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The Court superseded advising the state and scheme with regard to the pursuer's lands, and "appointed parties to give in a note of precedents, pointing out what rule the Court has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

No. 154. judicial proceeding as to the approbation of the proof led, the pursuer should sustain a loss which would not have been admitted by any former commission, or by the present high commission, with regard to the report of sub-commissioners even a hundred years back.

There did not appear to be any printed cases precisely applicable to the present question; but from notes of other cases, which were believed to be true and authentic, the old rent had been held to be the rule. 28th December, 1720, Dirleton against Hamilton of Saltcoats; 10th January, 1732, Kennedy of Romanno against Earl of March,; 1762, Heritors of Strathdon against Lord Erskine; 9th August, 1769, Burnet against College of St. Andrews; 11th July, 1770, Heritors of Dollar against Duke of Argyle, (See APPENDIX.) In the case, 1st February, 1738, Duke of Douglas against Elliot of Wooler, No. 138. p. 15739. the Lords steered a middle course, and found that the titular must bear a proportional part of the augmentation corresponding to his old rent, and half of the new. This case did not, however, apply to the present; there had been no process of valuation, citation, proof, or report; the rent had actually become due, and had been paid; whereas, in the present instance, a regular process had been raised and proceeded in, and the advanced rent had neither been paid nor had even become due.

The defender pleaded:

Though, upon a strict and rigid construction of the act 1633, C. 17. the rule of valuation was declared to be what rent the lands paid at the instant of time when the valuation came to be struck; yet, as a just and fair valuation was the object of enquiry, the usual course followed, where the rents have been fluctuating, was to take them at an average for the last seven years; though this, even in particular cases, might be hurtful to the heritors. Where, again, it happened, as in the present case, that the lands had been possessed for a number of years at a lower rent than what they were now worth, and actually let for to a good tenant upon a long lease, it would be unjust to the titular, if, by bringing his valuation only immediately before the new rent was exigible, the heritors should be enabled to get them valued so much below their true avail. The true, constant, and just rent, was the rule to be adopted, was sanctioned by the statute; and no better evidence of these qualifications could be produced, than a lease which had been immediately executed for a considerable length of time, depending upon no contingency whatever.

The proposition maintained, That the precise rent paid at the date of citation, or the summons of valuation, must be held as the established rule for fixing the value of the teind, did not appear to be authorised by the intendment of the Legislature. It would be productive of much injustice; as devices might be fallen upon by the heritor to have his land let, when he brought his valuation, (which he could when he pleased) at a rent infinitely below the real value.

The cases referred to were neither proper authorities, nor were the terms of them, as stated, applicable to the present question. The only authenticated case was that of 1st February, 1738, Duke of Douglas against Elliot, No. 138. p. 15739.

which supported the argument maintained; and hence, either upon that case, as the precedent, or upon general principles, a *medium*, should, at all events, be taken between the old rent of the parks of Craig, and that for which they were now let on a ninteen years lease. No. 154.

The Lords pronounced an interlocutor, "Finding, That, in this case, the parks of Craig must be stated at £.100 Sterling yearly of rent."

For Dalrymple, *D. Dalrymple.* For the Earl of Eglinton, *W. Mackenzie.*

Fac. Coll. No. 94. p. 277.

1772. *December 3.*

JOHN SINCLAIR of Freswick *against* SIR JOHN SINCLAIR of Mey.

No. 155.
Where the patron, on the one hand, was insisting in a declarator, that he had right to uplift the *ipsa corpora* of the teinds of an heritor's lands, while he, on the other hand, was suing a valuation and sale of his teinds, the patron found not entitled to draw the *ipsa corpora*, for that the heritor, as becoming defender, is entitled to hold the possession, without the necessity of a warrant.

In the year 1729, William Sinclair of Freswick, as patron of the parish of Cannisby, brought an action against the heritors of that parish; and, among others, against the defender's grandfather, for payment of the teinds of his lands within the foresaid parish; and, in the year 1731, obtained a decree against him, for payment of certain quantities of victual yearly, and in time coming, as the value of the teinds of said lands.

Freswick's right of patronage having been afterwards brought under challenge by the family of Mey, it was finally given in his favour; but the present Freswick, when he came to insist for payment of the teinds bygone, and in time coming, upon the foot of the foresaid decree 1731, having met with opposition from Sir John Sinclair now of Mey, upon various grounds, he brought a new action, to have it found and declared, that he had right to draw and uplift the *ipsa corpora* of the teinds of these lands, and that the defender should be prohibited and discharged from intromitting with, or away taking the same, &c.

On the other hand, Sir John Sinclair raised an action of valuation and sale of his teinds; and when Freswick, in terms of the conclusion of his action, came to insist to be put in possession of the teinds *quoad futura*, the defence was laid upon that clause of the statute 1693, Cap. 23, whereby, upon a recital, that "many times heritors intent actions for the valuation of their teinds, against the titulars and others having right thereto, of design only, that, upon pretence of a depending action of valuation, they may get a warrant for leading of their own teinds, and thereafter suffer the action for valuation to lie over, and do not insist therein; by which the titulars, and others having right to the teinds, are exceedingly prejudged: For remeid whereof, it is statuted and ordained, that any warrant to be granted hereafter, by the commissioners, to heritors, for leading of their teinds, shall endure only until a protestation for not insisting be obtained at the instance of the defender." And, therefore, as no such protestation had in this case been obtained, it was contended that the defender ought not so be dispossessed, or the pursuer let in to the drawing of the teinds themselves.