perly interest. The Court disposed of both points some time since; and, with reference to the latter, their judgment was that interest meant not rent-charge, but proper interest. The pursuer now lodged a minute of reference, referring to the defender's oath, whether the agreement truly come to between the them was not that the tenant should pay the whole rent-charge, and whether the term interest was not used erroneously to express that meaning.

GORDON, Q.C., and BLACK, for the defender, objected to this reference on two grounds—(1) that it was incompetent to contradict the terms of the written agreement; (2) that it was incompetent to make a *partial* reference after final judgment.

MILLAR, Q.C., and JOHN MARSHALL for pursuer.

The Court unanimously sustained the reference. They held that it was competent by the oath of party to establish that in a certain particular the written instrument did not truly set forth the agreement actually come to; and, with regard to the alleged lateness of the reference, they held that the point here proposed to be referred was one which would be conclusive of a distinct and separate part of the cause, and which, therefore, would not be the beginning of a new litigation, as in the ordinary case of a partial reference after final judgment.

Agent for Pursuer—G. L. Sinclair, W.S.
Agent for Defender—David Forsyth, S.S.C.

Friday, July 2.

FIRST DIVISION.

RICHMONDS *v.* OFFICERS OF STATE.

Teinds—Report of Sub-Commissioners—Proving of the Tenor—Expenses. Circumstances in which the Court *held* that the existence and tenor had been proved of a report by the Sub-Commissioners for Valuation of Teinds.

The action having been defended by the Officers of State for their interest, *held* that the pursuers were not entitled to expenses from them, it lying on the pursuers to establish their case, even in the absence of a contradictor.

This was an action of proving the tenor of a report by the Sub-Commissioners for valuation of the teinds and rents of lands lying within the presbytery of Dunblane, of date 5th October 1629, brought by George Richmond and John Richmond, proprietors of the lands and barony of Balhaldies, and of the lands of Glassingalbeg, lying formerly within the parish of Dunblane, and now within the parish of Ardoch, and county of Perth. The pursuers stated that the original report had gone amissing, and no trace of it was discoverable after 1797, in which year it was produced in an approbation then being carried on at the instance of John Stirling of Kippendavie; but they produced various documents which they alleged proved both its existence and tenor; and, in particular, they referred to a document lately found in the Keir charter-chest, entitled "Copie of the valuations of teinds of the parishe of Dumblane, valued before the Sub-Commissioners within written Oct. 5, 1629 zeirs." The Officers of State appeared and defended the action. A proof was led.

FRASER and DUNCAN for pursuers.

KINNEAR for defenders.

At advising—

The opinion of the Court was delivered by Lord Kinloch.

LORD KINLOCH—The present action has been brought for the purpose of proving the tenor of an alleged report of the Sub-Commissioners for Valuation of Teinds, bearing date in the year 1629, so far as this report regards the pursuers' lands of Balhaldie and Glassingallbeg, formerly situated within the parish of Dunblane, now within that of Ardoch.

I have considered the evidence before us with all the care and anxiety peculiarly appropriate to a case in which the Court is called on to dispense with the necessity of possessing an original deed, and to admit, as equivalent for all legal purposes, a duplicate made up from extrinsic evidence. It is rightly required in such a case that the evidence should be sufficient and satisfactory. But, from the nature of the process, the amount of evidence necessary will vary with the character and circumstances of the special case. The authorities recognise such a difference as, in some respects, matter of general rule; and every case will have its own distinguishing features.

I have come to the conclusion that, in the special circumstances of the present case, the pursuers have established enough to entitle them to decree in terms of their summons.

The document of which the tenor is sought to be proved is not a private writ, liable to be put away for the purposes of concealment by an individual holder. It is a public document, in which many were interested, and in regard to which there is comparatively little risk of successful falsification. It is an alleged valuation, said to have been made by the Sub-Commissioners for the valuation of the teinds of the lands within the presbytery of Dunblane, and to bear special reference to the teinds of the parish of Dunblane. The valuation is said to have been prosecuted at the instance of Thomas Campbell, procurator-fiscal named by the Sub-Commissioners. Its alleged date is 5th October 1629.

It is proved by conclusive evidence that a sub-valuation of the lands of that parish was actually made of the precise date stated, and was recognised and given effect to in repeated instances. This is proved by excerpts from successive processes of approbation, specially libelled on this very sub-valuation, and in which decree of approbation was pronounced of valuations therein contained. Within eight years of the date of the sub-valuation, viz., in 1637, there was a process of approbation as to the lands of Keir and others, founded on the valuation of these Sub-Commissioners. In 1796 Mr Stirling of Kippendavie raised a process of approbation as to the lands of Whitestone and others, in which the summons is specially laid on this sub-valuation of 5th October 1629; and after referring to the valuation of these lands contained in it, sets forth, "as the principal report of the Sub-Commissioners herewith produced will testify." Decree of approbation was obtained in terms of this summons; the extract decree bearing that the pursuer's procurator, "for verifying the points and articles of the libel produced a book or record containing the principal reports of the Sub-Commissioners of the Presbytery of Dunblane, and particularly the valuation of the pursuer's lands libelled on." In 1806 a summons of approbation was raised at the instance of Sir James Campbell of Aberuchill, in regard to his lands of Kilbride, setting forth "that the Sub-Commissioners appointed for the valuation of the lands and rents of lands lying within the Presbytery of Dunblane, by their report or decree

dated the 5th day of October 1629, found the yearly value of the stock and parsonage teinds of the said lands and barony of Kilbride to be nine score bolls victual, whereof 32 bolls bear and the rest meal;" and adding, "of which report or decreet the term follows." The part relating to Kilbride is then quoted, setting forth *inter alia* that the sub-valuation had been prosecuted by Thomas Campbell, procurator-fiscal; and it is added, "as a regular and authentic extract of said report, under the hands of Mr Harry Blackwood, clerk, specially nominated and commissioned by Sir Alexander Gibson of Durie, clerk-register, herewith produced, will testify." In connection with this there has been recovered a letter from this very Mr Harry Blackwood to Sir Colin Campbell of Aberuchill, dated 11th December 1671, sending him an extract of a valuation of teinds, made by him as successor to Mr James Niven, the clerk, who, as will immediately be seen, signs the report of valuation of 5th October 1629 founded on.

It has been just mentioned, that in the process of approbation at the instance of Mr Stirling of Kippendavie, raised in 1796, the extract-decree, which is dated 24th May 1797, sets forth the production in process of "a book or record, containing the principal reports of the Sub-Commissioners of the Presbytery of Dunblane." In confirmation of the fact of this production, the business ledger of the late James Dundas, Clerk to the Signet, bears, of date 20th September 1797, that amongst other charges in this process paid to the teind-clerk was a sum of six shillings, thus entered:—"Clerk's servant, for carrying the sub-valuation book to Court, during the diets of process, and scroll." It is thus made apparent that a book containing the principal report of this very valuation of 5th October 1629 was produced in that process; perhaps may be more correctly said to have been exhibited in custody of the teind-clerk's servant. Presumably it was returned to the teind-clerk's custody; being a document of value, proper to remain in official charge.

That it was so returned has been proved by Mr John Barron, whose valuable services for forty-seven years as Depute-clerk of Teinds invests him with peculiar trust-worthiness. Mr Barron produced a volume from the teind records, titled on the back, "Record Sub-commission Valuation Teinds 1629 and other years." He is of opinion that this is the identical volume which was produced in the process of approbation as to the teinds of Kippendavie. There is an old index to the volume bound up in it, and purporting to give its contents, indicating that it originally contained the sub-valuations applicable to the Presbytery of Dunblane. These are not now in the volume. But that such documents were occasionally taken out from the volumes in which they were bound up, without any evil purpose, is proved by the fact stated by Mr Barron, that the reports of the Sub-Commissioners of the Presbytery of Argyll were taken out of this same volume in his time, and are preserved in the Teind-office in a separate roll. Mr Barron has searched in every process, and in every corner in which the missing valuation was likely to be found, but could not find it. I think it is fairly to be held that the document has gone a-missing through that fatality to which all public registers are liable, and which seems peculiarly to have pursued the teind records. The pursuers, who are in no sense responsible for the loss of the document, have, I think, fairly placed themselves in circumstances entitling them to supply its loss by a proving of its tenor.

The question remains, whether the tenor of the sub-valuation has been sufficiently proved, so far as regards the lands in question? The case in this respect stands peculiarly. It might have been expected that, with so many judicial proceedings arising out of this sub-valuation, various copies of the document would be found to be in existence. But the pursuer's agent, Mr William Fraser, proves that he has inquired at the agents for Aberuchill and Kippendavie and others, and wherever he thought it likely to obtain such aid, and unsuccessfully. But one very remarkable document has been discovered and produced to the Court.

This document has been found in the family records of Stirling of Keir, and bears to be a copy of the sub-valuation of 5th October 1629, with an additional valuation of 23d February 1630. It contains valuations of a great many lands, including those of Balhaldies and Glassingallbeg now in question, expressed in the usual form of such documents. It bears the original sub-valuation to have been signed by five of the sub-commissioners, and Mr James Niven, their clerk. The document is in a handwriting which is proved, by various men of skill in such a matter, to be that of the seventeenth century. It is docqueted on the back—"Copie of the Valuations of Teinds of the parishe of Dumblaine valued before the sub-commissioners within written October 5, 1629 yeirs." And there is as strong evidence as the comparison of handwriting can afford that this docquet is in the handwriting of Sir George Stirling of Keir, who was proprietor of that estate from the year 1630 to the year 1667, when he died.

There is no reason to doubt that this document is truly what it purports to be, a copy of the sub-valuation of 5th October 1629, made shortly after the date of the sub-valuation, and retained amongst his family muniments by a proprietor materially interested. The next inquiry regards its accuracy. As to this, there is a direct test afforded by the proceedings in the processes of approbation already referred to, in which the original valuation is quoted, as regards the lands to which these processes apply. In particular, there is the process of approbation brought by Mr Stirling of Kippendavie in 1796, and the process of approbation as to Kilbride, brought by Sir James Campbell in 1806. In both cases the copy in question is shown to be a correct transcript of the original sub-valuation. The only deviations from strict accuracy proved against it are, that in the extract produced in the case of Kilbride, the *partibus* is somewhat differently and more lengthily expressed; and that in one or two sentences the writer of the copy in question has not finished the entire sentence he was transcribing. Of this last defect, the only important instance occurs in the case of the lands of Keir, of which those forming the leading parcel are set forth as valued, without the sum of their valuation being carried out. But the copy begins the next line with the valuation of the rest of the lands of that estate, occupying several lines; and it is here identical with the valuation of these same lands quoted in the decree of approbation obtained by Sir George Stirling in 1637.

There is nothing in this apparently accidental omission leading me to doubt the entire accuracy of this copy in all the particulars in which it bears fully to transcribe the original valuation. In regard to the pursuer's lands of Balhaldies and Glas-

singallbeg, the entries contained in the copy, and quoted in the present summons of proving the tenor, are fully and sufficiently expressed, and afford not the slightest room for supposing that they are otherwise than genuine and literal transcripts from the original sub-valuation.

On the whole matter, I am satisfied that the Court has sufficient evidence before it on which to hold the tenor of this sub-valuation proved as regards the lands of the pursuers. That a sub-valuation of the lands in this parish of Dunblane was regularly and effectually made at the date in question is beyond a doubt; and it is nothing more than the ordinary legal presumption, that the pursuers' lands were included in this sub-valuation with the other lands in the parish. The Court has before it what I think it is entitled to hold as in substance a contemporaneous copy of this valuation, preserved in the family records of one of the parties to the valuation; and the general correctness of this copy, and more particularly its correctness as regards the lands of the pursuers, is liable to no valid impeachment. The loss of the original is not in any way imputable to the pursuers; but must be held as an unfortunate accident happening in the public registers. Whilst no one case of the kind can afford an absolute rule for any other, I think that, in the special circumstances, the pursuers are entitled to the justice of having the tenor of this document held proved, so far as they are concerned in it.

Agents for Pursuers—Jardine, Stodart, & Frasers, W.S.

Agents for Officers of State—W. H. & W. J. Sands, W.S.

Friday, July 2.

SECOND DIVISION.

CALEDONIAN RAILWAY *v.* CITY OF GLASGOW UNION RAILWAY.

(FIRST ACTION.)

Railway—Lands Clauses Act sec. 120—*Superfluous Lands—Notice—Sale.* A railway company having taken certain lands for the purposes of the railway, they were sued for the price thereof, which they disputed, on the ground that the pursuers could not ask payment in respect they could give no title to the lands in question. Not having been used for railway purposes, they were, it was said, superfluous lands in the sense of the 120th section of the Lands Clauses Act, and as such had vested *ipso jure* in the neighbouring proprietors. *Held*, in the circumstances, that due notice and correspondence had passed between the parties, and that a valid contract of sale was concluded between them before the period allowed for the sale of superfluous lands had expired.

This was an action concluding for the price of certain lands taken by the defenders for the purposes of the railway. The defence stated was, that the pursuers could not claim payment of the price because they could not give any title to the lands, in respect that the lands, not having been used for railway purposes, were superfluous lands in the sense of section 120 of the Lands Clauses Act, and as such had vested *ipso jure* in the neighbouring proprietors. The Lord Ordinary (BARCAPLE) sustained the defence.

The following is his Lordship's interlocutor:—

"*Edinburgh, 15th April* 1869.—The Lord Ordinary, having heard counsel for the parties, and considered the closed record and proof—Finds that the lands, payment of the price of which is concluded for in this action, were superfluous lands which had been acquired by the pursuers, and were subject to the provision of the Lands Clauses Consolidation (Scotland) Act 1845, section 120; that in default of the same being absolutely sold and disposed of within the period prescribed by statute, they should thereupon vest in and become the property of the owners of the lands adjoining thereto: Finds that, by section 15 of the Caledonian Railway (Improvements) Act 1863, which received the royal assent on 11th May 1863, the period limited by the several Acts relating to the undertaking of the company, or by the Lands Clauses Consolidation (Scotland) Act 1845, for the sale of superfluous lands, was extended until the expiration of three years from the passing of that Act: Finds that said prescribed period for selling and disposing of superfluous lands was further extended by the Caledonian Railway (Lanarkshire and Mid-Lothian Branches) Act 1866, but that the same, in so far as regarded the lands now in question, had expired prior to 6th August 1866, when said last-mentioned Act was passed: Finds that the statutory notice, under which said lands were taken by the defenders the City of Glasgow Union Railway Company, is dated the 7th day of August 1866, and that before said notice was served upon the pursuers the period limited for selling and disposing of said lands had expired: Finds that, in these circumstances, the pursuers are not now *in titulo* to give to the purchasers a valid and sufficient title to said lands, or to demand the price thereof: Sists procedure until the 5th sederunt-day in May next, that the pursuers may state whether they can obtain the concurrence of the adjoining proprietors to the present action, or to the title to be granted to the defenders; and reserves the question of expenses.

"*Note.*—The Lord Ordinary does not think it doubtful that the ground in question must be held to be superfluous lands in the sense of the Lands Clauses Act. It appears to be conclusive upon this point, that they never have been used for any purpose connected with the company's undertaking, but have been let for the same purposes for which they might have been used if they had never been acquired by the company. The mere possibility that such lands may hereafter be useful for some purpose of the undertaking cannot exempt them from the character of superfluous lands, if the prescribed period within which the company is required to sell them be allowed to expire without their ever having been so used.

"The Lord Ordinary also thinks it is clear that the period limited for the sale of these lands, which were acquired under the company's Act of 1846, expired on 11th May 1866, three years after the passing of the company's Act of 1863, by which it was extended for that period. By a later Act, passed on 6th August 1866, the period for selling superfluous lands was again extended for five years. But the Legislature cannot be held to have intended by this enactment, in favour of a company constituted for purposes of speculation, to affect the right of parties in regard to lands, the period limited for selling which had already expired. The point was expressly decided in the case of *Moody* v. *Corbett* (34 L. J., Q. B. 166, 15th May 1865. Affid. in the Exchequer Chamber, L. R., 1 Q. B. 510).