No 6.

Observed for the respondent, That possession of one part of an apprising would so preserve the whole, that if that part happened to be evicted, the debtor could not exclude the appriser from the remainder; as also, that it was in the power of a creditor to use his apprising only as a security; which demand would merit a different consideration from the case wherein he insisted upon it to carry off a large estate, and here no more was asked.

For the petitioner, That, by the old nature of an apprising, it was a legal sale and extinction of the debt; so that if a person insisted on his debt, he behoved to renounce his apprising; and this being the nature of the diligence, when the apprising was led, the possession could not be constructed to preserve the debt from the negative prescription, when it was rather inconsistent with the subsistence thereof.

The Lords, 20th November 1746, "Found the pursuer had not proved her reply of interruption."

On a petition and answers, in which were cited for the pursuer, 1712, Murray of Blackbarony against the Viscount of Stormonth; for the defender, 1728, Hector M'Kenzie against the Creditors of Pitcalzian; (*see* Appendix.)

The Lords adhered.

Act. *J. Graham & Ferguson.* Alt. *R. Craigie, Lockhart, & Brown.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. *No* 161. *p.* 209.

1753. *February* 28.

The Earl of Morton and Captain Stewart of Dunearne *against* The Officers of State and the Marquis of Tweeddale.

No 7.
Contrary usage for forty years, by possessing on tacks containing a different *reddendo*, bars approbation of the reports of the sub-commissioners for valuation of teinds.

The pursuers, as heritors of certain lands, having brought a process for valuation and sale of their teinds, insisted for approbation of two reports made by the sub-commissioners in the year 1629 and 1630; by which reports, the stock and teind of their respective lands are declared to be worth yearly certain species therein particularly mentioned.

The Crown as titular, and the Marquis of Tweeddale as tacksman, defenders, without objecting to these reports, either in point of form or of matter, set forth, That as they had been obtained at the suit of the procurator-fiscal appointed by the sub-commissioners, without the privity of parties, so parties had never regarded them; for that the titular or his tacksman had let, and the heritors had received, tacks of the teinds for payment of certain duties, which, though not of greater value than those in the reports, yet consisted of different species.

Upon this, they objected to the approbation of the reports, that they had not only been disregarded, but deserted from the beginning; so that, besides

the mere negative prescription, here was also immemorial contrary usage founded upon consent of parties; and that therefore there must be a new valuation of the lands, according to their present rent. No 7.

Answered for the pursuers; That the negative prescription always supposes a right established which may be lost *non utendo*; but the reports of sub-commissioners did not establish any right whatsoever: They did not give the heritor a right to lead his own teinds; for that was only to be obtained by a special warrant from the Lords Commissioners, upon a depending process of valuation, as appears by act 1693, Wil. and Mar. cap. 23; neither did such reports, during the dependence of the process, so much as ascertain the titular's claim upon the heritor; but, like a prepared state of a proof, they had no legal effect whatsoever, till the Lords Commissioners gave judgment upon them. In short, they are nothing more than the evidence of a fact, which loseth not its force by lapse of time. And it is upon this principle, surely, that by the latter practice of the Court, the mere negative prescription is held not to bar the reports of sub-commissioners. Such being the case, it does not occur, why contrary usage should have any effect in the matter; seeing contrary usage must always presuppose a right to which the usage is contrary. And herein lies the great difference between the reports of sub-commissioners and the judgments of the Lords Commissioners: The latter gave a right, which was a subject of prescription; the former gave no such right.

2*do*, Supposing some sort of right established by the reports, yet a variation of the species, if within the value of the reports, which is the case here, will not infer a desertion of the right. See the case of the Viscount of Stormonth against Hunter, 10th June 1630, *voce* TACK.

Replied for the defenders; That though, by the later practice of the Court, the reports of sub-commissioners have been found not to be lost by the mere negative prescription; yet that was no argument why they might not be passed from, and entirely rejected, by contrary usage and possession. It is absurd to say, that proceedings of sub-commissioners had no effects which might be the subject of prescription; for this were to give them stronger effects than the proceedings of their constituents. It is certain, that, upon raising a process of valuation, the heritor gets right to draw his own teinds during the dependence, and the decree is drawn back to the date of the action, and makes the heritor liable from that time for the valued teind. This hath always been held to be the interpretation of the act 1633, Cha. I. cap. 17. and of the after acts. By the act 1693, a protestation, at the titular's instance, puts an end to the heritor's right of leading his own teinds, and to the whole proofs and other proceedings in the process of valuation: If so, an agreement between the titular and heritor, during the dependence, for the titular's possessing according to a rental entirely different from the reports, and possession upon that agreement for more than 40 years, should much more put an end to the whole process of valuation, and, by consequence, to the reports, which are a part of that process. Taking

No 7. the argument upon this footing, it makes no difference that the quantities paid upon the tacks were of no greater value than those in the reports.

"The Lords found the sub-valuations libelled on derelinquished, and quite innovated, by consent of parties, in the sub-tacks produced; and that these cannot now be approved; and, therefore, assoilzie the defenders from the approbation."

In a reclaiming bill against this interlocutor, after insisting upon the same topics as above, in support of the sub-valuations, the pursuers set forth, that they had lately discovered in the records, that the present rental, bolls, or rents, had been payable for the teinds in question, long before the reports were made by the sub-commissioners; and thereupon they urged a new and alternative argument, which would be still more beneficial to them; viz. That if the sub-valutions were not to be the rule, the reason ought not to be because they were innovated or derelinquished, but because they were erroneous *ab origine*; for that the sub-commissioners ought not to have taken a proof of the value of the stock and teind jointly, but ought to have reported the old rentals, which after deduction of one-fifth, called the *King's Ease*, should be found to be the value of the teind. That this is the rule laid down by the act 1633, Cha. I. cap. 17; and Lord Stair so explains that act in lib. 2. tit. 8. § 14. And his Lordship is followed by the later writers. See the case of Robertson of Bedlay against the College of Glasgow in 1734, (*see* Appendix.)

Answered for the defenders; That the just interpretation of the act 1633 is, That where the teinds are let to the heritor, and not drawn by the titular or his tacksman, so that they are not known separately from the stock; then the fifth part of the rent of stock and teind jointly is the rule for valuing the teinds: But where the teinds are drawn by the titular or his tacksman, and so are known apart and separately from the stock; then the worth of the teind alone must be proved, and that worth, after deduction of one-fifth, is the rule. The present case is the object of the first rule; for the teinds in question are let to the heritors, and not drawn. But rental bolls, or rents for teinds, were never considered by the Court as the rule for valuations; far less were they so with deduction of a fifth part. In the case of the College of Glasgow (mentioned above,) this construction was never argued or pretended: The single question was, Whether it would be a dilapidation in the College, to consent that the teinds should be valued at the rental bolls, which were admitted to be under a fifth part of the rent of stock and teind? and the Lords found that the College might consent. Lord Stair, in the place above mentioned, expresses himself very inaccurately; and the other authors only copy after him: But his Lordship in effect retracts that doctrine in § 24. of the same title, where he shews, that a rental proves the value of the teinds no longer than while parties acquiesce therein: And it is fixed by a variety of decisions, that the payment of rental bolls may at any time be determined, by inhibition used upon the part of the titular, or by intimation upon the part of the heritor. See the cases of Lenox against Tennents,

22d March 1626, *voce* TACK; Lord Blantyre against the Parishioners of Bothwell, 18th March 1628, No 37. p. 6434; and the College of Glasgow against Stewart, 20th February 1633, *voce* TACK. No 7.

To shew that it was not the sense of the law, that rentals should be the rule of valuations, it was mentioned on the Bench, that on the 28th February 1628, the Commissioners ratified a letter from the King, declaring old rentals to stand for a valuation only where the parties consent or do not oppose it. See Forbes, cap. 9, § 3. pag. 399.

"THE LORDS having considered the bill and answers, adhered; and refused the desire of the petition."

Act. *A. Boswell.* Alt. *R. Craigie.*

S. *Fol. Dic. v.* 4. *p.* 89. *Fac. Col. No* 69. *p.* 103.

1757. HERITORS of DRYMEN *against* OFFICERS of STATE.

No 8.

THE Duke of Montrose, and other Heritors of the parish of Drymen, having insisted in a process of approbation before the Court of Teinds, of a report of the sub-commissioners valuing their teinds in 1630, the same was opposed by the Officers of State, upon the ground, that all benefit arising from it was cut off by the negative prescription; and further, that it must be held as derelinquished, in consequence of the heritors having possessed their teinds by tacks from the Exchequer for above forty years, for payment of tack-duties different from the amount of the teinds as fixed by the report of the sub-commissioners; *Answered*, Such a valuation does not establish a new right to either party, which ought to be put to legal execution within forty years. It only means to restrict the titular's claim to the real value of the tithes at that time, and to lay the foundation for an exception against too high a demand, which being once founded, never can be lost by any course of time. And as to the tacks from the Exchequer, the yearly duty which the heritors paid being considerably within the value of the proven teind, the heritors had no interest to object to the proven species, which was no other than a conversion into money at a lower rate. THE LORDS repelled the objections, and approved of the report. See APPENDIX.

Fol. Dic. v. 4. *p.* 89.

*** This decision was affirmed on appeal.