No. 152. founded on was not known of, and when it could not, in contemplation, have been abandoned.

" The Lords having advised the libel of approbation of the report of the sub-commissioners, &c. They repel the objections offered to the approbation; and ratify and approve of the said report, in so far as concerns the pursuer's lands libelled, &c."

For Pringle, *Macqueen.* For the Officers of State, *J. Swinton, jun.*

Fac. Coll. No. 19. *p.* 44.

1771. *Jnne* 26.

JOHN KINCAID of Kincaid *against* The YORK-BUILDINGS COMPANY.

No. 153.
In a valuation of teinds, Whether certain deductions from the rental are to be allowed?

Kincaid having brought a process of valuation and sale of the teinds of his lands, a proof was taken, a state and scheme of the rental made; which having been advised by the Court, the following interlocutor, on the 14th January, 1770, was pronounced: " Sustain the deduction of the rent of the waulk-mill, but add to the rental of the pursuer's lands the conversions paid by the tenants for hens and carriages of coals; and repel the deduction claimed on account of the benefit of the three colliers and overseer received from the pursuer's coal-works; as also of the value of the privilege the tenants have of taking stones from the pursuer's quarry, and making lime thereof for the use of their possessions; and sicklike of the expense of upholding cot-houses; and find and declare the just worth, &c."

Kincaid having reclaimed against this interlocutor, appearance was made for the York-buildings Company, who had right to his teinds; and memorials having been ordered,

The pursuer, in support of the deductions from the rental claimed by him, pleaded:

The fruits of mere personal labour and industry were not teindable, but the produce only of the ground. When that produce was created entirely by personal industry, as by draining a lake, no teind was due; and when lands, by exertion and expense, were very much improved as to their produce, an equitable deduction had always been allowed. According to these principles, and the express words of the statute, what was the constant rent, was the rule observed in valuations; and the rents, which arose from accidental, extraneous, and temporary causes and situations, were never regarded.

On these grounds, deduction was claimed, 1*st*, For the kane and carriages, as these petty prestations flowed from good will merely, and being paid in kind, could not increase the rental; and though a certain price was to be paid in case they were not delivered or performed, this was no conversion, but a penalty in case of failure; nor was it in the pursuer's power to exact the converted value, which alone could have rendered them a certain addition to the rent.

2*d*, The pursuer claimed a deduction for the advanced rent paid by the hillmen of the coalliery, which they were enabled to give, not as the true value or constant rent of their grounds, but on account merely of the conveniency of their possessions to the situation they were in, and the advantages they derived from their employment about the coal-works. No. 153.

3*d*, He claimed a deduction of the advanced rent paid by the coal-grieve for his possession. Neither of these rents could be considered as constant rents, as their continuance depended both upon the endurance of the coal, which was constantly diminishing, and in some degree upon the heirs of the present possessors, who, though enabled from their industry and exertions to give a high rent, might not be succeeded by others who could. Where, by means of great personal skill and industry, a piece of ground was made to give a very great rent, as in the case of a bleachfield, such rent could not be considered as teindable. The case here was precisely the same: The enhancing causes were, the situation of the subjects in relation to that which these persons were in, combined with their personal skill and industry; so that the rent, in this manner acquired, could no more be considered as a part of the constant real rent, than if it had been drawn from a brewery, alehouse, or any other kind of manufacture.

4*th*, A deduction of the advanced rent paid by the tenants for the privilege of working lime from the pursuer's quarry. If the tenants had paid a rent expressly for the lime quarry, no teind could have been exacted; and it was adverse to principle, that what could not be done directly should be accomplished in an indirect manner. It was substantially the same thing when they paid a gross rent for the whole; and as it could easily be established by proof what was paid on account of the lime, which, as well as coal, was a consumable subject, it ought with reason to be deducted. If the pursuer had paid a sum of money out of his pocket to the tenants to be employed in purchasing lime, though the rent had thereby been increased, he would nevertheless have had a deduction on account of what he had paid; and it appeared to be precisely the same thing when he had given the lime itself. Upon the same principle had many decisions been pronounced, where deductions had been allowed to heritors on account of liming, dunging, or other industrious improvements. Forbes on Tithes, p. 398.; 28th December, 1698, Heriot's Hospital; 6th February, 1709, Scott against Officers of State; 1713, Middleton against Minister of Westkirk; 3d February, 1714, Glen against Dishington; 21st July, 1714, Campbell against Officers of State, (See APPENDIX;) 11th December, 1734, Heritors of Calder against University of Glasgow, No. 136. p. 15739.

5*th*, The expense of upholding a number of cot-houses was a proper deduction. As these were supernumerary houses, they could not be taken into computation as increasing the rental of the lands; so that the expense incurred in keeping them in repair was a dead loss.

No. 153. The defenders pleaded:

They did not mean to dispute the general principles laid down; but that they did not apply to the circumstances, or support them in the deductions claimed.

1*st*, Whatever was certain might properly be called constant rent, and of course formed a part of a valuation. Kane and carriages, when converted into money, were both specific and certain; they were as much so when the master had the option to take them in kind or not as he should think proper; nor did it make any difference where the tenant was bound to deliver or perform within a limited time, and on failure to pay the conversion; or, in other words, when the tenant had the option, as they were just as certain in the one case as in the other.

The 2*d* and 3*d* deductions could not be granted. It had been determined by the practice of the Court, that no deduction could be allowed from rents unquestionably raised by lime or dung, even when purchased and brought from a distance. This was decided in the case, 20th June, 1744, and 6th February, 1745, Feuers of Dalkeith against Duke of Buccleugh, No. 144. p. 15745.; where the increase of rent had been created by the tenants purchasing dung from the neighbouring village. In the case Hay against Duke of Roxburgh, No. 149. p. 15750. a deduction was refused for sea ware; and in the case, 5th December, 1733, Craigie against Sir J. Anstruther, noticed in the preceding, a deduction had been refused on account of lime. When such was the fixed rule of law, it was absurd to argue that a deduction should be allowed, in the present instance, for the manure produced on the pursuer's own lands, and which cost nothing either to him or his tenants.

The argument, that the high rent paid by these persons was on account of the advantages they received from their particular situation and personal industry, was ingenious but not solid. The advantages of relative situation, in being near a coal or lime-work, or other manufacture, was one which intrinsically belonged to the lands themselves; so that they naturally came to give a higher rent; whoever that was given by, was considered, in making a valuation, as of no consequence; and, according to this argument, lands near a great town ought to be considered and valued as if they were at a distance, and removed from all those advantages peculiarly incident to their situation.

4*th*, It was already shown that there was no deduction on account of lime or manure, even when these articles were brought from another person's lands; and there was still less reason why it should be allowed, when the lime, in the present case, was procured from the very lands themselves. The decisions quoted were not to the purpose; that of Calder related to a moss set to a tenant, with liberty of selling peats; and in the case of Skene, 16th February, 1737, No. 137. p. 15739. it was on account of a tolerance of casting peats which had been purchased from a neighbouring tenant.

As to the last article, it did not appear from the proof that there were more cot-houses than were necessary for the tenants, or that they were either upheld by or any allowance made by the pursuer on that account.

The Lords refused the desire of the petition, and adhered to their former interlocutor of the 14th of February, 1770. No. 153.

For Kincaid, *A. Bruce.* For York-Buildings Company, *J. Swinton, junior.*

Fac. Coll. No. 93. p. 274.

1771. *July 3.*

HEW DALRYMPLE of Nunraw *against* The EARL of EGLINTON and The OFFICERS OF STATE.

No. 154.
In a process of valuation of lands, let at an advanced rent, payable *in futuro*—the tack-duty payable, when the action is raised and proof taken, held to be the true rental.

The pursuer brought an action of valuation of his teinds in the parish of Kilmaurs; which, on the 15th April, 1768, was executed against the Officers of State, on the 3d of May, against the Minister, and against the Earl of Eglinton, the patron and titular. The act and commission for proving was granted on the 10th August, and the proof concluded on the 27th October following.

A question occurred as to the valuation to be put upon the parks of Craig; which, prior to Martinmas 1769, had been let at £.100 Sterling of yearly rent, but from that time were let upon a nineteen years lease, for the first year at the old tack-duty of £.100 payable at Whitsunday 1769, and for the second and subsequent years at £.190 *per annum.*

The Court superseded advising the state and scheme with regard to the pursuer's lands, and "appointed parties to give in a note of precedents, pointing out what rule the Court has followed in cases where the rise of rent was so recent as that of the pursuer's lands of the parks of Craig."

In a memorial, the pursuer pleaded:

The question to be decided was, Whether the rent, as paid seven years before taking the proof, payable at the time of taking it, and for two years thereafter, or if a rent stipulated *in futuro*, should be the rule of division? The rule of procedure of the high commission, at its first institution, was to give their judgment solely on the proof of the rent then presently payable, and which had been paid for seven years before, as reported by the sub-commissioners. The Lords of Session, having come in their place, were bound by the same rule, and must therefore direct the proof, and fix the rate of teind according to the same certain and permanent mean of reference. The only point submitted to the judgment of the Court was, Whether the yearly worth and value of the parks of Craig was agreeable to the proof, and to be approved of accordingly? In no case had a future or higher rent been admitted as the rule to ascertain the teind: It was considered as uncertain and precarious? and it was upon these principles that the report of the sub-commissioners, made upon a proof taken a century ago, had been uniformly held to be *probatio probata* of the value of the lands then and in all time coming.

In the present case, an act and commission had been granted, a proof, according to the present rent, taken, and reported almost two years before any new or additional rent was due; and it was therefore inconsistent that, by the delay of