# SCOTLAND.

## FROM THE COURT OF TEINDS.

1821.

MAKDOUGALL v. HOGARTH.

SIR HENRY HAY MAKDOUGALL, of *Makerston*, in the County of *Roxburgh*, baronet - - - - } *Appellant*;

The Reverend DAVID HOGARTH, Minister of the Parish of *Makerston* - - - - - - - - - } *Respondent.*

A DECREE having been made under the Authority of the High Commission Court in 1635, valuing the teinds of various lands therein described, and now belonging to the Appellant, an extract of that decree had been produced by the ancestor of the Appellant, in a process of augmentation of the minister's stipend in the year 1720; when it appeared, or was assumed, without objection on the part of the Heritor, that the word ascertaining the number of chalders at which the teinds of his lands were valued, had been obliterated by a fold in the paper, (or possibly left in blank;) and in that process consequently the lands were held as unvalued. Upon a similar process, in 1799, it was found by the Court that the valuation of the lands in question, in the decree of 1635, is not legible, and that, although the decree appears to have been intended as a valuation of the whole parish, and the lands belonging to the Appellant are set forth in the decree, the valuation annexed to them is *totally obliterated.* The same course was pursued, and with a similar result, in a process for augmentation in 1805. In 1814, upon a new process for augmentation, the Appellant as heritor having by his first defence admitted that the word appeared to be obliterated, afterwards produced evidence to show that the word supposed to be effaced was either *ten* or *twa,* and that no other word could have occupied the vacant space; and reports to that effect were made by men of skill and experience, in decyphering ancient and decayed instruments, to whom the inquiry was referred.

The original decree had perished among the records of the Teind Court, consumed by fire in the reign of Queen

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Anne. The extract had remained in the possession of the Appellant and his ancestors.

Held, that the extract not being an original instrument in the possession of the law, but of the party claiming a right under it, whose duty it was to have supplied the defect under the provisions of the statute of Anne (1707), as to the records of the Teind Court destroyed by fire, conjectural evidence could not be admitted to supply the word supposed to be effaced.

Whether under the provision of the Scotch statute 1707, for " making up the tenor of decreets, whereof the " extracts are amissing and the registers lost in the fire," the Lords of Session were empowered to receive evidence and supply the defects of an extract not missing, but imperfect and unavailable, on account of the obliteration of material words.—*Quære.*

Whether a defect by loss, erasure, or obliteration, in an instrument of gift or contract, if the proceeding to supply the loss, &c. were instituted recently after the accident, or the discovery of the defective state of the instrument, and where the party is not estopped by his own admission, and by former adjudications.—*Quære, semb. affirm.*

Where the substance of a question has been adjudged by former decisions, upon the admission or acquiescence of the party, costs are given upon the affirmance of a subsequent judgment on appeal.

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THE question in this Appeal arose out of a process raised by the Respondent for an augmentation of his stipend, as minister of Makerston. The following are the material facts upon which the decision turns:

The proprietor of an estate now held by the Appellant obtained by process before the Court of High Commission for the surrender of teinds in Scotland, a valuation of the teinds of his lands by a decree dated the 15th July 1635.

Of this decree an extract* was obtained by the proprietor of the land, from whom it was transmitted

* The original record of the decree perished in the fire, by which the registers of the Teind Courts were burnt in 1707.

to the Appellant. In this extract the numeral, ascertaining the number of chalders at which the lands were valued, had been effaced by the folding of the paper, or (possibly) had been from some cause originally left in blank. The extract, as produced in the process in the Court below, which is the subject of the present Appeal, appeared as follows:—

" They find and declare the just worth and yeirlie " availl of the lands underwritten, pertening to the " persones above and efter nominat, heritablie, lyand " within the said parochin of M'Kerston, to be in " personage teind, the quantities of victuell under- " written of the qualities efter spect., ilk ane of the " saidis heritors as follows: To witt, the landis, town, " and maynis of M'Kairstoune, &c. with their " pendicles and pertinentis perteining heritablie to " Sir W. M'Dougell, to be worth in personage " teind chalderis victual, tua part cheritet " beir, and thrid pairt heiper ait-meill, all of the " old mett and measour of Jedburgh. The lands of " Stodrig, and four husband landis in M'Kerstoun, " &c. to be worth in personage teind tua chal- " deris half chalder victual, tua pairt cheritet " beir, and third pairt heipet ait-meill of the said " auld mett and measour of Jedburgh. The " thrie husband landis of M'Kerstoun, pertening " heritablie to W. M'Dougell to be worth in " personage teind nyne bollis victuell, tua part " cheritet beir, and third pairt heipit ait meill of " the said auld mett and measour of Jedburgh; " and the saidis Lordis decernis and ordainis " the quantities of victuel, above written, of the " qualities above spect, to stand, continue, and " indure, and to be repute and haldin, in all

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" tyme coming, the just worth and yeirlie availl of " the landis above mentionat, in personage teind, " *communibus annis;* becaus the said persewar " compierand be the said John Dunlop, advocat, " his pror. producit the said rental of the personage " teindis of the landis above written; and the " saides Robert, Erle of Roxburgh, titular, Sir W. " M'Dougell, &c. compeirand personallie, and be " thair pror. as said is, consentit and agreit to the said " rental producit, and wer content to be halden as " confest thairupon: Thairfore, the saidis Lordis " fand, and declarit, decernit, and ordainit, in man- " ner foresaid; and, also, the saidis commissioneris " findis and declairis, that the landis of Charterhouse " pertening to, &c. extending three husband landis " lyand, &c. ar worth, and may pay yeirlie of " constant rent in personage teind, the number of " aucht bollis victuell, tua pairt cheritet bier, and " thrid pairt heipit ait meill of the said auld met " and measour of Jedburgh; and the saidis Lord " decernis and ordainis the samyne to stand and con- " tinew, and to be repute and halden the just worth " and yeirly avail of the saidis landis in personage " teind, *communibus annis*, in all tyme coming."

In the year 1720 a process of modification and locality of the stipend of the parish of Makerston was brought before the Lords of Council and Session, as commissioners for plantation of kirks, and valuation of teinds, in the course of which it became necessary to make up a state of the teinds of the parish, in order to show the extent of the fund liable in payment of stipend to the minister. The different heritors were accordingly required to produce the rights which they had to the teinds of their

respective lands. Upon this occasion, as appears from the records of the Teind Court, Henry MacDougal, of Makerston, the ancestor of the Appellant, produced, in presence of the said Lords, ane "decreet of valuation, obtained before the said "lords and others of the commission, for surrenders "and teinds, upon the 15th day of July, 1635 "years; whereby they found the just worth and "constantly yearly avail of the lands under-written, "pertaining to the persons after mentioned, lying "within the said parish of Makerston, to be in "parsonage tiend the quantities of victuals under-"written, of the qualities after specified, viz. *the "lands, town, and mains of Makerston, Luntonlaw, "Muirdean, Nethermains, Manorhill, with their "pendicles and pertinents pertaining, to Sir William "MacDougal, of Makerston, knight, to be worth "of parsonage tiends, —— chalders victual, two "part cheritet bear, ane third part heapit oatmeal,* "all of the old mett and measour of Jedburgh," &c. The decree then proceeds to specify the lands of Stodrig, and four husband lands in Makerston, which are valued at two chalders, eight bolls; the three husband lands of Makerston, which are valued at nine bolls, and the lands of Charterhouse, which are valued at eight bolls.

In making up a scheme of the teinds of the parish on this process, the lands of Stodrig and others, where the decree of valuation was legible, were valued at the quantities of grain there specified; but in regard to the first parcel of lands mentioned in the decree, viz. the lands of mains of Makerston, &c. where the number of chalders of grain

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corresponding to the teinds, had either originally been left blank, or had been accidentally obliterated, the teinds were held to be unvalued, and the stipend modified to the minister of the parish was allocated accordingly.

The stipend continued to be paid in terms of the decree of modification and locality of 1720, down to the year 1799, when the predecessor of the Respondent raised a new process of augmentation * and locality. Upon this occasion a rental was made up in the usual way, which was approved of

* According to the present forms, a process of augmentation is conducted thus:—The process is brought by the minister, as pursuer, against the proprietors of lands, the *titular* or lay impropriator of the teinds, and all others having right to teinds within the parish. The minister produces a rental of the parish, which is made up generally of the rents actually paid at the time. The first step to the process is to adjust that rental agreeably to the rights of parties. Those proprietors who have decrees of valuation of their teinds produce those decrees, or refer to them, if upon record; and they are rentalled agreeably to such valuations. Those having no decrees of valuation are rentalled agreeably to the *rents actually* paid at the commencement of the process, one fifth part of which is taken as the teind. After the rental is adjusted the minister exhibits the amount of the fund out of which augmentation may be made, and craves the Court to grant him a suitable addition to his stipend out of that fund, or to grant him the whole fund, when it is inconsiderable.

A decree of valuation made by the competent Court is conclusive as to the value of teinds. The person having right to such a decree has a right to have the stipend payable by him restricted to the amount of his valued teind: for this purpose he may at any time make a surrender to the minister of his valued teind, after which the minister can demand no more than the amount thereof.

by the Court; and in enumerating the lands belonging to the Appellant, it is stated that by decreet of valuation, dated July 16, 1635, the lands after specified "were valued as under." The rental then specifies the lands of Stodrig, and four husband lands of Makerston, which are valued at two chalders, eight bolls; the three husband lands of Makerston, which are valued at nine bolls; and the lands of Charterhouse, which are valued at eight bolls. It then proceeds thus, "*These are all the lands of which the* "*valuation in the decreet above mentioned is legi-* "*ble.* The decreet, however, seems to have been "intended as a valuation of the whole parish, and "it specifies, besides the above three articles, the "lands, town, and mains of Makerston, Lun- "tonlaw, Muirdean, Nethermains, and Manorhill, "pertaining to Sir William MacDougal, of Maker- "ston, knight; *but the valuation annexed to these* "*lands in the decreet is totally obliterated.*" The rental then enumerates the different farms belonging to the Appellant, including as well those of which the valuations are especially mentioned in the decree, as those of which the valuation was illegible or omitted; and after the enumeration concludes thus,—"Of "all the lands, the decree of valuation is effectual "only quoad Stodrig, seven husband lands of Maker- "ston, and Charterhouse." Upon this rental the heritors were held as confessed. It was approved of by the Lord Eskgrove, ordinary, and afterwards by the Court; and upon the proven rental the decree of augmentation was pronounced upon the 5th of June 1799.

The Respondent's predecessor instituted a second process of augmentation in 1805, which was ulti-

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mately dismissed, upon the ground of there not having been any such change of circumstances within so short an interval as to authorize a second augmentation; but the cause was prepared for decision in the usual way. A scheme of the rental was made up in common form; and in this scheme, (upon which the heritors, and among others the Appellant, Sir Henry Hay Macdougal, were held as confessed, and which was afterwards approved of by the Court,) the same statement is given as to the illegibility of the decree of valuation 1635, except in so far as regards the lands specially enumerated. The rental was accordingly made up in the same terms as the previous rental of 1799.

In the year 1814 the Respondent raised a process of augmentation and locality, in which the Court held the heritors as confessed upon the rental produced by the Respondent, and remitted to Lord Reston, Ordinary, to prepare the cause.

The Appellant, who is proprietor of the whole parish, with the exception of a small farm belonging to the Duke of Roxburgh, gave in objections to the rental exhibited by the Respondent, in which, after specifying the valuation of the three different parcels of land, which are contained in the decree 1635, he observes, "these are all the lands of "which the valuation in the above decree is legible. "The decree, however, was in fact a valuation of the "whole parish, as it specifies, besides the above "three articles, the lands, town, and mains of "Makerston, Luntonlaw, Muirdean, Nethermains, "and Manorhill, pertaining to Sir William Mac-"dougal, of Makerston, knight, *but the valuation* "*annexed to these lands is totally obliterated.*"

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The Respondent lodged answers to these objections, which it is not necessary to state, as the Appellant, in his replies, abandoned the grounds of objection to the rental which he originally brought forward, and insisted that this decree (extract) must be held as a good and effectual decree of valuation of the teinds of the lands called Mains of Makerston, &c. as at *ten chalders*, two thirds bear, and one third part oatmeal.

The Respondent maintained that this part of the decree was altogether illegible; that the amount of valued teind might be taken just as well at any other supposed quantity as at *ten* chalders; and that it was impossible to supply this omission or obliteration in the decree.

The decree (extract) was produced to the Lord Ordinary at the bar. It appeared that there had been a fold in the document, which was written upon a single sheet; and a hole had been worn through the paper at the place where the word expressing the number should have occurred. The Lord Ordinary made a remit to Mr. John Dillon, writer in Edinburgh, and to Mr James Miller, one of the teind clerks, who were accustomed to examine old writings, "to examine the decree, "and to depone as to their opinion of the disputed "word therein."

In consequence of this remit, Messrs. Dillon and Miller made a report on oath upon the 1st of June 1815, in the following terms, as expressed by Mr. Dillon, and concurred in by Mr. Miller: "That "he has, along with the said Mr. James Miller, read "over and examined the decreet of valuation of

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" teinds, shown to him, and marked as relative " hereto; and particularly that part thereof which " specifies the valuation of the town and mains of " Makerston, Luntonlaw, Muirdean, Nether Mains, " Manorhill, with their pendicles and pertinents: " that the word which expresses the number of " chalders payable out of these lands has become " illegible, owing to a small part of the paper on " which it was written being wasted away, occa- " sioned, as appears to the Deponent, by the fold: " That part of the first letter of the said number of " chalders is visible; and, from comparison with the " other parts of the decreet, the deponent conceives " that letter has been a capital T, as what remains " of it, being the top stroke, agrees with the like " stroke of other capital T's occurring on the same " decreet: That the space which the remainder of " the word has occupied could not well contain " more than two letters, and it is most probable the " word was either twa or ten; but in the present " state of the paper the deponent cannot take upon " himself to say, from any thing that now appears " on the face of the paper, which of these two " words was originally written; but upon measuring " with a pair of compasses, the space occupied by " the word twa, in the third line below the word in " question, it appears to be of the precise same " extent as that word: That there is a chance that " the application of infusion of galls may make some " parts of the word more apparent, which the dim- " ness of the ink, and bad colour of the paper, may " at present conceal; but the success of the applica- " tion is doubtful, because the substance of the paper

"is gone where the most part of the word was writ-
"ten, and all that can possibly be made appear is
"only a small part of the letters, which may have
"reached that part of the paper which remains, and
"of which the deponent thinks some trace remains,
"but at present cannot be certain. And further
"depones, that having, in presence of the commis-
"sioner, applied infusion of galls to the word in
"question, nothing appears that enables him to say,
"with greater certainty than he has above deponed
"to, what that word originally was. And being
"interrogated, depones, that he does not think the
"word in question was either three or threttie, be-
"cause he can observe no trace of the appearance of
"the down stroke of the letter *h*, which letter,
"throughout the whole Decreet, at least when it is
"medial, is almost constantly written with a down
"stroke coming below the line: That the only
"instance in said paper where an *h* appears without
"the down stroke, is when the word begins with *th*,
"in which case, the letters *th* are made in a sort of
"capitals, taking up a considerable space, and, by
"measurement with compasses, the space so taken
"up for these two letters alone would be more than
"the room left for it in the writing in question.
"Interrogated if it be his opinion that said word
"could be a contraction for *twenty*, depones, that he
"does not think it probable; for this reason, that it
"is not common in decreets of valuation of teinds to
"contract the numbers; and more especially, that,
"in the writing in question, which is written in
"a fair and uniform hand, there are throughout not
"a single contraction of a number, and therefore

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"it is not likely that the doubtful word would be "the only exception. And on again examining the "Decreet, the deponent does not find in it any word "contracted besides M^c^ in Mackairston."

June 9, 1815. The Lord Ordinary afterwards took the case to Report, and appointed the parties to state their respective pleas in memorials. These memorials were accordingly submitted to the judge, who, upon the motion of the Appellant, allowed an additional report to be made by Messrs. Miller and Dillon; and also a report by Thomas Thomson, Esq. advocate, as to the state of this writing. The additional report by Messrs. Miller and Dillon was made on the 13th of February 1816, in the following terms: "We have again carefully examined the decree of "valuation in question; and it appears that the "solution of galls has had a further operation, more "than it had when we formerly examined it, in so "far as the colour of the ink, where it was applied, is "now deeper; and, particularly, we can now discern "what appears to be the remains of a stroke, which "probably constituted part of the last letter of the word "which occupied the place where the paper is worn "away; and we are of opinion, after again carefully "perusing the Decreet, and examining the forms of "the letters in it, that the last letter of the word "was more probably an *n* than any other we can "conceive to have stood there; we are also of "opinion that the first letter (which we suppose to "have been a capital *T*) could not be an *F*, as "we observe the form of the *F* is quite different "from that of the *T*, wherever it occurs." Mr. Thomson reported, "I have examined the extract

" of a decree of valuation of the teinds of that parish,
" dated July 15, 1635, produced in that process,
" and more particularly that part of the writing
" which is partly worn away, and which has been the
" subject of dispute between the parties; and I am
" of opinion that the word in question could not
" have consisted of more than three letters; that
" the first of these letters evidently enough has been
" a capital *T*; that the next letter is entirely obli-
" terated, or rather, the paper on which it has been
" written is entirely worn away; that the last letter
" is very nearly in the same state, but that there
" does appear a small portion of it, which I am
" inclined to think from its form is more likely to
" have been the last limb of the letter *n* than of the
" letter *a*, or any other letter that can be supposed
" to have ended any numerical word that could have
" stood in this place; and, *without presuming to*
" *state it as any thing more than a probability*, I
" am of opinion that the word is more likely to have
" been *ten* than *twa* or *tua*, the only two numerical
" words which I can conceive it possible to have
" stood in this part of the writing."

Upon these reports the Lord Ordinary made avizandum with the cause to the court.

The memorials were afterwards considered by the Court, with the aid of these additional reports, when the following interlocutor was pronounced: " The
" Lords having advised the memorials for the parties,
" and the minute for the pursuer, they sustain the
" objections made for the pursuer to the decreet of
" valuation produced and founded on by the defender,

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"Sir H. H. Mac Dougal of Makerston, and remit "to the Lord Ordinary to prepare a scheme of the "rental accordingly, and to report."

Against this interlocutor the Appellant presented a reclaiming petition, in which he insisted, that the reports which had been obtained from the persons who had been appointed to examine this old writing afforded sufficient evidence that the obliterated word was either *two* or *ten*; that he was willing to take the numeral which was more favourable for the Respondent, and to hold the teinds of the lands in question as having been valued at *ten* chalders; and he therefore maintained that the decree should be so interpreted.

The Respondent having put in an answer, the Court, upon advising the petition and answer, adhered to their former interlocutor.

Against these judgments the appeal was presented.

For the Appellant, *The Attorney-General*, and *Mr. Wetherell.*

Although part of the word in the extract of the decree has been obliterated, enough remains to afford conclusive evidence, that the word must have been ten or twa. According to the reports of experienced men no other word could have been in the space worn away. The Appellant ought not to be deprived of his right by unavoidable accident, if the loss of more certain evidence can be supplied by probable conjecture.

In the analogous case of wills the Roman law

permitted such a defect to be supplied by any means whereby the will of the testator might be ascertained *. In such cases, where instruments were lost or destroyed, recourse might be had to parol testimony †.

The law of Scotland is the same as to instruments of gift or contract which have been lost, destroyed or effaced. In all which cases the Court allows the tenor to be proved ‡.

Here the proof is supplied by probable conjecture. According to the report of the inspectors no word could have occupied the obliterated space but ten or twa, and the Appellant is willing to concede to the Respondent the insertion of the word most for his advantage. By inspecting the valuation of the lands in the parish, as it appears in the cess-books, it is ascertained that the proportion of value assignable to the lands of Makerston, as compared with the other lands in the parish, and their proportion of teinds remaining legible in the decree, gives exactly ten chalders as the teind of Makerston. So that the conjecture of the reporters is fortified, if not rendered certain, by this calculation.

In former proceedings on this same question it has been taken for granted, that the word is illegible; but there has been no decision to that effect, nor any admission sufficient to exclude the Appellant

* Voet. Lib. 28, tit. 4, s. 2.

† Mathæus de Probationibus, c. 3, s. 131.

‡ *Earl of March* v. *Montgomery*, 19 July 1743, a personal bond; *Nimmo* v. *Sinclair*, 26 July 1771, a heritable bond; *Inglis* v. *Hay*, 26 June 1712, *Cunningham* v. *Greenlees*, 9 June 1674, marriage contracts.

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from now showing that the word is legible. The presumption arising from the experiments and examination, detailed in the reports, is sufficient to infer that certainty or strong probability, to which the text-writers refer *.

For the Respondent, *Mr. Brougham*, and *Mr. W. Adam.*

The burthen of proof lies upon the Appellant. It is for him to produce a perfect document to ascertain the value of his teinds. The defect of this indispensable word cannot be supplied by conjectural evidence.

The referees commence their report by admitting that the word is illegible. The question is thereby concluded. They cannot make it legible by any *hypothesis*, or any chain of *hypotheses*. The ground of their conjecture from fragments of lines and measuring of spaces is fanciful. The instrument has been in the possession of the heritors, and who knows how and when the marks now forming the basis of this conjecture came, or were put upon the paper. As to spaces, the writers of manuscript vary materially in their writing. Mr. Thomson, whose opinion is the clearest, will not presume to state it as more than a probability. If the horizontal line which furnishes the ground for the *hypothesis* was not discoverable in 1720, in 1799, or in 1805, the probability is, that it has grown upon the paper since one of those dates.

* Ersk. B. 4, tit. 2, s. 34.

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As to the argument drawn from the comparison of the teinds with the cess, and the real rent, it is entirely against the Appellant. In the comparison of the cess he selects the lands of Charter House, which happen to answer his purpose. If he had tried a comparison with the other lands comprised in the decree, he would have found, that the result was adverse to his conjecture. So it appears also upon a comparison of the real rents with the teinds, which gives twenty or thirty chalders as the probable valuation of the teinds.

There is no precedent for supplying such a defect in a record or instrument by conjectural evidence. It is an accidental loss which must fall on the party who claims under it * ; *Bayley* v. *Garford.*

*The Lord Chancellor* :—The question upon this appeal is, whether the blank in the decree ought to have been considered as filled up with the word "*ten* :" Whether, upon inspection, or upon the result of the evidence produced in the cause, the Court of Teinds should have found that the instrument was perfect, and acted upon it as demonstrating the number of chalders of victual, which originally stood in the decree.

The instrument now produced is not the original record. It is an extract which comes out of the

* March, 125, 2 Show. 29. S. C. Three were bound in a bond, jointly and severally; the seals of two were eaten by rats. As March reports the case, the Court were *inclined* that the bond was void against all. Shower cites it as *adjudged* that the bond was void.

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possession of the party, who now insists that it ought to have the effect of a complete record. He therefore, or those under whom he claims, were bound to preserve the document in such a state as to manifest the right with reasonable certainty. The act which was passed in Scotland in 1707, for the valuation of teinds, reciting the loss of the registers of the Court of Teinds by fire, provides, "that "*authentic* extracts from these records may be "brought in," (the authenticity of this extract is not disputed, the question turns upon the contents,) "and being presented to the Lords, be recorded in "a particular register, and that the said extracts so "brought in be kept by the Lord Clerk Register, &c. "and be held as valid and authentic, as the principal "warrants themselves, if the same were yet extant; "and the Lord Register, and his deputes, are or-"dained to give a new extract, *gratis*, to every "person that shall give in an old extract, &c.; and "extracts from these new records shall make the like "faith in judgment, and out-with the same as the "extracts from the old registers of the commission "were wont to do before they were burnt."

If indeed the extract here in question was as defective at the date of this statute, as it now appears to be, the giving a new extract copied from the old one would not have assisted the claim. But then a material question might have arisen, whether the Court were not authorized to inquire what were the contents of the original register; for, by the following clause of the act they were "empowered, upon "such evidence, and as they should see cause, to

"make up the tenor of such Decreets in manner "above mentioned, whereof extracts are amissing, "and the registers lost in the said fire." If this clause is to be considered, as providing only for the case of extracts from the burnt registers, which had been lost, it would be inapplicable to the case in discussion. But if such a construction may be put upon the words of the clause, as to authorize the Court to make up the tenor of the decree, where a word is missing or obliterated, then an application might have been made to the Court of Teinds, under this act of Parliament. It appears that in the process in 1720, this extract was produced, and considered to be unintelligible as to the lands in question.

The same thing has happened in two subsequent proceedings; and it is now to be considered, whether the proofs, in support of the instrument produced, furnish such a degree of certainty as to authorize a reversal of the judgment.

You cannot apply to the case of a document in the custody of a party the same principle of decision, as if the question related to a record in the keeping of the law. Considering, moreover, what has taken place with respect to this extract since the year 1720, it would be too hazardous to decide, upon the evidence now produced, that the obliterated word in the extract was "Ten;" and as the Court of Teinds has repeatedly held this extract to be unintelligible, the judgment ought to be affirmed with costs.

*Lord Redesdale*:—The evidence produced in the cause is evidence to prove that some teinds of the

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parish were valued, but is no proof as to the teinds in question. The valuation of those teinds might have been left in blank in the original decree; there is nothing to prove the contrary. In that case the decree had no operation as to these teinds. The act 1707 provided a remedy for the loss of the records of valuation; and it was the duty of all persons, who had an interest in preserving the records, to proceed without delay to establish their rights.

The persons, who in 1707 were entitled to the lands of the Appellant, ought to have brought their extract into the Court of Teinds, to have it recorded as evidence of their rights, if it was then perfect; or if any part of the extract was effaced by accident, to have supplied the defect by evidence. Such evidence then probably might have been adduced. Now it is difficult, if not impossible, to produce, and dangerous to admit, such evidence. If the right ever existed, it has been lost by the negligence of those who failed to claim it. A century has elapsed since the claim ought to have been presented; and this neglect furnishes a strong ground to presume, that they were incapable in 1707 of supplying the defect. The proceeding in 1720 called upon the party to supply the defect. Instead of doing so, it seems by acquiescence to be admitted, that the defect was incapable of being supplied. Can we at this distance of time supply the word by conjecture? The evidence which has lately been produced might equally have been offered to the Court in 1720. As the parties interested omitted to do so, we must presume that the defect

could not be supplied, which, in effect, they have admitted then, and in subsequent proceedings.

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Ordered, and adjudged, That the said petition and appeal be and the same is hereby dismissed this House; and that the interlocutor therein complained of be affirmed, with 200*l.* costs.