No. 171. February 1802) " sustained, the defences;" but on advising a reclaiming petition with answers, they unanimously (15th June 1802) " altered" their former interlocutor, and found the defender liable for the full teinds.

Lord Ordinary, *Cullen.* Act. *Robertson, Monypenny.* Agent, *Wm. Callender.*
Alt. *H. Erskine, Hay.* Agent, *Ja. Dundas, W. S.* Clerk. *Gordon.*

Fac. Coll. No. 46. p. 92.

1802. *December* 8.

EARL of SELKIRK *against* OFFICERS of STATE.

No. 172.
No deduction allowed for improvements by manure, nor for *extra* houses in the valuation of teinds.

In the valuation of the teinds of the parishes of Rerwick, Kirkcudbright, Twyneholm, and the old parish of Kirkcormick, now annexed to Kelton, the Earl of Selkirk claimed deduction on account of improvements, by making fences and drains, building houses, and laying on lime. The claim of deduction was allowed for the improvements of fencing and draining, (7th December, 1797;) but was rejected as to the buildings and liming. With regard to these last, it was again, on the part of the heritor, in a reclaiming petition,

Pleaded: In ordinary cases, the expense laid out in manuring lands will afford no claim of deduction from the teinds of such lands; because it is presumed, that the sum laid out is replaced by the extraordinary crops which are the consequence of it. But where, in order to obtain a higher rent for his lands, the heritor agrees with the tenant to lay on a certain quantity of lime, the produce to be enjoyed by the tenant, and not by the heritor, the increased rent is created by the heritor's expenditure of money, not by the lands themselves, nor by the industry and skill of the proprietor or tenant; the whole rent received by the heritor cannot be held as the annual produce of the lands. If, instead of employing a sum of money in laying lime upon the farm, the landlord had, in order to induce the tenant to give a higher rent, agreed to allow him a certain sum to be employed in this way, the landlord would have been entitled, in valuing the teinds, to have deducted from the rent a sum equal at least to the interest of the money so expended. It makes no difference that the landlord lays out the money himself, so long as the tenant enjoys the benefit of the improvements, paying only a rise of rent, as in this case, equivalent to $7\frac{1}{2}$ *per cent.* the deduction claimed; Town of Dunbar against Earl of Roxburgh, quoted by Forbes on Tithes, Ch. 9. § 3, (See APPENDIX;) Gordon against Officers of State, 23d February, 1785, No. 160. p. 15765.

As to the deduction for houses, where the proprietor does no more than lay out money in erecting houses absolutely necessary for the accommodation of the tenant, and without which the lands could not have been let, he can claim no deduction on account of such expenditure; because no part of the rent is paid on account of the houses, from which the tenant derives no profit; but if the tenant, desirous of better accommodation than usual, agrees with the landlord to give a higher rent for the use of a house beyond the style of what the farm usually has,

a part of the rent being paid for this additional accommodation, not to give a proportional deduction, would be to make a dwelling-house a teindable subject. Extraordinary buildings on a farm, by which it produces a higher rent, are just in the situation of houses built for the purpose of a manufacture unconnected with the farm. No. 172.

Answered: In the valuation of teinds, wherever the rental of the lands is visibly and permanently increased by any expensive operation performed by the heritor, a deduction bearing some kind of proportion to what would have been the annual produce of the money, if otherwise employed, must be made. Of this precise nature are the operations of draining and fencing. In estimating the apparent increase of rent by manuring, it must, however, be attended to, that all rentals have, within a few years, greatly increased without any expenditure of money, by the increased price of the productions of the earth, and by improvements in the art of husbandry. The alleged improvement by lime is not of a visible and permanent nature, the value of which may be ascertained at any time. No manure has yet been discovered of a permanent nature; and lime and marl are among those whose effects are acknowleged to be the most uncertain; even when beneficial, it is impossible to affix a duration to their effect. Many years ago a certain quantity of lime may have been laid on, and all the good effects of it may have been obtained during the currency of a former lease; yet from the improvements in farming, and the advanced prices, an increase of rent might be obtained on a second lease, even though the land might have been the worse for the lime laid upon it. It is different when the landlord, for a higher rent, stipulates annually to expend a certain sum in laying on lime; but if this be done by the tenant, the landlord can claim no deduction, Erskine, B. 2. Tit. 10. § 32. In short, if operations of this kind be at all beneficial, their effects are but temporary; and it is impossible to ascertain what proportion of an actual increase of rent may have arisen from the expenditure, and what may have arisen from other causes. A comparison of the former with the present rental, does not afford any criterion.

As to the deduction claimed for houses: Where these are necessary for the accommodation of the tenant, and for enabling him to possess and labour the farm according to the conditions of the tack, no allowance can be given for them, as without such buildings no farm can be possessed. On the other hand, for houses erected not for the purposes of agriculture, but to indulge the whim or vanity of the tenant, no deduction in like manner can be claimed, as they do not come under the consideration of the law, which allows deductions; for the titular's interest must not be hurt by such unnecessary accommodations.

The Court refused to admit the deduction claimed on account of the *extra* houses, 2d December, 1801; but allowed *5 per cent.* of the expense laid out on lime, shells, and marl, to be deducted from the rental of the lands in valuing the teinds.

But, on advising a reclaiming petition upon this last point for the Officers of

No. 172. State, with answers, this interlocutor was altered, 8th December, 1802, and the Court returned to their first opinion, finding no deduction due for liming, &c.

For Earl of Selkirk, *H. Erskine.* Agent, *R. Hill, W. S.* For Officers of State, *Crown Lawyers & Solicitor of Tithes, Balfour.* Agent, *R. Dundas.*

F.

Fac. Coll. No. 68. *p.* 154.

1803. *November* 30. HAMILTON *against* COLEBROKE.

No. 173.
In an action for a sale of teinds, they were valued according to a rental formerly adjusted between the titular and heritor, by which an heritable right to them had been granted, notwithstanding the opposition of the titular's singular successor.

James Hamilton of Gilkerscleugh, (30th May, 1749,) raised a process of valuation and sale of the teinds of his lands, lying in the parish of Crawfordjohn. He called the Earl of Selkirk, the titular, as a party, and the moderator of the presbytery of Lanark, as the parish was then vacant.

In this process a proof was allowed, (7th February, 1753,) but no further step was taken in it.

On the 13th May, 1762, the titular granted Mr. Hamilton a disposition of his teinds; and to ascertain the sum to be paid, a note of the value of the teinds was made up between the parties.

Daniel Hamilton, now of Gilkerscleugh, raised an action of wakening and transference of the former process, calling George Colebrooke of Crawfurd-Douglas, now titular, in room of Lord Selkirk, and also the Minister of the parish, and concluding, that it "should be found and declared, that the stock and teind of the pursuer's said lands shall be now, and in all time coming, the particular sums of money above specified, and contained in the foresaid rental and valuation of consent."

In this action the Minister did not appear; but Mr. Colebrooke objected, and Pleaded: Although no decree can be pronounced in a process of valuation in which the Minister is not called as a party; yet a decree is demanded in terms of a private and extrajudicial consent between the titular and the heritor, to which the Minister was not a party, although he has an undoubted legal interest in the transaction. Teinds might thus be valued, not only without a process before the competent court, and without a proof, but even without any communication with those who have a substantial interest to object. Agreements of the nature of this, which is called a valuation of consent, are private latent deeds, of which it is impossible for the Minister to know any thing.

Such procedure is repugnant to all the enactments, which declare that teinds must be valued by a process in this Court. The law recognises no other mode; and no private agreement, when all parties have not consented, can possibly be held to regulate the rights of the whole. A regular decree before the competent court, to which the Minister has not been made a party, is insufficient, much more a private extrajudicial valuation, in which he had no concern; Colquhoun against Fergusson, No. 164. p. 15768. and No. 171. p. 15775. Besides being an heritor, the objector is titular, and has been called as such in this action. His interest to