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, 1*st*, Whether the fifth part of the rents, stock and teind, ought to be considered as the rate of the tithes? 2*dly*, Whether any deduction should be allowed on account of the increased rent of the land by the use of sea-ware? 3*dly*, 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: 1*st*, "The fifth part of the constant rent which each land payeth of stock and teind, where the same are valued jointly;" and, 2*dly*, "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

teind can be ascertained, by separating it from the stock; or, if that delay shall not be granted, the teind ought to be valued, not at one fifth of the total rent, but at one fourth of it, or at one third of the rent which is payable for the stock: That this rule was followed in the case of Geils Moncrieff against Yoeman, No. 129. p. 15733. where, in a question between a lady-tercer and the heir of her husband, who had right to the teinds payable out of her terce-lands, the Lord ascertained one fourth of the total gross rent as the teind; and in the case of Sir William Hope against Creditors of Balconie, 10th December 1701, observed by Dalrymple, No. 132. p. 15736. where the rent payable by the tenant was only for the stock, and the heritor drew the teind; and the question was, What deduction should be made for the teind in settling the rental in a judicial sale of the lands? the Lords estimated the teind to a fourth of the whole; that is, for every three bolls payable by the tenant for the stock, they added a fourth for the drawn teind; and ordered the rental to be framed accordingly." No. 149.

Answered: The teinds in this case are clearly valued jointly with the stock, and are to be ascertained by the rule expressed in the statute in that case, viz. "At the fifth part of the constant rent which each land payeth in stock and teind;" and the other rule, of proving the separate value of the teind, cannot take place here. In the case of Sir Robert Gordon against Dunbar of Newton, in the year 1744, No. 141. p. 15741. the Court refused to delay the valuation till the amount of the teinds should be ascertained by drawing the *ipsa corpora*, although in that case Dunbar had been in use, till within a few years of the valuation, when Sir Robert laid down his grounds into grass, to draw the teinds *ipsa corpora*, but without keeping an exact account.

The fourth part of the stock alone has, in some cases, out of necessity, been held to be the rate of the teind, viz. where the teinds had not been possessed jointly with the stock, but had been drawn *ipsa corpora*, and the titular, from negligence, or other causes, had not kept an exact account. In these cases, the stock and teind could not be valued jointly, not having been possessed jointly; neither could the drawn teind be separately proved; and therefore, the method followed was, to take a fourth part of the rent of the stock as the teind, reckoning that to be nearly equivalent to one fifth of the rent of stock and teind jointly. This was the rule followed in the case of Dunbar of Newton against Sir Robert Gordon; but the Duke, in this case, demands that the one fourth of the rent of stock and teind should be taken; which is a great deal higher than one fourth of the rent of the stock alone.

The decision in the case of Moncrieff against Yoeman did not relate to the valuation and sale of teinds upon the act of Parliament, but to what the heir should draw as teind from the lady-tercer of his lands; and the other case of Sir William Hope related only to a rental in a judicial sale.

With respect to the deduction for sea-ware, it was contended for the Duke, That though the tenants depone, that they would not pay above two thirds of the present rent if they had not the advantage of the sea-ware, yet this can give no

No. 149. claim for a deduction; for that here the heritor is at no expense; he gets his rent from his tenants without any obligation upon him to furnish them sea-ware; neither do the tenants themselves pay any thing for it; and therefore this does not fall under the case of expensive improvements made by an heritor, or the case of manures purchased from third parties. Besides, this deduction has, in many cases, been refused; 18th February, 1719, Orrok against the Officers of State; 20th February, 1723, Fraser *contra* Lord Salton; 5th December, 1733, Craigie *contra* Sir John Anstruther, where a deduction was also refused on account of lime; and a case was there referred to in support of the same doctrine, as to lime, Colonel John Murray of Pilmore *contra* Lord Blantyre. These are the latest cases. It is true, that, in December, 1698, in the case of Heriot's Hospital, a deduction was given on account of dung; and the same judgment was repeated in the case of Mr. Patrick Middleton, December, 1713, (See APPENDIX.) But, in a much later case, the Duke of Buccleugh against the Heritors of Dalkeith, a deduction on account of dung was refused, though purchased from the inhabitants of Dalkeith, No. 144. p. 15745.

Answered: The Court has been in use to give deductions to heritors on account of industrial and costly improvements; and, in the several cases of Glen *contra* Dishingtoun, February 3, 1714; Patrick Middleton *contra* Minister of West-kirk, 2d December, 1713; and Heriot's Hospital, 28th December, 1698, (See APPENDIX,) a deduction was given to the heritors on account of the increase of the rent arising from the accidental advantage of getting dung from the neighbouring burghs. And, with respect to sea-ware, the Heritors of West-barns, in this very parish, in a valuation against the Duke of Roxburgh's ancestors, got a deduction upon account of the sea-ware. The like decision was given, 6th February, 1709, Scot *contra* Hadderwick; and 21st July, 1714, Campbell and other Heritors of Byrehills. And, in this case, though the tenants do not purchase the sea-ware, yet they are at a great expense in keeping men and horses for carrying it from the shore to their lands: besides, the Duke pretends right to the links lying between the pursuers' lands and the sea-shore, and has threatened to debar the tenants from the liberty of carrying away the sea-ware.—See APPENDIX.

With respect to the deduction claimed for the orchard, the Duke contended, That if a deduction on this account were to be allowed, large tracts of corn-land might be converted into an orchard, by planting a few fruit-trees, in order to avoid tithes; *2dly*, That the rent of this orchard was formerly £.6 Sterling, and the rent of a small inclosed field adjoining was £4. 3*s*. 4*d*.; that both are now let at £.13; which increase of rent must be considered as wholly on account of the inclosure.

Answered: The orchard, consisting of two acres, has been always the orchard of the mansion-house. It has been walled in, and planted with fruit-trees, past memory. These walls have lately been repaired, at a great expense, and new trees planted. Orchards or gardens are not teindable subjects, as they neither

produce parsonage nor vicarage tithes. This was decided, 10th June, 1709, Sir Walter Riddel *contra* the Duke of Roxburgh, where a dove-cote and fruit-yard were found not teindable. And, in the case of the Minister of Kirkurd *contra* Lawson, *anno* 1730, the rent of a mansion-house and yard was deducted from the rental. See APPENDIX. No. 149.

The little inclosure, of about three acres, is fenced by a stone wall; and the expense of inclosing it must either be allowed, or, if not, the rent of it cannot be rated higher than the open ground contiguous, viz. at about 10*s. per* acre, so as the remaining rent may be ascribed to the orchard. At any rate, the late increase of the rent must be proportioned between the orchard and that inclosure, reckoning the present rent of the orchard at £7. 13*s.* 5*d.* and of the inclosure at £.5 6*s.* 6*d.*

" The Lords found, That the fifth part of the rent of the lands of East-Barns payable for stock and teind is to be the rule for liquidating the teind, without any deduction on account of sea-ware; without prejudice to the heritors, if the rentals of the lands shall be diminished by the failure of the sea-ware, to bring an action, as accords; sustained the deduction claimed for the orchard; and found, that the additional rent is to be divided between the same and the little inclosure, in proportion to the former rent they severally paid."

For the Duke, *Lockhart.* Alt. *And. Pringle, Ferguson.*

W. J. *Fac. Coll. No.* 18. *p.* 29.

1758. *January* 27.

KING'S COLLEGE of ABERDEEN *against* LORD FALCONER of Halkertoun.

No. 150.

The King's College of Aberdeen having right to the teinds of the parish of Marykirk, had them valued, in 1756, by the Lords Commissioners; and the teinds, on account of the inconvenience of drawing the *ipsa corpora*, being let in tack to the heritors, the College insisted, That these heritors were bound to make their tenants transport the victual-teind to a market-town, at the option of the titulars, at as great a distance as the tenants were bound by tack or custom to transport their victual-rent payable to the heritors; and they argued, That the refusing such carriage by the heritors was done with a view to oblige the College to convert their teind-bolls below the market-price, as they had no opportunity of getting them conveyed to market from the farms. Answered, Were the *ipsa corpora* to be drawn, the titular must be at the sole expense of carrying them off; and there is no reason why the valuation of the teinds should make a difference. The Lords found, That the heritors were not obliged to transport their victual to a market-town.

Fol. Dic. v. 4. *p.* 357. *Sel. Dec.*

*** This case is No. 21. p. 6568. *voce* IMPLIED OBLIGATION.