that they would not do, and, moreover, I think it goes to this extent, that they were so wasted that you could not merely repair them. I quite agree that when a rivet has got loose and there is a hole, you are not necessarily to take out the plate and put in a new one. You may repair the hole by rivetting over it; that will do very well. "Repaired," I think, means patching where patching is reasonably practicable, and where it is not you must put in a new piece. The instances which have been mentioned already by some of your Lordships seem to me to show that that is the plain meaning of the word.

Taking that to be the case, Messrs Inglis having said we will "overhaul" the plating "of the hull," and "repair" it (using the words "overhaul" and "repair"), can it be said—when it was found that many of those plates were so wasted that it was required in order that the ship should be put in a good condition that they should be replaced—can it be said that that was not "repairing?" I think it cannot. As I have already observed, some of the Lords of Session seem to me to have gone as far as this, that a little replacing would be "repairing," but when it turned out to be much it could not be considered as repairing, on the ground of hardship upon Mr Inglis. Now, I should have thought it would have been hard upon Mr Inglis if he had been unable to discover it beforehand, and at first I thought it was so; I supposed that when the ship was afloat you could only guess at what was wanted. But the evidence of Lloyds' surveyor seems to show that as to the larger portion Mr Inglis really did commit a mistake in not going down or sending someone down into the hold or the coal-bunkers, and that if he had done so he would have found that the plates were wasted, and that there was a good deal more requiring to be done than he expected. However that may be, we can only construe the agreement now as it stands, and it seems to me that he was bound to repair whether what needed to be done was much or little.

Consequently, I am of opinion that as regards the £1200 the judgment of the Court below is correct.

Lord Gordon—My Lords, I quite concur in the proposal which has been made to your Lordships by my noble and learned friend now on the woolsack. It is so late in the day that I really think it would be wrong in me to detain your Lordships much longer, but still there are one or two points connected with the disposal or management of this case in the Court below that I respectfully think it my duty to bring before your Lordships.

The Lord Ordinary (Lord Adam) gave judgment for the appellants looking at the documents alone, and not ordering any general proof, and I must say that I think, upon the whole, that was probably a more judicious course than to open up a proof before answer, as it is called. A proof before answer is a very convenient proceeding, but I think it is one which should be very carefully limited before the Court allows it to take place, especially upon such a record as the present, for really there are no averments upon which a proof could well be taken, or which could afford any restriction or limit to the proof. When a proof before answer is granted, it appears to me that the proper course is to limit the proof to certain definite points which the Court will take up before they leave it to a jury or to a Judge to go into what are called the surrounding circumstances, which really opens a floodgate for litigation of a very uncertain character indeed; and therefore I venture to say that the proper course is to define what are the points with reference to which the Court are of opinion that an inquiry is relevant. Unfortunately that course was not adopted in this case, and the result has been a proof which has been very discursive and in no way limited.

I quite concur in the view which has been taken by your Lordships, that certain views have been expressed by the Lord Justice-Clerk with reference to the competency of proof which I think might be attended with dangerous consequences if it were not that your Lordships have expressed an opinion opposed to the principles which he has laid down. Lord Ormidale has gone into the "surrounding circumstances." Now, there were undoubtedly some facts which might need to be inquired into, but with reference to these I wish they had been defined before the proof was ordered, and then we should have had a more relevant and limited proof. But Lord Gifford, I venture to think, has expressed more correctly the views which ought to regulate this case.

I think it quite unnecessary to go into the circumstances connected with the case at this late hour of the day, and I shall merely express my opinion that your Lordships have disposed of the case in the best manner.

Interlocutors complained of affirmed, save so far as the interlocutor of the 3d November 1877 ranks and prefers the respondents Messrs John Buttery & Company to the sum of £60, 0s. 10d., part of the consigned fund of £1260, 0s. 10d., with interest upon such part since the 18th October 1877; and as to such sum of £60, 0s. 10d., and interest, declare that the said interlocutor should be reversed, and that the appellants should be ranked and preferred as entitled thereto. No costs of the appeal.

Counsel for Appellants (Respondents)—L.-A. Watson—Benjamin, Q.C. Agents—W. A. Loch—Gibson, Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents (Reclaimers)—Kay, Q.C. Herschell, Q.C. Agents—Robertson—J. W. & T. Mackenzie, W.S.

COURT OF SESSION.

Monday, March 25.

OUTER HOUSE.

[Lord Adam.

M'INTOSH AND OTHERS (STEVENSON'S TRUSTEES), PETITIONERS.

Lands Clauses Act—8 *and* 9 *Vict. cap.* 19, *sec.* 79—*Reinvestment of Consigned Money—Expenses.*

Certain subjects, held by testamentary trustees for behoof of A in liferent allenarly

and of his children in fee, had been acquired by the Glasgow Improvement Trustees in virtue of the powers conferred upon them by their Act of Parliament, and the sum consigned by the said Improvement Trustees had been invested in a heritable security under the direction of the Court of Session, as provided by the 68th section of the Lands Clauses Act (8 and 9 Vict. cap. 19), the Improvement Trustees being found liable in the expenses of the application to the Court. The testamentary trustees eight years thereafter applied to the Court for authority to discharge the security held by them, the debtor being desirous of paying up the same, and craved the Court to find the Improvement Trustees liable in the expenses of discharging the security of consigning the money in bank, and of this application to the Court.—*Held*, under the 79th section of the Lands Clauses Act, that the Improvement Trustees were not liable for any expenses attendant on a change of security until the applicants were prepared to invest the fund permanently in the purchase of other lands.

Counsel for Petitioners—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Glasgow Improvement Trustees—M'Laren. Agents—Campbell & Smith, W.S.

Saturday, January 12.

WHOLE COURT.

[Lord Curriehill, Ordinary.

BURT AND OTHERS *v.* HOME (COMMON AGENT IN THE LOCALITY OF CALTON).

Teinds—Statute 1633, *caps.* 15, 16, 17—*Liability for Stipend of Lands permanently diverted from Agriculture.*

The lands of C, of which the teinds were unvalued, had from an early period down to 1835 been included by general words in tacks of the teinds of "the lands in the parish," but no stipend had ever been localled on them, and for 70 years they had been omitted from the localities of the parish. They were now part of the city of Glasgow, and covered with streets, dwelling-houses, shops, and factories, small portions of ground being occupied by courts, gardens, bleaching-greens, &c. In 1876 the common agent of the current locality included C in his state of teinds, and proposed to local stipend on an estimate of the agricultural rental. *Held* (in conformity with the opinions of a majority of the whole Court—*diss.* Lords Justice-Clerk, Ormidale, Shand, Young, and Adam) (1) that, in respect that the Teind Valuation Acts of 1633 enlarged the estate of teind from a tenth of the teindable produce of land to a fifth of the rent of all land, however occupied, and on the authority of the cases of *Glenlyon* and *Learmonth*, the lands of C were properly included by the common agent; (2) that the rent to be taken for the calculation of teind and localling of stipend was the probable agricultural rent of the lands, whatever the present mode of occupation.

Opinions by the dissenting Judges, that the Valuation Statutes of 1633 did not enlarge the estate of teind, and that where teinds are unvalued the right of the titular is to one-fifth of the agricultural rent, if any.

Opinion per Lord Justice-Clerk, that the Act of Commissioners of Teinds, 23d March 1631, as ratified by Act 1633, cap. 15, constituted merely regulations for payment *pendente processu.*

This was a question between John Burt, leather merchant, and others, owners of subjects lying in the parish of Calton, within the burgh of barony of Calton and municipal boundaries of the city of Glasgow, and John Home, W.S., common agent in the locality of Calton. The subjects consisted of houses and shops, but in many cases the buildings had attached to them back greens, courts, or other spaces capable of cultivation. They had never been localled on for stipend *per expressum* in any previous locality, but it was averred by the common agent that they were included in the lands lying within the ancient Barony parish of Glasgow—from which the parish of Calton was disjoined *quoad omnia* in the year 1849—the parsonage teinds of which had been let in general terms by the various titulars from an early period, and since the Revolution settlement of 1688 by the Crown to the Magistrates and Town Council of Glasgow. The last lease in their favour expired in 1835, since when it was averred the Crown had drawn the surplus teinds, but this was disproved by the evidence of the receiver of Crown rents. It was admitted, however, that since 1814 the subjects in question had been omitted from the localities of Barony and Calton. In these circumstances the common agent proposed to include the subjects in the present locality, and to value them at £5 per acre, as the average agricultural value of land in and around Glasgow. He pleaded—(1) that the owners had no right exempting their lands from teind or stipend; (2) that the lands had formerly paid teind and stipend, as being included in the tacks abovementioned. The owner pleaded—(1) that their houses and shops were not teindable subjects; (2) that the value named by the common agent was excessive.

After a proof had been led—the import of which, so far as relevant, is alluded to in the opinions of the Court—the Lord Ordinary (CURRIEHILL) on 8th February 1876 found that the lands in question were teindable subjects, and that no valuation of them had been produced or alleged to exist. He further found that the teindable rental of the subjects was at the rate of £4 per acre, and that they were liable to be localled on for stipend accordingly. His Lordship added the following note:—

"*Note.*—In the interim scheme of locality of the parish of Calton the lands belonging to the objectors have been localled on for stipend on the footing that the annual value thereof as agricultural subjects is £5 per acre. The objectors object to the interim scheme—(1) that as their lands are occupied by houses and buildings, they are not teindable subjects, and therefore are not liable for stipend at all; and (2) that, assuming them to be teindable, their annual value is greatly less than £5 per acre.