LORD KINNAIRD, ... *Appellant;*
JAMES MATHEWSON, ... *Respondent.*

House of Lords, 27th Dec. 1802.

LANDLORD AND TENANT—DEDUCTIONS FROM RENT.—Circumstances in which the tenant was held entitled to deductions from his rent, on account of part of the lands being taken away to make public drains and roads; also to deduction for the insufficiency of houses and steadings blown down by the wind. Reversed in the House of Lords, and held the tenant not entitled to these deductions.

An agreement for a lease was entered into by the respondent's father with the appellant, whereby he offered his Lordship, "for every Scotch acre of the West Mains of "Inchture 30s. Sterling, two firlots of wheat, and two firlots "of barley." The measurement of the number of acres was not mentioned in the lease; but it was stipulated that "all public drains shall be excluded from the measurement, "which shall be ascertained by William Ireland; and, when "so ascertained, the rent to be extended *in cumulo* in the "principal tack." The lands contained two farms, the lease for the one was to be for 21 years' duration, the other for 19 years.

This offer was accepted of in writing, and the agreement for the lease was thus concluded. Mathewson, the tenant, entered into possession. The lands were measured off as containing 87 acres, 3 roods, and 33 falls, under deduction of those lands not entered into at 1794, in consequence of being in the possession of another. £500 was allowed the tenant for building new steadings. The landlord built these, and the tenant approved of their sufficiency; and, on a report on the buildings, it showed that they were conform to the agreement. These, some years thereafter, were blown down by the wind. No formal lease was entered into: the stipulated rent was paid, as was alleged, without objections of any kind, during the tenant's life.

After the tenant's death, the respondent, his son, succeeded to the lease, and continued the management of the farm, as he had done some time previous to his father's death, until he fell into arrear with his rent, when an action was raised against him for arrears of rent before the Sheriff, concluding for payment of the sum of £539. 9s. 5d., under deduction of £200, being the value of some property which

1802.

LORD KINNAIRD *v.* MATHEWSON.

the appellant purchased some years ago from his tenant, John Mathewson. In answer, the respondent insisted on several claims of damages, in consequence of not timeously obtaining the repairs, and the new steading stipulated in the lease, also damage for its insufficiency, and also for parts of the lands which had since been taken up for drains, and by the road trustees for a turnpike road. In order to support these, he brought a counter action, in which he claimed, 1. Deduction for rents of those parts of the farm occupied by roads, drains, &c. all of which were nevertheless included in Mr. Ireland's measurement. 2. That he should have allowance on account of the insufficiency of the farm houses or steading. 3. That having taken the two farms, as occupied by James Crow and James Just, he was entitled to the two family seats in the church occupied by these tenants. The two actions were conjoined.

Mar. 20, 1799. The Sheriff pronounced this interlocutor: "Disallows of, "and repels the pursuer's (respondent's) claim of damages "for not having sooner than in July 1797, obtained posses- "sion of the new steading of houses referred to in the first "article of his complaint. Repels his objection to these "houses, both in point of accommodation, and in point of "value; in regard it clearly appears that the steading in "both these respects, had the approbation of the tenant to "whom the possession was let, and were accepted of and en- "tered to, and have been possessed accordingly: Finds that "the pursuer is entitled to a seat or seats in the parish "church, sufficient to accommodate the family and servants "residing on the farm, but that he is not entitled to more. "Appoints him to say if the three seats alloted to him are "sufficiently roomy for his family and servants: Repels the "sixth, seventh, eighth, and ninth articles, respecting the "ground taken off the pursuer's farm by the trustees on the "turnpike roads from Perth to Dundee; reserving to the "pursuer to make any claim competent on that account "effectual against the trustees, as the law directs." On advocation, the bill was refused by Lords Glenlee and Meadowbank successively. But, on reclaiming petition to the Court, their Lordships remitted to Lord Meadowbank to remit to "the Sheriff, with these instructions, to proceed in "directing the remeasurement of the farm, in order to "ascertain the extent of land in the tenant's actual posses- "sion, exclusive of those parts of the farm which are occu- "pied by roads, fences, embankments, or public drains, or

Nov. 15 and 19, 1800.

" by the steading of houses and barn yard, and to find him " only chargeable by his landlord for the remaining lands " after the above deduction."

On reclaiming petition from both parties, the Court remitted to Lord Meadowbank to remit to the Sheriff " to Jan. 21, 1801. " inquire into the fact as to the insufficiency and falling of " the houses, and to find the petitioner, James Mathewson, " entitled to corresponding deduction of rent during his " lease, for the ground rendered unarable by the soil being " carried off to make the roads; also to find the petitioner " entitled to the best seat in the church belonging to the " farm; and, with these additions, adhere to their former " interlocutor reclaimed against, and *quoad ultra* refuse the " desire of both petitions."

The Lord Ordinary (Meadowbank), accordingly, remitted to the Sheriff, as directed; and, in terms of the remit, the Feb. 21, 1801. Sheriff found, " that the defender's claim of compensation May 27, 1801. " will fall to be sustained when liquidated; prorogates the " diet for the defender's signing the disposition till the 10th " day of June next, and *quoad ultra* adheres to the former " interlocutor, and decerns." And in the action at Mathewson's instance against the appellant, the Sheriff-substitute, of the same date, pronounced this interlocutor: " Finds the May 27, 1801. " pursuer only chargeable with rent for the lands in his " possession, exclusive of those parts of the farm which are " occupied by roads, fences, embankments, or public drains, " or by the steading of houses, or barn yard; and, in order " to ascertain the extent of the land in the pursuer's actual " possession, exclusive as aforesaid, appoints William Ireland, " land-surveyor, to remeasure the pursuer's farm, and to re- " port his measurement the 10th day of June next; appoints " the pursuer to state particularly his allegation in the pro- " ceedings before the Court of Session regarding part of his " houses having been blown down by the wind, that that " circumstance may be inquired into, as directed by the " Lord Ordinary's remit: Finds the pursuer entitled to a " corresponding deduction of rent during his lease for the " ground rendered unarable by the soil being carried off to " make the roads, and appoints him to give in a condescend- " ence thereanent; and finds the pursuer entitled to the " best seat in the church belonging to the farm, and *quoad* " *ultra* adheres to the former interlocutors, and assigns the " 10th day of June for the pursuer to condescend as " aforesaid."

1802.

LORD KINNAIRD v. MATHEWSON.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The direction to measure the farm of new, "in order to ascertain the extent of land "in the tenant's actual possession, exclusive of those parts "which are occupied by roads, fences, embankments, or "public drains, or by the steading of houses and barn yard, "and to find the tenant only chargeable with rent for the "remaining lands," is repugnant to the solemn agreement of the parties, and, in truth, making a bargain for them which they never thought of themselves. The tenant agreed to pay a rent for every acre on the farm, to be ascertained by the measurement of Mr. Ireland, which is a common mode of letting land in the country. This offer the landlord accepted of, and Mr. Ireland ascertained and fixed the measurement accordingly. The respondent contends that he is not liable for that measurement, but only for what yields profit, or for arable acres, and therefore maintains, notwithstanding this agreement, and notwithstanding the measurement following thereon, that certain parts shall be excluded in the computation, upon an idea that rent should not be paid for land which does not yield profit, or is incapable of cultivation. If this untenable proposition were given assent to, it would unhinge and unsettle every lease on the appellant's estate, as well as in the neighbourhood. Besides, it is manifestly based on an erroneous view of the agreement; for, when the parties entered into it, they well knew that there were parts comprehended in the farm which could not be under crop. The agreement says, that when the measurement is ascertained, *the rent shall be extended* in cumulo *in the principal lease.* Had a formal lease been made, the rent would therefore have been stated in gross, and not at so much per acre; and, in that shape, it seems utterly impossible to contend that the Court could have interfered to restrict or diminish the gross rent, on account of there being certain parts of the farm unarable, or unprofitable to the tenant. Yet the matter still standing upon the agreement, can make no difference upon the justice of the case. And this construction of the agreement is fortified by one exception made therein, namely, that public drains should be excluded in the measurement, which is equal to the most explicit declaration, that every thing else should be included. The farm is part of a large tract of level carse land, that is, land which has, at an early period, been recovered from the

sea or the river, by drains and embankments. Some of the drains are public or common property, and it was agreed that the land occupied by them was not to be computed; but there were private drains, fences, roads, &c., which the parties could not but have in view; and if their idea had been that the rent was only to be calculated by the number of acres fit for cultivation, a further exception of private drains would have been made. In the proceedings before the Sheriff, the respondent at first contended that Mr. Ireland's measurement must be the rule, but, with singular inconsistency, he afterwards maintained that there ought to be a new measurement, and that the site of the farm houses, barn yard, roads, &c. ought to be left out. The Sheriff, well acquainted with the custom of the country, could not listen to this; but he was more successful in the Court of Session. And this, after rent had been repeatedly paid according to Mr. Ireland's measurement, which, applied to the agreement, brought the money and corn-rent to the most minute fractional parts of a pound, and of a boll. Is it possible then to believe, or can the respondent be heard to allege, that the tenant did not know he was nominally paying rent for parts incapable of cultivation? The direction, therefore, to make a deduction generally, for all roads, ought not to be sustained. So ought the deduction given for the present state of the farm houses or steading, as not being countenanced by the agreement, as well as contrary to the transactions subsequently had and passed between the parties, whereby the tenant approved of their sufficiency.

Pleaded for the Respondent.—1st. In regard to the sufficiency of the steading, nothing has been determined either by the Court of Session or the Sheriff in regard to it. The former has merely directed the Sheriff to inquire into the fact, as to the insufficiency and falling of the houses blown down by the wind; and no good reason can be assigned, or has been assigned, why this fact should not be inquired into. These houses were agreed by the lease to be erected. They were erected by the landlord, and though built conform to agreement, their falling down by the wind supposes insufficiency of a very glaring nature. 2. Regarding the measurement of the ground. It was unquestionably agreed on that the rent was only to be payable on arable acres, or acres yielding by culture profit to the tenant. This necessarily excludes what the tenant does not, or cannot possess; and, therefore, in so far as the land has been taken up by drains and by public

1802.

LORD KINNAIRD v. MATHEWSON.

turnpike roads running through the farm, the Court has properly found him to have right to deduction on this account. The appellant has not said, and, in point of fact, cannot say, that these were included in Mr. Ireland's measurement; and therefore it is just that the tenant should not pay for acres that he does not possess. The same applies to that part of the ground rendered unarable, by the soil being carried off to make the roads. And the seats in the church is a claim beyond all dispute. The claims of compensation thus in view will therefore be best inquired into, and expiscated by the Sheriff.

After hearing counsel,

LORD CHANCELLOR ELDON said,

" My Lords,

" This case comes before your Lordships on the appeal of Lord Kinnaird, against several interlocutors of the Court of Session, of 15th November 1800, another of the same date, in the conjoined action between the parties, of 20th January 1801, of the Sheriff-substitute of Perthshire, 27th May 1801, and of the Lord Ordinary, 12th June 1801. It arises out of circumstances which I must detail at some length, to render myself intelligible.

" The connection between the parties is that of landlord and tenant. Lord Kinnaird, and the father of the present respondent, had a similar connection in the respondent's present farm, and in another called the Polgavie farm. John Mathewson having entered into a treaty with Lord Kinnaird for a lease of the present farm, on the 6th August 1794, stated his proposition to the landlord by way of missive; and, in the same way, his offer was accepted of on the 7th August, on the part of the landlord.

" The respondent states, that these missives having provided for the admeasurement of the farm, it was the expectation of his father that the lands were to be forthwith measured, and the payment of rent to be made according to such measurement. A question was made in this cause, Whether this was to be considered as a lease executory, or a lease executed? On considering the nature of the instruments, I can entertain no doubt as to this question. Every syllable in them shows that it was a lease executory. At same time, I confess, it does not appear material to discuss this question.

" It was never doubted, in the course of the argument, 1st. That parties were bound to permit a measurement to be made by Ireland; and, 2d. that Ireland was bound to make such measurement according to the legal meaning of the instruments, else parties could not be bound by it. It is true, that if parties, duly informed that the measurement was not justly made in terms of the agreement, still chose to act upon such measurement, they might be bound by the

acquiescence. But I am clearly of opinion, that if parties acted on Ireland's measurement, with a persuasion that it was justly made, and if they were mistaken in this, when the lease came to be matured they had a right to relief.

" It appears, though I cannot distinctly state when, that Ireland did actually measure the farm, and it is admitted that he included in it matters which the tenant (respondent) alleges should have been excluded; and that the tenant paid his rent according to such measurement. But I cannot see in the papers in the cause any distinct evidence of what the tenant averred, as to whether he did or did not know that this measurement included several particulars which ought not to have been in it. He must have known that some of these were included in it, if he *thought* at all upon the subject.

" The missives say that a sufficient *steading* was to be built upon the farm. I do not enter at present into the question on whom the obligation to build, or to defray the expense lay, or how the sufficiency of these buildings was to be ascertained;—a steading was built, and the landlord says that this obligation was fulfilled;—the tenant says it was not fulfilled; and this formed the first of his claims against the appellant. 2. He insisted to have reparation for the alleged errors in Ireland's measurement, and for certain portions of the farm of Polgavie which had been taken for public roads, &c. 3. He claimed all the seats in the parish church which had been possessed by those parties mentioned in the missive as the former occupiers of the farm. And, lastly, he claimed £200, with interest, from Lord Kinnaird, for a piece of ground purchased from the respondent's father.

" The respondent meantime having refused to pay his rent, the appellant made a demand for it before the Sheriff-substitute of Perthshire. This demand was resisted by the respondent on the grounds before mentioned. The respondent also brought his counter action for those claims; and the controversy appears to have proceeded with keenness on both sides; how this was provoked, is not worth your Lordships' discussion or inquiry.

" At length the Sheriff-substitute, on the 20th March 1799, pronounced this interlocutor. (Interlocutor read.)

" As to the first article of the pursuer's libel, the steading, the principle of the interlocutor is, that the tenant having entered to and possessed it without objection, was to be held as considering it sufficient in terms of the missive, which the Sheriff considered to be decisive against the tenant. With regard to the 2d article of the pursuer's libel, *that* alluded to two circumstances, first, that part of the Westmains farm was not included in the tenant's possession, and the other, that a part was left out, which, by the boundaries specified in the missive, the tenant ought to have had; these portions were not large;—the Sheriff ordered production of Ireland's measurement, with a view to determine if these boundaries were

1802.

LORD KINNAIRD v. MATHEWSON.

included in it. Whether that production would have been decisive or not does not appear, but if made, it would have let the Sheriff into the question, whether the farm was to be remeasured or not. The interlocutor next proceeds to the fourth article of the libel,—the seats in the church, with regard to which the Sheriff declares, that the pursuer was entitled to seats sufficient for the accommodation of his family. The Sheriff repels the 6th, 7th, 8th, and 9th articles of the libel, but reserves a compensation in another quarter. These claims were made by the tenant against Lord Kinnaird, in consequence of parts of the farm of Polgavie being taken for public roads, the tenant insisting against his landlord for a compensation by a deduction in rent; Lord Kinnaird, on the other hand, contending that this was done by trustees under an act of parliament, of whom his Lordship was one, and that the compensation therefore was only to be demanded in terms of the act of parliament, and ought not to be conjoined in an action of this sort. The meaning of the interlocutor as to the last article was, that if the pursuer proposed to have this £200, he was at same time to deliver a proper conveyance to the defender.

"To this interlocutor the Sheriff-substitute adhered, and the Sheriff-depute did the same. So far, therefore, as this judgment can be stated, it was in favour of Lord Kinnaird, after twice considering the subject. The respondent now appealed to the Court of Session, and Lord Glenlee, Ordinary, on 17th July 1800, pronounced this interlocutor. (Interlocutor read.) And a second bill having been presented, was also refused by Lord Meadowbank as Ordinary. These interlocutors were all in favour of the appellant. The respondent, availing himself of Lord Meadowbank's permission, lodged petitions with the Court against the interlocutors which had been pronounced. In the action of rent, the Court, on the 15th November, pronounced an interlocutor, directing a remit to be made to the Sheriff, to allow a farther time for signing the conveyance above referred to, and to sustain the claims of compensation when liquidated.

"The prayer, in the respondent's reclaiming petition in the action of damages, is worthy of particular notice. It is in these words: (same read). As I read the prayer of this petition, the respondent confines his claims to the same articles as before the Sheriff-substitute,—the complaint with regard to the steading, the complaint for an alleged defalcation in the quantity of land, the matter of the seats in the church, the turnpike roads, &c., and the matter of the £200, with the exception of the claim of deduction for the site of the steading and barn yard, which is now first set up. The Court, on the 15th Nov. 1800, pronounced this interlocutor. (Interlocutor read). The tenant is here to have deduction as to those parts of the present farm which 'are occupied by *roads*, *fences*, *embankments*, *public* '*drains*, *or by the steading of houses and barn yard*.' The following particulars as to this seem worthy of notice.

"As to *roads*, nothing was to be found with regard to them in the respondent's claims on the farm of Inchture. Not only the turnpike roads, but the occupation roads, and those of every description whatever, had relation solely to the Polgavie farm. As to *fences*, there was no claim for their being deducted, neither before the Sheriff nor the Court of Session. If the Sheriff, therefore, was to determine, in consequence of this remit, on the claims already before him, he could decide nothing as to them.

"*Embankments*.—It is whimsical enough that directions are given to deduct these in measuring the farm. These embankments, as to which the respondent claimed compensation, were on the farm of Polgavie, not of Inchture. Of these, however, the interlocutor directs deduction to be made; and then it adds, what the tenant had not yet claimed, "exclusive of *public drains;*" and no doubt these are expressly excluded in the missives.

"The interlocutor, lastly, gives deductions of the ground occupied by the *steading of houses and barn yard*. I see that before the Sheriff, the respondent had no idea of claiming such a deduction; and, if any argument arises as to the understanding of parties at the time of entering into the missives, in interpreting their meaning, it may from this be contended, that the claim as to this was entirely an after thought.

"The interlocutor having thus given the respondent more than he asked, he naturally enough determines to submit his case to the Court, to see if he cannot get something more. Then he prays the Court will grant him this relief. (Prayer of 2d reclaiming petition of respondent read).

"After answers for the appellant, the Court, on 20th January 1801, pronounced this interlocutor. (Same read). I shall show by and by, that this ground, mentioned to have been rendered unarable, had been made so before the tenant entered to the possession. (His Lordship now read the subsequent interlocutors in the cause without comment).

"From these interlocutors an appeal has been brought to your Lordships. Speaking as I should do, in the courts of this country, I may say, that it has struck me that it is very difficult to reconcile them in point of principle with themselves. Your Lordships will see, in the last interlocutor, that the tenant gets a deduction of rent, on the ground that the soil had been carried off a portion of his farm, which was thereby rendered unarable. I see the respondent had also claimed a deduction for marshes, or land always covered with water. These must have been at least as unproductive as the other, but no deduction is given for them. As to *barn yard and steading*, which are to be excluded, what principle is there which protects the other houses mentioned in the agreement, but excludes them? If a tenant be evicted from his possession in this country, a reduction of rent is not held to be a sufficient compensa-

1802.

LORD KINNAIRD *v.* MATHEWSON.

tion, but he is also entitled to a recompense in damages for the loss he sustained by being deprived of the beneficial enjoyment. Perhaps the same principles may not apply in Scotland to regulate the proceedings of the Court of Session.

"The claims which I have been mentioning, arise out of an instrument which I shall now state more particularly. (Here his Lordship read the missive verbatim).

"*Prima facie*, the words, 'every Scots acre of the West Mains of Inchture' includes every particle of that land. It was stated, however, that *bona fides*, and moral justice required, that when a certain rent is to be paid per acre, it was requisite that every unarable or unproductive part of the farm should be excluded in numbering the acres. The question is, Where is this principle of law to be found? This is stated in the printed papers with such a difference of expression, that it is difficult to think that it is confirmed by decisions.

"Those who argue on *bona fides* are bound to state distinctly what *bona fides* truly requires. In one paper, it is said that the land must be susceptible of cultivation. It is no easy matter to state what is or is not so susceptible.

"In another paper of the respondent's the words used are, *capable of production*. So that, when I come to let my lands at so much per acre, the tenant is to refuse paying his rent, till it be ascertained how much is susceptible of cultivation, or capable of production. In another paper, it is said, that the tenant shall only be bound to pay for what is *capable of cultivation and production*. Another argument of a singular nature appears in one of the papers, and the authority of a high character is urged on behalf of the respondent's argument, from the circumstances of his name appearing to a paper, when a counsel at the bar, in which a similar argument was maintained. (Here his Lordship read from the respondent's petition.) These considerations of *bona fides* and *moral justice* have little room, when persons enter into a contract.

Lord President Campbell.

"Put the case of a person taking a lease of this house, covered as it is with benches, which so far prevented the tenant from applying it to a given use, and that he had agreed to pay so much per square foot for the whole. He could not surely obtain a deduction of the rent for the portion so covered with benches, but must take the bad and the good together. In the same manner, if I take a farm, though some part may be covered with houses, and other parts may be marshy and unproductive, may I not exercise my judgment upon this, and give thirty shillings for every acre, some of which may be worth nothing, and some worth forty shillings?

"But this is not all; the tenant has his advantage in another point of view, from thus interpreting the lease. By the mode of cultivation here pointed out, the tenant is restricted in some years from having more than a fifth part in wheat or barley. In reckon-

ing the fifth, the tenant has a right to include the whole farm, though part of it should be considered as unproductive. The question, therefore, is merely matter of discretion, whether a rent of 30s. per acre is to be paid or not; it is impossible but the rent must be calculated on the average of the whole; and I see no ground in *bona fides*, or *moral justice*, upon which to support the respondent's claims.

"The question then is, Whether the *lease* orders the lands to be measured with a view to those reductions claimed by the respondent? It was said, the custom of that part of the country would so interpret it; but as positively as this is asserted on the one hand by the tenant, it is on the other denied by the landlord; and we have nothing else for it.

"Before the Sheriff not a word was said of the steading and barn yard as being to be deducted in the measurement. Is not this evidence that the respondent, while making a great many claims, did not think fit to bring forward these? Besides, this is the case of a lease, which says that there was not a sufficient barn and steading upon the farm; but that such were to be built in two years from the entry. They were built too, with the tenant's acquiescence, upon James Just's possession, the entry to which was not till the separation of crop 1795 from the ground.

"In this country the *res gestæ* would have shut out all claims upon this head. Mr. Nolan, who argued this case, as he has done a great many others, with much sound judgment, was gravelled to death, when asked why the steading should, under such circumstances, afford ground for a re-admeasurement of the farm. He says, it was to fix the *cumulo* rent. But how can this be applied to what was the subject of future plans, and of future expense? Can it be contended, that, after a measurement and rent paid for the first year, the farm was to be remeasured in the second or third year, when the steading was built?

"Besides, the clause in the lease is capable of being interpreted two different ways. Public drains, steading, and cottars' houses, &c. are severally mentioned. It cannot be said that the law has declared, that all these are to be excepted from the measurement; but as it has excluded the public drains, a strong argument arises from thence, that as these are expressly excluded, parties did not mean to exclude the others.

"Take it the other way; if the law had excluded the whole, parties might still competently say, we will select what shall be excluded and what not. Where is the improbability that they who specially excluded public drains, meant to include nothing else? The tenant says he sustained damage, in this very productive part of the country, by part of the old road through Inchture not having been made arable for four crops:—how could this man suppose that this part of the old road was not to be included in the measurement, while he claims damages for part of it not having been made arable?

1802.

LORD KINNAIRD *v.* MATHEWSON.

"With regard to the occupation roads, if parties will not exclude these distinctly in their arguments, is it not infinitely better for the security of property, that your Lordships should read them this lesson, that you will not let loose those instruments, which parties can make as they please, upon averments similar to those urged in the present case? Is it not better to put parties upon such *astutia*, that they shall distinctly state what is granted, and what to be enjoyed? I do not enter into the matter of the fences and private ditches,—the same reasoning applies equally to them.

"The next point is, that in the interlocutor of 20th Jan. 1801, directing inquiry to be made into the sufficiency and falling of the houses. I shall read in one short sentence the terms of the missive as to this, (the same read.) This is expressed in a very slovenly manner; but it is to be noticed, that the entry to different portions of the farm was at different periods, and the steading was to be built within two years after the entry; the steading also was to be built on Just's possession, to which the tenant did not enter at the date of the missive. Surely it would make wild work, if a tenant, occupying a farm while the houses are building, without complaint, and, in such circumstances, were still allowed to maintain an action of damages for building them upon that site, and for any alleged delay thereby occasioned.

"But the respondent said, further, that the steading was insufficient. 2. That Lord Kinnaird was obliged to build it. And, 3. That he was to lay out £500 upon it. Notwithstanding the very slovenly terms of the missive, I deny that it gives ground for these averments. If we look only at what the respondent has printed in Italics upon this subject, you might see something of what the appellant states. But how was the tenant to produce the vouchers to the landlord, if he was not to lay out the money? Lord Kinnaird was to make the steading sufficient, and expend £500 upon it. Nothing being said as to the mode of determining the sufficiency—parties might have litigated upon this for ever; but they were also competent to decide upon this themselves. This very respondent appears to have taken a part in determining this. His father and he had seen the progress in this from beginning to end. They were aware of the site; the season when the building was going on, and the size. When the expense of £500 was laid out, the tenant and the landlord called persons together to inspect them, and the tenant, by letter, accepted them as sufficient, and declared that he had no further claims on the landlord relative to these. What situation would a landlord be in, were it suffered, that after rent is due, payment is stopped, and he is to be involved in a law suit on such a pretext as this? It distinctly appears to me, that the tenant's mouth was closed for ever on this subject.

"The next point is, a deduction claimed from ground rendered *unarable*, by the soil having been carried off to repair roads. There are two grounds why, in my opinion, the interlocutors ought not to be

affirmed as to this. 1. This was done before the tenant's entry; he does not then object to this; but after three or four years' possession, he says, a rood or two was thus rendered unarable, therefore I will not pay any rent till I have compensation. As the Court does not always, as we do in this country, in such circumstances, take out of a party's hand what he would withhold from the landlord, they ought to have been sure that the tenant was right in this, before thus allowing him, by retention of rent, to arm himself against his landlord. But, in the 2nd. place, if right in this, the Court has not done him justice in other respects; this is much better than marshy land, and yet the Court has refused him a deduction on that account.

"The next point is, with regard to the *best seat* in the church. He contends, that he took the farm as possessed by certain other persons, and that therefore he was entitled to all the *appurtenances* which they enjoyed. But the farm, though described as being formerly possessed by others, is also described by certain boundaries; and it is clear, that if he did not possess all that the former tenants held, he could not possess it by all their metes and bounds. If he had not the whole of their farm, then why should he claim the appurtenances of the whole, or the *best part* of these appurtenances? Is it necessary that he should worship God in a manner pleasing to his vanity? Is not ample justice done him, to give him seats roomy enough for his family, &c.? The interlocutor, as it stands, only tends to entangle the landlord with those who have possession of the other seats.

"With respect to the turnpike roads on the farm of Polgavie, the Sheriff reserved the tenant's claim against the trustees under the act of parliament, and as the Court of Session has not gone beyond that, the appellant has here no ground of complaint. It may be questioned, if this reservation be sufficiently broad for the respondent; not that I consider that this should be held a ground for retention of his rent. If it could be made out, that Lord Kinnaird, though a trustee under the act, but not proceeding *debito modo*, had taken the man's land from him, though the tenant would still have recourse against the trustees as such, he ought farther to have compensation personally, as against Lord Kinnaird.

"Though I am ready to admit that the tenant's argument upon this head is just, yet I am far from saying that Lord Kinnaird's intermeddling in these roads may not have been strictly according to the act of parliament. The utmost your Lordships could do here, would be to reserve any action competent against Lord Kinnaird, as well as against the trustees.

"With regard to the admeasurement of the farm, if the interlocutor of the Sheriff is affirmed, with an alteration only in so far as respects the exclusion of public drains, in my opinion this will be all that public justice requires. And if some words are added to the

1802.

LORD KINNAIRD *v.* MATHEWSON.

reservation with regard to the turnpike roads, as before alluded to, this is all that I think the tenant can justly demand.

"It may require an hour's time to put these words together in proper form for these purposes; and I shall therefore move to put off this cause till to-morrow. In the meantime, I deemed it convenient thus to discharge my mind of these matters, to save delay and further expense to the parties."

Next day his Lordship read the following judgment :—

The Lords find, that, according to the agreement contained in the Letters Missive, and under all the circumstances of this case, the tenant is not entitled to any allowance or deduction out of his rent for the farm, except for such parts thereof as are occupied by public drains. Find also that, in the circumstances of this case, the tenant is not entitled to have any inquiry made into the alleged insufficiency or falling of the houses; and that the tenant, in the circumstances of the case, is not entitled to a deduction of rent during his lease, for the ground alleged to be rendered unarable by the soil being, as is alleged, carried off to make the roads. And find that the tenant is only entitled to a seat or seats in the parish church sufficient to accommodate his family and servants residing on the farm. Find that the tenant is entitled, with respect to the ground alleged to have been taken off his farm by the trustees on the turnpike roads from Perth to Dundee, to have the benefit of a reservation not only of any claims competent on that account effectual against the trustees, but also against the appellant, in any other proceeding. Find that the tenant is entitled to have the possession of the lands described by the boundaries in the missive of the 6th of August 1794. And it is ordered and adjuged, That all such parts of the several interlocutors complained of as are inconsistent with these findings, be, and the same are hereby reversed. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, and that the said Court do give all necessary and proper directions for carrying this judgment into execution.

For Appellant, *W. Adams, Adam Gillies.*

For Respondent, *Sam. Romilly, J. Reddie, M. Nolan.*

NOTE.—Unreported in the Court of Session.