

Agents for Suspenders—T. & R. B. Ranken, W.S.
Agents for Charger—M'Neill & Sime, W.S.

Thursday, May 30.

JAMIESON (ALLARDICE'S JUDICIAL FACTOR), PETITIONER.

Judicial Factor—Special Powers.

Circumstances in which the Court granted authority to a judicial factor to sell heritable estate.

Succession—Vesting.

Terms of a bequest *held*, by the majority of the Court, to import vesting *a morte testatoris*.

This was a petition by Mr G. A. Jamieson, C.A., judicial factor on the trust-estate of the late Robert Barclay Allardice, of Ury and Allardice, for special powers. The most important object of the application was to obtain authority from the Court to expose to sale by public roup the estate of Allardice at an upset price of £41,500 and also certain subjects in Stonehaven at £1300.

The late Robert Barclay Allardice, of Ury, died in 1854, survived by a daughter, Mrs Margaret Barclay Allardice or Ritchie, and by three grandsons, sons of Mr Ritchie. He also left two natural sons, Robert and David. Mr Barclay Allardice left a trust-disposition and settlement, dated February 1851, by which he conveyed his whole estate, heritable and moveable, to trustees. The first purpose of the trust is for payment of debts; the second for payment of £3000 to his son David; the third for payment of an annuity of £100 to Ann Angus, the mother of his natural sons, and of an annuity of £200 to his daughter, Mrs Ritchie; the fourth for payment of £1000 to each of his three grandsons. In the fifth place, the truster directs his trustees to make over the residue of his estate, heritable and moveable, to his eldest natural son Robert, adding, "And I leave and bequeath the same to him accordingly, with full power to my said trustees to apply the annual rents, or interests of the foregoing bequests, to my said two sons *in alimenting* and educating them during their minority, and, if found advisable, to apply the principal sums, in whole or in part, in purchasing commissions for them in the army or navy, or otherwise settling them in life; and declaring that, subject to the exercise of these powers, the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." Power was given by the trust-deed to the trustees to sell the heritable estate, though the truster stated it to be his earnest wish and desire that they "shall, if possible, and if considered by them to be expedient in the circumstances of the trust, make over my landed property, in whole or in part, after making provision for the payment of my debts, bequests, and others before-mentioned, to my eldest son Robert, by the said Ann Angus, on his arriving at the age of thirty years, or earlier if deemed expedient."

In 1871 Mr Jamieson was appointed judicial factor on the trust-estate, and in February 1872 he presented the present petition, with concurrence of Lieutenant Robert Allardice, the beneficiary under the trust.

The following is taken from the report by Mr Alexander Hamilton, W.S., to whom the Lord Ordinary (MACKENZIE) remitted to inquire into the circumstances set forth in the petition:—

"The petitioner sets forth that, at the death of the said deceased Robert Barclay Allardice, his estates were heavily burdened with debt, and his affairs were in great confusion and embarrassment. His trustees sold the estate of Ury by public roup; but they retained the estate of Allardice, conceiving that it would increase in value, and that the rental would be sufficient to meet the interest of debts and annuities, as well as maintain the truster's son, Lieutenant Allardice, for whose benefit the trustees were desirous of preserving the estate, in conformity with the earnest wish and desire of his father.

"The anticipations of the trustees have not been realised, for the interest of the debts, the annuities to Mrs Ritchie, now Mrs Barclay Allardice, and Mrs Ann Angus or Macdonald, the public burdens, and expenses of management, more than swallow up the rental, so that, instead of there being any surplus for the maintenance of the truster's son, there is a deficiency.

"There is embodied in the petition a state of the rental and expenditure, bringing out a deficiency of £8 1 8
exclusive of the interest of £1500, borrowed by Lieutenant Allardice on his reversionary interest, at 5 per cent, . 75 0 0

which makes an annual deficiency of £83 1 8

"The petitioner has had the estate valued by Mr James F. Beattie, land-surveyor, Aberdeen, and he recommends that if the property is exposed for sale the upset price should be £41,500. The