from the part that is left; and that the owners would be entitled to compensation as being injuriously affected in that respect. I therefore think we cannot preclude him from having justice done to him, and having redress for the injury.

I have had considerable doubts as to the remaining part of the item, the general nuisance and deterioration of the tenement, as to whether that might or might not comprehend matters for compensation, or in respect of which compensation can competently be claimed. But in the vague way in which it is here expressed, I cannot hold that we can sustain it. It is too general, and not very intelligible in itself. Therefore I concur in the judgment proposed, altering the interlocutors of the Court of Session as regards the last item of £392, with the exception of reserving the right of the pursuer to claim for injury done by the railway bridge, and I concur in thinking, that the ten per cent. ought to be deducted as the jury deducted it.

LORD CHANCELLOR.—My Lords, inasmuch as we are equally divided in opinion, the interlocutor complained of will not be reversed, but we all agree that the interlocutor shall be varied. And it will run thus :—"That the interlocutor complained of be varied by finding that the verdict of the jury, so far as it awards the sum of £392 for damage to the respondent's remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway, is *ultra vires* and inept, and therefore reduce it to that extent, and find, that the respondent is not entitled to enforce the verdict, and the interlocutors following thereupon, except under deduction of the said sum of £392, but without prejudice to such claim as the respondent may be advised to make in respect of the damage done to his tenement by the Railway Bridge by obstruction of light and air."

Appellants' Agents, MacGrigor, Stevenson, and Fleming, Glasgow; Murray, Beith, and Murray, W.S; Martin and Leslie, Westminster.—*Respondent's Agents*, Campbell and Smith, S.S.C.; William Robertson, Westminster.

JULY 8, 1870.

The LORD ADVOCATE, *Appellant*, *v.* THE GOVERNORS OF DONALDSON'S HOSPITAL, *Respondents*.

Teinds—Valuation of 1636—Extract—Register—Custody of Document—Evidence—*An extract valuation recorded under the Statute* 1707, *c.* 9, *purported to be signed by the Clerk Depute to J., the Clerk of Register and Keeper of the Register, and stated, that in* 1636 *the teinds of the lands of W. were worth eight chalders victual, and that this was a just extract of the valuation as contained in the principal register thereof.*

HELD (affirming *judgment*), *That this must be taken to be an authentic valuation, the document being found in the proper custody, and the officers named having filled those offices described in the document.*

This was an appeal from a decision of the First Division of the Court of Session as Commissioners of Teinds. A summons of augmentation, modification, and locality was raised by the Rev. Wm. Mearns, minister of the united parishes of Kinneff and Caterline. The Court of Teinds modified a stipend of 18 chalders, half meal, half barley, with £8 16*s.* 8*d.* for communion elements; and in the course of preparing a locality, the question was raised whether the teinds of Wester Barras, in the parish of Kinneff, belonging to the Governors of Donaldson's Hospital, had or had not been valued. This turned on the proper effect to be given to the following document :—"At Edinburgh, the 3d day of February 1636, the lands of Wester Barras, pertaining to Sir John Douglas, are worth, and may pay in stock and teind, parsonage and vicarage, eight chalders victual. This is the just extract of the valuation of the foresaid lands, as is contained in the principal register thereof. Extracted by me, Thomas Murray, Advocate Clerk Depute to Sir Archibald Johnston of Warriston, Knight, Clerk of Register and Keeper of the said registers.—THOMAS MURRAY." This document was only recorded by the Court of Session in 1792, under the authority of an Act of Parliament, passed in 1707, for supplying the loss of certain records of the Court of Teinds, by the registration of any authentic extracts from such records which might be presented to the Court of Session. On behalf of the Lord Advocate, acting for the Commissioners of Woods and Forests, it was objected, that the above was not

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[1] See previous report 4 Macph. 1096; 39 Sc. Jur. 627. S. C. 8 Macph. H. L. 136; 42 Sc. Jur. 435.

admissible evidence, for it did not purport that there had been any decree of valuation, and that the necessary parties had been called before it was pronounced. On the other hand, the respondents contended, that faith must be given to it, for it had been recorded by a competent Court, in 1792, and must now be taken to be authentic. The Lord Ordinary held, that the document was invalid as a record of a decree of valuation. On appeal, the Court, by a majority of 5 to 2, held, that the document was valid and authentic as a recorded decree, and gave effect to it. Thereupon the present appeal was brought.

The *Lord Advocate* (Young), and *J. M'Lennan*, for the appellant.—The document founded upon is not an authentic extract, and does not import, that there ever was an authentic decree in a process in which all parties having interest had been cited. The *onus* of proof lies on the heritor who founds on such a document—*Duke of Buccleuch* v. *Connall*, 4 D. 157, and there must be produced either a decree or an authentic extract, or its equivalent, a decree proving its tenor—*L. Lynedoch* v. *Liston*, 14 S. 374. An extract decree is a well known document in the law, being a copy or summary of a judgment of Court by the proper custodier of such judgments, and is taken to be conclusive evidence of such judgment—*Kirkwood* v. *Grant*, 4 Macph. 4. This document is loose and unreliable. It has none of the characteristics of an extract decree, being a bare assertion of a fact. It does not imply, that there ever was a competent suit or process on which the decree was pronounced; it has no date, and it does not profess to be extracted from the books of the Commissioners of Teinds, or that Thomas Murray was clerk to the Commissioners when the document was written—*M'Gibbon* v. *Officers of State*, 24 D. 1344; *Gordon* v. *Dunn*, 7 W. S. 68; *Simpson* v. *Skene*, 15 S. 1163; *Stewart* v. *Brown*, 13 D. 556; *Farquhar* v. *Glegg*, 15 Sc. Jur. 284. If the document was not in itself an authentic extract decree, it could not be protected by registration under the Statute 1707, c. 9.

Dean of Faculty (Gordon), and *Sir R. Palmer* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR HATHERLEY.—My Lords, the question that is raised by this appeal, and which has been most ably argued, rests upon a point which may be discussed in a very few words, namely, whether or not a certain extract or excerpt, (whichever may be the proper term to give it, for there is a question upon that,) a certain document purporting to be an extract from the principal register, (whatever that may mean,) and signed by Thomas Murray, the Deputy Keeper of the Registers, with reference to the valuation of the teind of Wester Barras, which extract has been subsequently, under the Act of 1707, duly entered in the Special Register, by that Act directed to be kept as an authentic extract from the principal records of the proceedings of the Teind Commissioners, is a document sufficient in itself, *primâ facie* at least, to establish the title of the respondent in the present case to hold his land, as having the teinds valued according to the purport of that document which is thus signed by Thomas Murray, it being held, therefore, to shew, what value was put upon the teinds in 1636 when the property was so valued. As far as actual possession goes, there is no question that not only, generally, up to the present time, but especially on three or four occasions which have occurred since 1792, when this proceeding that I have referred to was taken under the Act of 1707, these teinds have been dealt with as being valued teinds.

The document itself bears no special date as regards the delivery up of the documents, but the date which it bears, and which purports to be on the face of it the date of the original thing, whatever it was, from which it was an extract, is 1636, and thus it is headed or titled on the back, "Valuation of the lands of Wester Barras, 1636," and is in the following terms: "At Edinburgh, the 3rd day of February 1636, the lands of Wester Barras, pertaining to Sir John Douglas, are worth, and may pay in stock and teind, parsonage and vicarage, eight chalders victual. This is the just extract of the valuation of the aforesaid lands, as is contained in the principal register thereof."

Now as to the meaning of those terms and the construction of the language, there can be no doubt, that the register thereof means the Register of the Valuation. It is "the just extract of the valuation of the foresaid lands, as is contained in the principal register thereof," that is, the register of valuation. It is extracted by Thomas Murray, who described himself as "Advocate Clerk Depute to Sir Archibald Johnstone of Warriston, Knight, Clerk of Register and Keeper of the said Registers." We have in evidence a document shewing, that in the month of November 1649, Thomas Murray was formally appointed by the Commissioners under the Act of Charles the First, who sat at Edinburgh for the purpose of ascertaining the value of the teinds, and to whom fell the duty, if the sub-Commissioners made a valuation, of affirming that valuation, or if they chose to take the matter in hand themselves, of directly settling the valuation. These Commissioners so appointed did in November 1649, admit Mr. Thomas Murray to the office of Keeper of the Registers, on the appointment of Sir Archibald Johnstone, who was Lord Clerk Register at that time. It is said, that he was not distinctly the Depute of Sir Archibald until the year 1657; that Sir Archibald, under the Government of that date, held another office connected with the same subject, and then appointed him distinctly as Depute. But I think there is no reason for supposing, that Thomas Murray might not describe himself as

Clerk Depute of Sir Archibald Johnston; for it appears, by the very extract I have referred to, that in 1649 Sir Archibald Johnston was the proper person to appoint him, and that he did *de facto* appoint him, and that he was *de facto* admitted to take care of the registers.

That being so, there can be no question raised at this distance of time, that Thomas Murray was the proper person to have charge of this register, or this system of registering. It may be doubted whether a thing that could be taken into manual possession, and which would now be called a register, was or was not kept; but whatever be the fit title to apply to them,—and it is clear, that, being such a keeper, he was the proper person to make extracts therefrom—I am now dealing with it as if the document before us were not a copy made and registered pursuant to the Act of 1707, which was to have the same effect as the original, but as if the document before us was the thing itself signed by Thomas Murray.

Now, in whose custody do we find the extract? We find the extract in the custody of him who now seeks to avail himself of it, or rather his predecessors in the title; and as Murray was appointed in 1649, although we do not know how long he lived, we may reasonably suppose that, for at least two hundred years, the heritors, who have been the predecessors in the title of the present respondent, have held their land subject only to the valued teinds, pursuant to this extract, and that persons who held it obtained that extract originally from the proper person to give it out, and that it was given out from the proper office. The only question is, whether or not it is to be taken as evidence of a decree having been made which effectually settled the value of the teinds?

It appears to me, that after this distance of time faith must be given to the document itself as regards the purpose for which it was given out, namely, on the application of a heritor to the office which Murray held, which was the office of Clerk Depute to the Lords Commissioners of Teinds, who were the proper authorities for this purpose, and as regards its being found on the register, and that no other interpretation can possibly be given to the instrument than this, that it is not a mere idle note, but that it is a document given as a document of title to the person who is described to have the extract, and who so long held it and acted upon it. It appears, that it was given out in a solemn manner by the person having the charge of the instrument from which this extract purports to have been made, that being an instrument detailing the proceedings of those who were competent to make the valuation by their decree, and we must hold, that it would not be entered in their registers, unless it was a complete and perfect instrument effectual for the purpose for which they desired to register it. No Court whatever would register its document in an incomplete or imperfect form. Again, the document would not be given out to any person as the result of what had taken place before the Lords Commissioners, and of what was to be found in their books, if it were merely a document which indicated, that there had been nothing imperfect and incomplete which had been going forward in the course of their proceedings, and which it would be an idle and worthless thing to deliver out to those who might ask for it, and which it would have been a most improper thing on the part of the person who gave it out to hand over to the applicant, because he must have known, that it was applied for, for the purpose of shewing it as evidence of something formally done and recorded in the office which it was his duty to keep in the proper possession.

I hardly need say more upon this case. I find that Lord Deas has so completely put all that I should have to say upon the subject in his opinion expressed in the other case to which we have been referred, that I prefer using his words:—"Now, when we put the question to ourselves, Is this an extract? I do not understand how it is to be doubted that it is. At the end of it, it says, 'This is the just extract of the valuation.' I do not know anything that has more faith in judgment than an extract by the proper keeper of a register. If it appeared, that the person who signed it was not the keeper of the register at all, that would be another matter, but that is not suggested here. If he was the proper keeper of the register, his extract must be taken *pro veritate*, and he here says it is a just extract. It is signed by a man who describes himself as the keeper of the register. And what does he describe the extract further to be? He says, it is an extract of the valuation, and that it is taken from the principal register. That obviously means the principal register of the Commission of Teinds. In addition to that we have on the back of the document, 'Valuation of my Lord Arbuthnot's lands within mentioned.' In the case of the extract now before us, it is the valuation of other lands, but there is a similar indorsement upon it."

Now I really can add nothing to that. As regards the effect of the Act of 1707, I do not think it necessary to say more, because that Act must at least go as far as this. It was stated by the Lord Advocate, that he could not put the contention higher than this, as far as regards this particular argument, namely, that the same faith must be given to that document now in evidence from the register kept under the Act of 1707, as if we had Mr. Murray's own signature here and the thing which he signed. I think, that in the absence of all other evidence we must beyond all doubt hold, that the thing we have before us was signed by Mr. Murray, that Mr. Murray held the office which he is stated to have held, that he made the "just extract" which he says he made, and that the just extract was an extract from a record of something done, and not a

mere idle note, or something that was handed out to the heritor for no purpose whatever, but that the note so handed out could have had no other object or effect than to show the valuation which had been made by the Lords Commissioners of Teinds.

It appears to me, therefore, that this appeal must fail, and must be dismissed with costs.

LORD WESTBURY.—My Lords, I cannot assent to the manner, in which this case has been put in argument, by the learned counsel for the appellant. They have required of your Lordships that you should try the question, whether this document entitled, "Valuation of the lands of Wester Barras" is to be regarded as an authentic extract of a decree of valuation of that time. And they contend, that you are to try that without any conclusion or presumption being derived from the fact, that the document in question was registered as such under the Act of 1707, more than about eighty years ago. I say, they require the House, without deriving any conclusion from that, to try the question now as if the document were presented for registration under that Statute. They say that, unless you find that it is an authentic extract of a decree, it ought not to be considered as entitled to the benefit of the Act of 1707, and the privileges of the new register conferred by that Statute.

Now, though I do not at all think it necessary, that the judgment of your Lordships' House should rest upon the conclusion that I draw, yet I must undoubtedly insist upon this being accepted as the true ground resulting from the fact of the registration under that Statute, namely, that the Statute affords a presumption *primâ facie*, until it be repelled, that the instrument so registered was a genuine and authentic extract, and that it was accepted as the extract of a decreet of valuation. Therefore that presumption would carry with it the conclusion, unless it were repelled by some evidence on the part of the appellant.

Now the argument of the appellant has consisted of nothing more than urging these considerations. You are told, that on the face of the document it mentions no Court. They further say, that, upon the face of it, it refers to no decree in terms, and therefore you cannot accept it as the extract of a decree. Now I have already spoken of the presumption that it is such, which ought to be derived from the manner in which it has been dealt with. But putting that aside, that argument may be answered by the internal evidence afforded by the contents of the document itself. The document itself bears upon the face of it, that it is an extract of the valuation as contained in the principal register thereof. Now, substituting for the word "register," in order to avoid any confusion resulting from the English notion attached to that term, the word "record" of proceedings, that is, the original proceeding made up into rolls if you please, it would read, "This is a just extract of the valuation of the aforesaid lands as is contained in the principal record thereof." Record of what? Record of the valuation. What can be the meaning of that, but the record of the decree of valuation. That record is made with reference to the proceedings of the Commissioners, and the record of the proceedings of the Commissioners will be the record of the valuation made by the Commissioners, and the valuation made by the Commissioners would be embodied in the decree of the Commissioners.

Some little attempt was made to found upon the language used this further observation, that the words do not warrant the implication or presumption of its being a decree of the superior Commissioners, and that it might be a decree of the sub-Commissioners never affirmed. That conclusion cannot be drawn, for if it was a decree of the sub-Commissioners never affirmed, there would have been no record made of it in the proper sense of that word according to the Scotch meaning of the word "register." Therefore we are bound to assume, that it was a final proceeding, because it appears to have been recorded, and this document appears to be an extract from that record. All these things are fairly to be inferred from the language which is here used. One cannot but admire the *nimia activitas* with which these things are argued in the Court below, for I can assure your Lordships, that if this had arisen in an English court of justice, it might have been made the subject of observations for five minutes, and at the end of that period of time it would have been finally decided. There is no doubt, that this document ought to be accepted in the manner in which it has been accepted in the Court below, and that this appeal ought to be dismissed with costs.

LORD COLONSAY.—My Lords, I have nothing to add to the opinion which has now been expressed by my two noble and learned friends. I will merely observe, that I think, that the language of this document comprehends everything that is necessary in Scotland to a valuation of teinds. These words are inconsistent with any other supposition being entertained. All that we find here is not to be accounted for except as the necessary result of a regular valuation. I will just make one other remark with reference to what has been said by my noble and learned friend who spoke last, as to the use of the word "register," to the effect, that the word "register" is very often substituted in Scotland for the word "record." I would remark, that in the Act of 1707 the word used is "record." Therefore the inference which my noble and learned friend draws is perfectly correct.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Warren H. Sands, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, W. and J. Cook, W.S.; Connell and Hope, Westminster.