

* * D. Falconer reports this case :

No. 147.

1748. July 13. — David Oliphant of Bachilton pursued a valuation of his teinds against David Smith of Methven, and Katharine Cochran, his mother, the titulars, and insisted to have a report of the Sub-commissioners of the Presbytery of Perth made 1643 approved of and found to be the value, as the Lords had frequently done in similar cases.

Answered: The acts of Parliament 1641, by which this Commission was appointed, were rescinded by act 15. Parl. 1661, without exception of the decrees of the Commission; although, by the 9th act of the same Parliament, annulling the Parliaments held after 1648, these were excepted, but, even with regard to them, the exception can only reach to cases finally determined, not to sustaining the interim steps taken by the Sub-commissioners, which never were approved of by the High Commission.

The Lords Commissioners found, That the report could not now be approved of.

Act. Ferguson.

Alt. R. Craigie.

D. Falconer, v. 1. No. 273. p. 367.

1752. July 15.

MR. FRANCIS ADAM against The HERITORS of CUSHNEY.

In the augmentation, modification, and locality, pursued by Mr. Francis Adam, Minister of Cushney, the following questions occurred in settling the rental: 1^{mo}, Whether poultry, which are valued in the tenants' tacks, ought to make part of the rental? 2^{do}, Whether services valued in the tacks, when not exacted, should make part of the rental? 3^{tia}, Whether multures, payable to the master, by the tacks, were to make part of the rental?

With respect to the poultry, some of the Lords were of opinion, that the poultry should make part of the rental; that it may be true, that, in a sale of teinds, they are commonly deducted from the rental, for the encouragement of the purchaser, which is rather an indulgence than law; and that no such deduction ought to be in a modification, heritors often increasing their poultry, in that very view, to keep their rental low, in a question with the Minister.

But it was the more general opinion, that where poultry were *bona fide* put into tacks, they ought to be deducted no less in a modification than in a sale; and accordingly the deduction was allowed in the valuation at the instance of Harries of Mable against the Duke of Queensberry. At the same time, should it appear that an unusual number of poultry were thrown into a tack, which might shew an intention *fraudem facere*, the deduction ought to be only allowed of what might appear to be a reasonable number in common usage.

No. 148.

Deductions from the rental in a modification or augmentation.

No. 148.

And this was the method the Lords took in this case, where the Laird of Cushney, having an unusual quantity of poultry paid out of his estate, and which were valued in the tacks, the Lords, without requiring any proof, slumped them to 100 hens, to be deducted from the rental, and in which both parties acquiesced.

As to the services, the Lords found, that such services as were for the use of the mains were not to be added to the rental, although they were rentalled in the tack when not exacted; but that, with regard to other services rentalled in the tacks, when not exacted, the value put thereon in the tacks was to be added to the rental.

As to the multures, it was remitted to the Ordinary to hear parties farther.

Kilkerran, No. 16. p. 561.

1757. *March 2.*

JOHN HAY of Lawfield, and Others, *against* The DUKE of ROXBURGH.

No. 149.

Where heritors have possessed the teinds of their lands by tacks, what rule is to be followed in the valuation? — Whether a deduction must be allowed on account of sea-ware, an orchard, or stone inclosure?

The Duke of Roxburgh had right to the teinds within the prebendary of Pinkerton, as patron of that prebendary; and had also obtained certain long tacks, now expired, from the prebend.

In the year 1642, the predecessors of John Hay, and others, whose lands lie in that prebendary, entered into an agreement with the patron, by which the patron accepted of a certain annual sum in full of the teinds of their lands; and, on the other hand, the heritors agreed not to pursue a valuation or sale of their tithes.

The Court having found, that this contract was not binding upon the heritors after the expiration of the tacks of the teinds of that prebendary in the person of the then Earl of Roxburgh, a proof of the value of the tithes was allowed; at advising of which, three questions occurred, *1st*, Whether the fifth part of the rents, stock and teind, ought to be considered as the rate of the tithes? *2dly*, Whether any deduction should be allowed on account of the increased rent of the land by the use of sea-ware? *3dly*, Whether the rent of an orchard ought to be deducted; and also the expense allowed of inclosing a small field with a stone-wall, or the rent of it valued as open field?

The Duke of Roxburgh insisted, That by the decree-arbitral and statute 1633, two rules were established for the rate or valuation of tithes: *1st*, “The fifth part of the constant rent which each land payeth of stock and teind, where the same are valued jointly;” and, *2dly*, “Where the teinds are valued apart and severally, as the same is, or shall be, valued and proved, deducting the fifth part thereof for the ease of the heritors:”

That neither of these rules apply to the present case; for that there is here no joint valuation of stock and teind; and neither is the teind valued separately from the stock; and therefore the valuation ought to be delayed, till the value of the