1763. *July* 20.

THOMSON of Ingliston *against* OFFICERS of STATE and EARL of GALLOWAY.

No. 151.

The Lords found it was no sufficient objection to the approbation of a valuation of the Sub-commissioners, that the Crown being titular, the Crown Officers had not been called as defenders in the process before the Sub-commissioners.

Fol. Dic. v. 4. p. 358.

*** This case is No. 12. p. 10687. *voce* PRESCRIPTION.

1770. *February* 14.

JAMES PRINGLE of Bowland *against* The OFFICERS of STATE.

No. 152.
Objections to the formality of a report of the Sub-commissioners for the Valuation of Teinds, and that the same was lost by dereliction, repelled.

Pringle of Bowland, after having obtained a decree of valuation of the teinds of his lands, but before it was extracted, made a discovery of a report of the Sub-commissioners, in the year 1630, in which his lands were comprehended.

He accordingly brought a process of approbation; in which the Officers of State appeared, and stated the following objections:

1*st*, That in the report, so far as it related to the lands in question, the depositions of the witnesses were neither signed by themselves nor by the Commission. Without signature of some kind, there was no proof at all; and in sub-valuations it was particularly requisite, "That the oaths of the witnesses should be subscribed by most part of the Sub-commissioners present;" this being one of the articles contained in their commission. Besides this, there was no general finding by the Commission at the end of the proceedings, nor indeed in any other place, which could include the sederunt in question.

2*d*, The parish as to which the report was made, was one of the mensal churches of the Archbishop of St. Andrew's. Though so materially interested, therefore, as titular of the tithes of this parish, yet it did not appear that the Archbishop had either been called or compeared; which made a total nullity in the sub-valuation that had been made.

3*d*, Although this sub-valuation had been properly authenticated, yet it had never been made use of, or founded on by the parties interested. Without any regard to the rent contained therein, tacks had been taken out from the Crown, and the composition struck upon the rent as it stood at the time, much higher than the rent libelled. The pursuer also had brought a process of valuation in common form; all the previous steps had been followed out; and a decree of valuation pronounced, at a rent much higher than that contained in this supposed report. As these acts, therefore, were totally inconsistent with this report; they inferred a contrary usage, which grounded a sufficient objection upon the negative prescription; and must therefore be held a complete bar to the approbation craved.

And in the case, 28th February, 1753, Earl of Morton *contra* Officers of State, No. 7. p. 10672. dereliction was construed to have taken place upon circumstances less marked than the present. No. 152.

The pursuer answered:

1st, The sub-commissioners, as to their proceedings, were not to be considered as Courts of judicature; but having been appointed to carry into execution a general and public measure, according to their discretion and best information they could procure, it could not be imagined that, in their proceedings, they should be tied down to the same rules as were properly observed in established Courts of justice. The report, therefore, in the present instance, the despositions being engrossed, was sufficiently probative. The reports of all sub-commissioners were most justly considered as affording sufficient presumptive evidence of the value of the lands and teinds, and, where it could not be pointed out that the report was erroneous, fell, of course, to be approved of by the high commission.

The same rule furnished an answer to the objection that the Archbishop of St Andrew's had not been called. It was not necsssary that every one having an interest should be called. A procurator fiscal was appointed in every presbytery to carry on this public measure without the concurrence of any one: Neither did there appear to have been any particular rule as to what parties should be called, nor was it ever understood that a nullity of the sub-commissioners' proceedings was incurred on that account. Of this numerous instances occurred in the records: And the very point had been determined in the year 1713 betwixt Sir John Clark and Sir David Forbes; as also in 1763, Thomson of Ingliston against the Earl of Galloway and Officers of State, *supra*.

2do, The objection, that this report was either cut off by the negative prescription, or the right to found upon it excluded by some positive act which inferred a dereliction upon the heritor's part, was equally unfounded. A decree of valuation, whether pronounced by the commission or sub-commission, was not liable to the negative prescription. It did not establish a new claim to the heritor, which ought to be put to legal execution: It only instructed the burden competent to the titular against the heritor's lands, to what was then found to be the just and real value, and created an exception to the heritor against any further claim; which in its nature was perpetual. If a decree, therefore, of the high commission could not be hurt by prescription, it was impossible to conceive that the evidence on which it proceeded, the report of the sub-commission, could be affected by it. Evidence never could be the subject of prescription; so what was good evidence a hundred years ago must remain so still. The circumstances from which derelinquishment was inferred were inapplicable to that conclusion. If the heritor had for 40 years paid more than what was ascertained by the sub-valuation, it might admit of argument; but dereliction never could be inferred where, as in the present instance, he had all along paid less. And as to the tacks and action lately raised, these measures were entered into when the report

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.