'vision in the lease touching the timber on the subtenants' houses. Feb. 21. 1821.
'And the Lords farther find, That, according to the terms of
'the lease, the respondent is entitled to be allowed for so much
'of such new buildings as, consistently with the former finding,
'he is entitled to have an allowance for, according to a valuation
'to be put thereon at the time of removal, and not according to
'the actual expenditure in making such new buildings. And it
'is ordered, That, with these findings, the cause be remitted back
'to the Court of Session in Scotland, to do therein as is just and
'consistent with such findings.'

Appellant's Authority.—Ducat, May 14. 1803, (15264.)

J. CAMPBELL,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 3.*)

Sir HENRY HAY M'DOUGALL, Bart. Appellant.—*Romilly—Leach—Forbes.* No. 2.

Rev. DAVID HOGARTH, Respondent.—*Clerk—Jardine.*

Valuation—Proof.—Held (affirming the judgment of the Court of Teinds) that an old extracted decree of valuation, in which the numerical word fixing the value had been almost entirely worn away, and a hole left, could not afford evidence of the value of the teinds, although it was the opinion of persons of skill that the word must have been either ten or twa.

IN 1814, the Reverend David Hogarth, minister of the parish of Makerston in the county of Roxburgh, raised a process of augmentation and locality, in which, after the Court had held the heritors as confessed upon the rental, and had remitted the cause to Lord Reston, Sir Henry Hay M'Dougall, the proprietor of the whole parish, (with the exception of a small farm,) gave in objections, and produced an extracted decree of valuation of the teinds of Makerston in 1635 by the High Commission, which, he alleged, established that the value of the teinds was fixed at two, or, at all events, at ten chalders. This extracted decree embraced several other lands, and was quite entire in every respect except at the numerical word ascertaining the number of chalders at which the teinds of Makerston were valued. This word, in consequence of the folding of the paper, stood at one of the corners, which was worn away, and a small hole left. So far as related to Makerston, the decree was in these terms: 'Find and declare 'the just worth and yeirlie availl of the lands underwritten, per-

Feb. 23. 1821.

TEIND COURT.
Lord Reston.

Feb. 23. 1821. ‘ tening 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 underwritten, of the qualities efter ‘ spect., ilk ane of the saidis heritors as follows: To witt: The ‘ landis, town, and maynis of M'Kairstoune, Luntonlaw, Meir- ‘ done, Nether Maynis, Manerhill, with their pendicles and per- ‘ tinentis perteining heritablie to the said Sir William M'Dougell ‘ of M'Kairstoun, Knight, to be worth in personage teind ‘ chalderis victual, tua part cheritet beir, and thrid pairt heipet ‘ ait meill, all of the old mett and measour of Jedburgh.' Sir Henry alleged, that at the blank space preceding the word ‘ chal- ‘ deris,' the upper horizontal line of the letter T was perceptible, and that it was impossible that more than two letters in addition could have been comprised within the space, so that the word must have been either Ten or Tua; and he stated that he was willing to adopt the former. To this it was answered, That the word was altogether illegible; that therefore as it was impossible to ascertain the extent of the valuation, the decree was ineffectual to any extent whatever; and that, accordingly, it had been disregarded by the Court in three separate processes of modification in 1720, 1799, and 1805. Lord Reston, before answer, remitted to Mr. John Dillon, writer in Edinburgh, and Mr. James Miller, one of the Teind clerks, ‘ to examine said decree, and to depone ‘ as to their opinion of the disputed word therein.' The former gentleman reported, that it appeared to him that the first letter was a T, and ‘ 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 Tua in the third line below the word in question, it ‘ appears to be of the precise same extent as that word.' In this opinion Mr. Miller concurred. The Lord Ordinary having made great avizandum, the Court remitted to Mr. Thomas Thomson, advocate, to examine the decree, and to give his opinion as to what the word had been. After mentioning several circumstances, he reported that, ‘ 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 nume- ‘ rical words which I can conceive it possible to have stood in this ‘ part of the writing.' Thereafter the Court, on the 6th of March 1816, ‘ sustained the objections made for the pursuer to the de-

'creet of valuation produced and founded on by the defender, 'Sir Henry Hay M'Dougall of Makerston, and remit to the Lord 'Ordinary to prepare a scheme of the rental accordingly, and to 'report.' To this interlocutor they adhered on the 20th of November thereafter.* Feb. 23. 1821.

Sir Henry then appealed, and contended, that as it was undoubted that there had been a valuation, a right was thereby created in his favour to some extent or other; that when a right has once been legally constituted by a valid and effectual grant, it would be unjust to deprive the party of the benefit of this, merely by the loss of the evidence itself, if the import of it can be supplied; and that accordingly it was competent, where an entire deed had been lost, to prove its tenor by other evidence, so as to restore to the party the evidence of his right. On this principle he maintained, that the Court were entitled to supply the word which was wanting,—and that the above reports, together with a collateral argument deducible from the valuations of the other lands in the decree, afforded sufficient evidence that the obliterated word was either two or ten. To this it was answered, That it was incumbent on the appellant to instruct, by the production of such a decree of valuation as a Court of Law can safely proceed upon, that his teinds had been valued at a certain amount; that he was bound to do so by a regular probative document, complete in its essential parts; that he was not entitled to supply a radical defect by probable reasoning; nor could a Court of Law in such a question balance probabilities, and lean to that side to which the evidence on the whole seemed to preponderate; and that this was just one of those contingencies in regard to an old writing, the loss of which must fall upon the party who claims under it. The House of Lords ordered and adjudged, that the appeal 'be dis-'missed, and the interlocutors complained of affirmed, with £200 'costs.'

The Lord Chancellor, after alluding to another case, observed—There is another cause that is appointed for judgment, the case of Sir Henry Hay M'Dougall of Makerston, Baronet, and the Rev. David Hogarth, minister of the parish of Makerston; and it will be recollected by your Lordships, that the principal question in that case was, whether the Court of Teinds ought to have considered a certain blank in a decree of 1635, as if it were filled up with the word *ten*; and whether they ought to have found, that upon the inspection of the decree, or upon the effect of the testimony, (such as it was exhibited in the cause, in order to show

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* Not reported.

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that the word had originally been ten, or any other number,) the instrument was perfect,—an instrument demonstrating the number of chalders of victual which originally stood in this decree.

My Lords, I will call your Lordships' attention to the act of 1707. This paper, which was produced before us, is not an original record; but it is an extract, and an extract which must be considered as having been in possession of the party who now insists that it ought to have the effect of a complete record,—an extract which has been in their possession and custody. The obligation upon them was to preserve that in such a state, that what it did manifest, it should manifest with reasonable clearness, and reasonable certainty. My Lords, in the year 1707, an act was passed in Scotland, entitled 'An act for the plantation of kirks and 'valuation of teinds;' and that act proves that the registers of the Court of Teinds had been lost; 'and for supplying the lost registers of that 'Court, Her Majesty and the said Estates do hereby appoint and ordain that any authentic extracts from the said records be brought in.' We have had no doubt raised before us, whether this is an authentic record, the question being not on its authenticity, but upon its contents. 'And the said records, being presented to the said Lords, be recorded 'in a particular register, and that the said extracts so brought in be kept 'by the Lord Clerk Register, and his Depute Clerks to be appointed by 'him for that effect, as their warrants, which shall be held and repute 'as valid and authentic as the principal warrants themselves, if the same 'were yet extant. And the Lord Register and his Deputes are ordained 'to give a new extract gratis to every person that shall give in an old 'extract immediately upon delivery thereof; and that extracts from 'these new records shall make the like faith in judgment, and outwith 'the same, as the extracts from the old registers of the commission were 'wont to do before the same were burnt.' If the present extract was as defective in the part in which the defect now appears at the time this act passed, as we now see that it is, to be sure, giving a copy of the extract with as little manifestation of what the word was, as there is now, was doing nothing material. Under this act a question may arise, whether, if this extract had been carried in, what follows in the act would not have authorized the Court to have inquired into what were the original contents of the original register at this period of 1707; and that depends upon the words which I am now about to read: 'And 'further empowering the said Lords, upon such evidents and adminicles 'as they shall see cause, to make up the tenor of such decreets in man-'ner above mentioned, whereof extracts are amissing, and the registers 'lost in the said fire.' If this clause is to be interpreted as applying only to extracts that are wholly lost, and to the registers lost in the fire, to be sure this clause could not be taken to apply to such an extract as we have before us. If, on the other hand, a construction can be put on that which could have authorized the Court to make up the tenor of this decree in the part in which the word is lost by wear, at present they

might make it up. So far, then, an application might have been made to the Court of Teinds under this act of Parliament. Feb. 23. 1821.

It appears that, as long ago as 1720, this instrument had been considered as unintelligible, and repeatedly since; and the question upon the whole is, Whether you have such a degree of certainty arising out of this instrument as will authorize you to reverse that which has been the judgment of the Court of Teinds. My Lords, this is not an original record of a decree which was lost, but it is an extract in the keeping of the party, and therefore you cannot apply the same principles in favour of the appellant as you might apply to it, if it was the record itself that had been in the keeping of the law; and considering what has happened between the year 1707, or rather between the year 1720, and the present time, it would be going a great deal too far to say, that with this evidence the word was ten, and that it should settle the question between the parties. My own opinion is, that that cannot be admitted under the circumstances of the case; and as the Court of Teinds have repeatedly held this to be unintelligible, it seems to me that the party ought to have his costs in this case.

Lord Redesdale.—I agree with the Noble Lord. It seems to me, that the evidence which is offered is evidence to prove, that some teinds of the parish have been valued; but it does not follow that the teinds in question have been valued; for it does not appear clear from any thing that I can find, that the valuation of the particular teinds in question was not left in blank at the pronouncing of the original decree. If so, the decree itself was imperfect, and operated nothing as to these particular teinds. In respect to the teinds in question, my Lords, the act of 1707 having afforded a remedy to those persons who might otherwise have lost their remedy by the destruction of the records of the Court which had taken these valuations, it was the duty of all persons who were in that situation immediately to proceed to establish their right under those valuations; and in the year 1707, therefore, it was the duty of the persons who were then entitled to the estate of Sir Henry Hay M'Dougall to have brought this extract into Court, there to have had it recorded as evidence of that which then appeared clear upon the extract; and if there was then any deficiency of the extract occasioned by accident, to have supplied by evidence that defect. That evidence, in the year 1707, might probably easily have been produced; but to suppose that that evidence can now be produced, is a supposition that can scarcely be maintained. It is not absolutely impossible, but it is nearly so; and therefore it does seem to me that the parties have lost their right, if they had the right, by their own negligence. Above a hundred years have elapsed since it was their duty to have taken this step. They have neglected to take the steps to avail themselves of the relief the act gave them, and that is in itself a strong ground for presuming that they were incapable, in the year 1707, of supplying the defect. My Lords, in the year 1720 there was a proceeding which called upon them directly to

Feb. 23. 1821. supply the defect; but, instead of supplying it, they admit the defect was incapable of being supplied. Having themselves, in the year 1720, thus admitted the fact, that the defect was incapable of being supplied, are we, at the distance of a hundred years, upon conjecture, to supply that defect? It appears to me, therefore, that the party has lost his right by his own negligence, and that originally the decree was defective in that point, and I presume it was defective,—that is, that there was originally a blank, which is now attempted to be supplied; because all that has been now offered to the Court to supply that defect was equally capable of being offered in the year 1720; and, in subsequent proceedings, the parties have admitted they could not supply the defect. Under these circumstances, I conceive that it is fit that what has been done by the Court below should be affirmed.

Appellant's Authorities.—28. Voet. 4. 2; Matheus de Prob. l. 3. c. 131; Earl of March, July 9. 1743, (15820); Nimmo, July 9. 1771, (15825); Cranstoun, Jan. 22. 1674, (15794); Cunninghame, June 1674, (15794); 4. Ersk. 2. 34; Gilbert's Law of Evid. 301.

Respondent's Authority.—Bacon's Abridg. p. 700, voce *Obligation.*

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 6.)

No. 3.

JOHN DINGWALL, Appellant.—*Lord Advocate Maconochie—Romilly—Horner—J. A. Maconochie.*

Rev. GEORGE GARDINER, Respondent.—*Leach—Connell.*

Manse—Stat. 1663, *c.* 21.—Held, (contrary to the judgment of the Court of Session,) that where a manse has been built and has become ruinous, the first clause of the statute 1663, c. 21. relative to the building of manses, and limiting the expense to £1000 Scots, does not apply; but that the second clause as to repairs, and which is unlimited, is applicable; and therefore the judgment of the Court of Session, awarding £1000 sterling, was affirmed.

Mar. 2. 1821.

2D DIVISION. Lord Pitmilly.

IN 1814, the Rev. George Gardiner, minister of the parish of Aberdour in the county of Aberdeen, presented a petition to the presbytery of Deer, founding on the statute 1663, c. 21. stating that his manse and offices were ruinous and untenantable, and praying for decree against the heritors to rebuild them. By this statute it is enacted, that 'Because, notwithstanding divers acts of 'Parliament made before, divers ministers are not yet sufficiently 'provided with manses and glebes, and others do not get their 'manses—therefore, &c. ordains, that where competent manses 'are not already built, the heritors of the parish, at the sight of 'the bishop of the diocese, or such ministers as he shall appoint, 'with two or three of the most knowing and discreet men of the