No 5. question as to both; if it subsist, it must subsist in his person who has the only right to the same. *Replied*, Prescription is no other than a personal exception; it is not a real extinction, like payment, to cut down the debt; and therefore, though the voluntary assignee be excluded, because of his negligence, the apprising may well subsist to be taken up by any person who can connect a title to it. The Lords found the conveyance of the apprising by Boghole to Auchlossin prescribed *non utendo*.

Fol. Dic. v. 2. p. 97.

1746. *November* 19. *and* 1747. *January* 27.

Jacobina Clerk *against* The Earl of Home.

No 6.
The nature of an apprising, and particularly, if possession of a part of the apprised lands by the appriser or his assignee, will preserve against the negative prescription as to the rest.

Helen Trotter apprised the estate of Home in 1655; and in 1724, Major Clerk adjudged this apprising from Helen Trotter's grand-child, upon a decreet *cognitionis causa*, and thereon Jacobina Clerk his daughter pursues an action of mails and duties.

In which the Earl of Home having compeared, and *pleaded*, That Helen Trotter's apprising was prescribed; and the pursuer having replied upon interruption, the Lords, after hearing parties, "found the reply of interruption not proved, and sustained the defence of prescription."

A variety of things were thrown out in this case, many of them from the Bench, which deserve to be taken notice of, although they did not receive special interlocutors, the interlocutor being only in general, as has been said.

And *first*, it was for the pursuer *pleaded*, that as an apprising was of its nature a right of property, a sale under reversion, and, after expiry of the legal, a right absolute and irredeemable, it could not be lost by the negative prescription; as the negative prescription lay only against a debt or obligation, and that rights of property were not the subject of the negative, but only of the positive prescription.

And *esto* the negative prescription were competent to be alleged against a right of property, it could only be competent to one who could plead the positive prescription: And as to the positive prescription, there were not habile terms for it in this case, as the Earl of Home, the heir of the debtor, against whom the apprising was led, could not plead a positive prescription on the ancient titles of the family, of which they were divested by the apprising and infeftment following on it.

With respect to the first, the negative prescription of rights of property, it was admitted, that an apprising was in its nature a right of property, a sale under reversion, and absolute after expiry of the legal. But *answered*, That all claim upon right of property was lost *non utendo*, as well as action upon obligations; for which the letter of the act 1617 was referred to, where it is sta-

tuted, 'That actions upon heritable bonds, contracts, and others whatsoever, 'must be pursued in 40 years;' and *de praxi* the negative prescription of rights of property is constantly sustained. No 6.

And as to the point, that the negative prescription could only be competent to be alleged by one having right by the positive prescription, it was *answered*, That the farthest the Lords had ever gone, was to find that the negative prescription could not be pleaded by a naked possessor, who had no right or other title of possession than *possideo quia possideo*; Presbytery of Perth against the Town of Perth, in the year 1728. But it was no where ever found, (though so much was argued in that case), that the positive prescription was necessary to entitle one to plead the negative prescription. All that is necessary, is, that he who pleads the negative have some right to shew to the subject. And two cases were referred to, where the Lords were said to have found that no more was necessary. One was, in the ranking of the Creditors of Redcastle, Mackenzie against the Creditors of Redcastle, *anno* 1728; and the other, the late case of Thomas Hay *alias* M'Dougal of Mackerston against Thomas M'Dougal. See APPENDIX.

And as to the *second* point, the Earl's title in this case to plead the positive prescription upon the old titles of the family, a case was remembered in 1723 between the Earl of Marchmont and the Earl of Home, who then pleaded the positive prescription on the very same charter in 1638, on which he now pleads; and the Lords unanimously sustained said charter and infeftment as the title of positive prescription, against a wadset right flowing from his predecessor: And there can be no reason in the nature of things, why, even where a voluntary right is granted, if the receiver do not attain possession, the granter continuing the possession may not, even against his own deed, acquire by the positive prescription; and *multo magis* against an apprising.

The remaining question then was, how far the prescription, positive or negative, was in this case interrupted? As to which, it was on the pursuer's part *pleaded*, That as the apprising had been conveyed in part by Helen Trotter to Chesterhall, and in part to Gibson of Durie in 1669, each of whom had, in virtue of their several conveyances, possessed part of the lands; their possession, as being upon a right *pro indiviso* to the apprising, was to be held as the possession of Helen Trotter their author; and if so, her possession of a part upon the apprising interrupted the prescription of the whole, and consequently of that part of the apprising which remained with her.

And, for supporting this, the case of an annualrenter was referred to, and the case of a servitude of fuel over different mosses, where the taking annualrent out of one of more tenements subject to it, or of fuel out of one of more mosses liable to the servitude, preserved the annualrent or servitude over the whole.

Answered for the defender, That, had even Helen Trotter herself, in virtue of her apprising, possessed those parts of the lands that were possessed by Ches-

No 6. terhall and Durie, that possession would not have interrupted the positive prescription of the other lands contained in the apprising which continued to be possessed by the defender and his predecessors, nor the negative prescription of the apprising as to the said other lands not possessed by the appriser.

Suppose that the Earl of Home, in place of having had the lands apprised from him, had given a voluntary disposition to Helen Trotter of the lands contained in the apprising, that she had possessed only a part, but that the Earl had never ceased to possess the rest; the prescription would have run as well positive in the Earl as negative of the disposition as to the part never possessed by the disponee. And the case of an apprising, which is a legal disposition, is the same.

And the argument from the case of an annualrenter taking his annualrent out of one tenement, and thereby saving the right on another tenement, does not at all apply. An annualrenter can take his annualrent but once; and therefore, if he take his annualrent out of one or more tenements over which it is constituted, he preserves his right over the whole other tenements, because he takes all he can take out of one tenement.

The case is the same in servitudes, where one has a servitude of fuel over several mosses; as he takes all the fuel he has occasion for out of one moss, he must thereby preserve his servitude over the whole other servient tenements, because he has taken all he can take. The like where one has a variety of lands bound to thatch his mill; if one do it, it preserves the servitude over the whole; but, from all these, the case of a right of property is quite different, as thereupon the proprietor can possess every inch of the ground, and therefore his possessing a part can have no effect upon the part not possessed; but the rule applies, that *quantum non possessum tantum præscriptum.*

And the case is the same, should we consider an apprising as a right in security (to which effect apprisings and adjudications are sometimes sustained *ex equitate,*) for still they are rights in security of principal, as well as annualrent, and every inch of the ground may be possessed upon them till every shilling of principal, as well as annualrent, be paid.

And whereas, it was stated as a doubt from the Bench, Whether taking an apprising as a right in security, or claim of debt, the possession of a part, did not preserve the whole debt, and consequently the apprising, from being lost by the negative prescription? And as to the positive prescription, How far the heir of the debtor, against whom the debt is supposed to be saved from the negative prescription, can plead the positive, when, in case of eviction of that part of the lands that was possessed by the appriser, he might recur upon the other lands? In answer to these doubts, it was also from the Bench observed, that in law an apprising is truly a right of property, and not a claim of debt; and, according to principles, is, as all other legal diligences, either absolutely good, or totally void, though, from notions of equity, the Court has gone into the practice of sustaining them as securities, which has occasioned some confu-

sion in this part of our law; yet, notwithstanding of this equitable practice, it is from principles that questions, such as the present, must be determined. No 6.

And when it is considered, that, according to the principles of law, and by the ancient practice, in which the old decisions are uniform, after the legal of an apprising is expired, an appriser possessing is no more creditor; for, though the subject possessed should not be to the value of the fourth of his debt, he can have no further demand upon the debtor; it is incongruous in law to suppose a debt preserved from prescription by the partial possession of an appriser. Nor does this the less apply to the present case, that Helen Trotter had never possessed, since others had possessed in her right.

And as to the other point of the positive prescription, that depends upon another question, What warrandice is implied in an apprising? and it was admitted to be absolute warrandice; and justly, as the appriser was by his possession, after the legal, confined to the subject possessed; but then that warrandice could be no other, than of the subject possessed, of which there is at present no question.

It was *separatim pleaded* for the defender, That whatever might have been the case, had Helen Trotter the appriser possessed those parts of the lands apprised that were possessed by Chesterhall and Gibson of Durie, yet their possession could noways be available to her to preserve either from the positive or negative prescription the apprising so far as it was retained by her, because they possessed upon an interest separate from her's.

The three interests in the apprising were separate from, and independent of each other, and each of them possessed for themselves; and it is a mistake that the pursuer insists on, that, as the lands were not divided, each had a right to the whole *pro indiviso*, and therefore the possesion of any one of the three must be deemed the possession of the other two. For the present case is the same with that of heirs-portioners, who, from the moment they succeed, have each their own separate interest, though the lands be not yet divided, and the minority, or the possession of the one, will only preserve her own interest, and not that of any of the other heirs-portioners from prescription.

What effect a document by proof, at the instance of one of more heirs-portioners might have, is not at present the question; but as minority, so neither is possession a document taken for interrupting prescription. It is an interruption of another nature; it stops prescription, because, while I possess a subject, prescription cannot run against me, but that interruption can only profit myself.

How far the possession of one party profits another, is a point that may be settled by this rule, That, wherever one possesses in the right of another, his possession will profit that other person. Thus the possession of a tenant will profit his master; the possession of a liferenter will profit the fiar; the possession of the vassal will profit the superior; and, in such cases, the party possessing cannot, by his possession, acquire a right against the party in whose right

No 6. he possesses. But where one possesses, not in the right of another, but in his own right, *et suo nomine*, then his possession can profit none but himself. Thus, where one purchases, his possession of the subject purchased can never profit his author; on the contrary, he can, by his possession, acquire a right against his author, as, in this case, Chesterhall and Durie might, by positive prescription, have acquired a right against Helen Trotter, their author, with which it is inconsistent that their possession should be held as her's.

Having thus stated what occurred at pronouncing the interlocutor of the 19th November 1746, it remains to observe, that though, upon advising petition and answers, the Lords adhered upon the 27th January 1747, somewhat of a different system was now stirred from the Bench, by one of the Judges who had not been present when the former interlocutor was pronounced.

His notion was, that the apprising, so far as it remained with Helen Trotter, and was now in the right of the pursuer, was to be considered as a claim of debt, or right in security; for though it may be true, that when, after the legal, the appriser possesses, there is no longer any debt in being; yet, that would not apply to the present case, as Helen Trotter had never possessed; and if it continued to be a claim of debt, so far as it remained in her person, it was then said to be a difficulty not easy to be solved, how it could be in part preserved, as, without doubt, it was by the possession of Chesterhall and Durie upon rights derived from her, and yet be lost by prescription, as to the part retained by her, when an apprising, so long as it is a right in security or claim of debt, is *jus individuum*, that cannot in part subsist, and in part be lost.

And upon that principle, it was said, that the Lords had proceeded in the case between Murray of Blackbarony, as trustee for the Countess of Lauderdale, and the Viscount of Stormonth, in 1712, (*See* Appendix) where Blackbarony, having pursued reduction and improbation on the title of an apprising, led against James Earl of Annandale-Murray in 1656, to which the Viscount objected the negative prescription; and the pursuer having replied, that the defender himself, or his predecessors, had purchased a part of this very apprising pursued on, and, by virtue thereof, possessed the estate; the Lords found, that the Viscount having purchased part of the debts in the apprising libelled, and being in possession of the apprised lands, the right of the apprising continued in the same case, as it was at the time of the acquisition, so long as the Viscount possessed the apprised lands *quocunque titulo*; and that the prescription did not run against those parts of the apprising not acquired by the Viscount during his said possession.

But after all this said, the mover of it did not propose to alter the interlocutor, but only, as he owned it to be a dubious case, to state the principles on which it appeared to him to stand. On the one hand, that it was incongruous to suppose a right was incapable of prescription; which would be the case, if the possession of Chesterhall and Durie interrupted the prescription of that part of the apprising retained by Helen Trotter, as their charters proceed on this

apprising. On the other hand, the apprising could not, according to principles, prescribe in part, and subsist in part; and to get out of this dilemma, it was said, that though the apprising was not prescribed, the debt on which it proceeded was prescribed, so far as it remained with Helen Trotter; which might well be, though the apprising subsisted, as the negative prescription is not so much founded upon dereliction, as on a presumed payment *præsumptione juris et de jure*, and that the error in said decision in 1712, between Blackbarony and Stormonth, lay in not having adverted to that distinction. No 6.

And here the matter was let rest; and the LORDS, without further argument, "adhered to their former interlocutor;" for as this had been moved, not for altering, but for supporting the interlocutor, it would have been improper to have had any dispute on the Bench about what principles the interlocutor stood upon, when all agreed in the interlocutor itself.

N. B. The difference lay wholly in this, Whether the apprising, so far as it remained with Helen Trotter, was to be considered as a claim of debt, or as a right of property. If as a claim of debt, on which supposal the last scheme proceeded, it was justly said to be difficult to conceive how it could subsist in part, and be lost in part; and it might be necessary to recur to the ingenious distinction between the prescription of the debt, and the prescription of the apprising; but, there lay the difficulty, How it could in one be a claim of debt, and in another a right of property, than which nothing can be more inconsistent with the notion of a *jus individuum?*

The just conception of the matter would seem to be, that possession having been continued after the legal in the right of Helen Trotter, though not by herself, there was no longer any debt remaining, but that all consisted in the right of property by the apprising; and then it is easy to conceive, how it may subsist in part, and be lost in part. For, although it be true, that an apprising was considered as a *jus individuum* in this sense, that where an apprising was led for more than was due, *e. g.* for L. 120, when no more was due than L. 100, that apprising as a *jus individuum* could not stand in part, and fall in part, in respect *non constabat* how much of the land would have been apprised for the L. 100; and, therefore, as a *jus individuum*, behoved either totally to stand, or totally to fall, (though this is so far now receded from, that apprisings are in practice sustained as securities, when led for more than is due;) yet, where an apprising is regularly led, that such apprising should, as a *jus individuum*, not be capable of being preserved in part, and by prescription lost in part, is a notion that is no more tenible, than it would be to say, that a disposition of property cannot be lost in part, and preserved in part.

Fol. Dic. v. 4. *p.* 88. *Kilkerran*, (ADJUDICATION, *&c.*) *No* 16. *p.* 11.

*** D. Falconer reports this case :

No 6.

1747. *January* 27.—Helen Trotter, daughter to William Trotter, merchant in Edinburgh, *anno* 1655, apprised the estate of Home, for the accumulated sum of 1655 merks Scots.

Major Clark, son and executor to Gilbert Clark of Piteuchar, who was creditor to William Trotter in a bond for 4000 merks, granted 1664, charged John Foulis, grandson to Helen Trotter, to enter heir to the said William and Helen, his predecessors, and obtained a decreet *cognitionis causa*, 1724, whereupon he adjudged the apprising on the estate of Home, and his daughter and heir, Jacobina Clark, pursued a mails and duties.

Sundry objections were made to Major Clark's right to lead this adjudication, particularly, that the bond by William Trotter was prescribed, and also, that Helen Trotter, who led the apprising, not representing her father, that right could not be carried off for his debt, upon a decreet *cognitionis causa*, against a person who also did not represent him: But the Lords, upon what appeared to them in that question, having found, 3d June 1741, " That it was not competent to the Earl of Home to object to the titles of the pursuer;" the event of the cause came to depend on this defence, that the apprising led by Helen Trotter was prescribed, and the reply made of interruption.

Trotter of Charterhall had obtained a wadset of the lands of Fogo and Sisterpath, part of those contained in Helen Trotter's apprising, and been thereon infeft, 1662; and having, 1665, paid to her 3000 merks, she disponed to him her apprising, and the lands contained in it, proportionally as the said sum corresponded to 8000 merks still due to her of principal and interest, after deduction of 5500 merks due by decreet of the Commissaries of Edinburgh, to the children of Gilbert Clark, with warrandice from fact and deed, excepting therefrom the sum due to the children of Clark, consisting of 4000 merks of principal, and interest thereon, and, in satisfaction thereof, a disposition of the apprising to that extent, made or to be made in their favour. This decreet of the Commissaries did not appear, but was related in the disposition to Charterhall, who, with Mortonhall, as deriving right from him, obtained and continued the possession of the lands contained in their wadset.

Also another wadset had been granted by the family of Home of the lands of Longbirgham, part of those apprised, which came into the person of Gibson of Durie; and Helen Trotter, 1669, conveyed to him her apprising, excepting from the warrandice the former partial conveyance to Charterhall, and the disposition intended in favour of the Representatives of Gilbert Clark; so that there were three several interests in the apprising, the two conveyances, and the adjudication led by Major Clark, in default of the disposition intended in his favour: And it was *pleaded*, That these two rights, with the possession of

part of the subject, preserved the whole apprising over the whole subject, and in favour of all concerned. No 6.

In the year 1716, the then Earl of Home had conveyed to Durie the lands of Longbirgham, contained in his wadset; and 1727, this Earl disponed to Mortonhall, irredeemably, those in his, and he, on the other hand, renounced all former rights, except in so far as they might still subsist as a security for the wadset lands.

THE LORD ORDINARY, 11th November 1742, and 17th July 1744, "Having considered the interlocutor of date the 12th of December 1734, sustaining the reply of interruption of the prescription, by the conveyance of the apprising led by Helen Trotter to Trotter of Charterhall, or Gibson of Durie, in security of debt due by her to them, and by their, or either of their possessions of the lands apprised, in virtue of such conveyances, or receiving from the proprietor of the lands apprised, payment of their debts within the years of prescription, together with the production made of the contract made betwixt Alexander Earl of Home, and Gibson of Durie, in the year 1716, in which the apprising in debate is narrated as one of the claims of debt, in virtue of which, lands, to the value of are disponed to Durie by the said Alexander, in lieu and place of the whole debts therein mentioned, and, particularly, the said apprising led by Helen Trotter, and now in debate, so far as Durie had right thereto; Found the pursuer had proved her reply of interruption, sufficiently to satisfy the terms of the said interlocutor, more especially, that, in all the conveyances of the apprising, and, particularly, in the said contract betwixt Earl Alexander and Durie, the debt due by Helen Trotter to Gilbert Clark, and the right to the apprising in security thereof, now by progress in the pursuer's person, was excepted from the warrandice of all such conveyances."

Pleaded in a reclaiming bill, That when a debt is taken away by prescription, the debtor may pass from that defence, in favour of a person having a partial interest, without saving the right of any other; and, therefore, the contract with Gibson of Durie, after prescription was run, cannot be available to the pursuer: Also, where two persons have separate and distinct rights in one obligation, if one of them should preserve his right by diligence, this could not be pleaded on by the other: Nor is it any impeachment of the doctrine here laid down, that interruptions used by one that has a subaltern right, will be beneficial to the person from whom he derives it, as in the cases of fiar and liferenter, wadsetter and reverser; for there the possession of the one is the possession of the other. Upon which principles, there has been sustained by the Ordinary in this case, a relevancy of possession upon conveyances in security of debt; as there the disponee has not the full right, possessing in name of the disponer, who remains the proprietor: But this is not the present case; for the partial conveyances are absolute and irredeemable. It must also be observed, that no transmission of rights, from one to another, can operate an inter-

No 6. ruption, but it must be by a document taken on the debt, or obtaining payment.

The possession that was had of any part of the apprised lands, was not upon the apprising, but upon former wadsets, the owners whereof, to fortify their titles, purchased the shares of the apprising, but never extended their possession further than the wadset-lands, as appears with regard to Mortonhall, by a process, 1727, at this Earl's instance against him, of reduction and improbation of his right to the lands of Fogo and Sisterpath, in which mention is made of a mutual discharge 1663, between the Earl of Home and Charterhall, whereby the Earl discharges the wadsetter of any claim of super-intromissions, and he him of bygone annualrents. There was also in the said process produced the original wadset charter and infeftment, the above discharge and conveyance from Helen Trotter, by which production the pursuer's title was found to be excluded; and as this rested on a single interlocutor, it appears the matter has been compromised; for, by an after-deed, the Earl makes over to him, irredeemably, these lands, the reversion whereof still belonged to him; and Mortonhall, besides the payment of a sum of money, renounces all former rights, except in so far as he might use them in security of his purchase.

Also in 1716, the then Earl disponed the lands of Longbirgham to Durie; but there is no evidence that these were possessed prior to 1725, when the purchaser from Durie, as he depones, entered on the possession of them; so that the possession of these lands may have commenced on the disposition, and can never be applied to the apprising, which was long prescribed, so as to save the pursuer's interest therein.

Answered, The prescription of the apprising was interrupted by the possession had by Charterhall and Durie on their several rights; for here it behoves to be observed, that the lands were not disponed to them in distinct parts; in which case it might be alleged, that the possession of one part could not profit the person having right to another; but the apprising was disponed, effeiring to their several sums; so that each of the parties had an interest in the whole subject; and, therefore, the possession of one joint owner of this individual right preserved the interest of the whole, and that over the lands not possessed as well as the others: For here it is necessary to distinguish between the positive and negative prescription. It is true, that, by the positive, a possessor acquires no more than he has possessed; but if he has a claim secured upon certain subjects, and possesses part of them, this saves his whole claim from being cut off by the negative prescription, as servitudes over a whole tenement are preserved by being exercised over part of it; and an annualrent-right is preserved over the whole subjects affected by it, by payments out of any one.

The possession had cannot be so attributed to the wadsets, as to exclude from the title thereof the apprising; for though in an accounting, a person having several extinguishable rights cannot ascribe his possession to any subsequent title, so as to save from being accountable on the first, whereon he en-

tered to possess; yet the effect of possession is to save from prescription all the rights in the possessor's person; and, indeed, in this case, the apprising was the only title that could protect the possession; for it appears by the discharge produced in the process of count and reckoning, and improbation, mentioned in the petition, that the wadset was improper, and the apprising was the only right that could exclude the pursuer's title; and upon it Mortonhall had obtained a charter under the Great Seal, 1682, which was an applying his possession to that title; nor could it be necessary, in order to this, to cede the possession, that he might take it up again. No 6.

The contract with Durie, 1716, is another interruption; nor can it be pretended that the prescription being run, this can have no effect in favour of any, except the contractors; for, beside the rights being saved by the possession, it was an acknowledgment of the justice of the claim, and the right being individual, it must operate in favour of all.

Pleaded further for the parties, at a hearing in presence, and argued by the Court;

For the respondent, That the translation, in favour of Durie, was not of a proportion of the apprising corresponding to his sum; there was only a reservation in the warrandice of a deed to be granted in favour of Clark; so that the whole apprising was conveyed to him; and the clause resolved in a faculty to burden his right; and he, therefore, having right to the whole, it could not be pretended there were separate interests; and his possession of a part must save the whole from prescription: That an infeftment on an apprising, after the legal was expired, was a full right of property, and could not be lost by the negative prescription singly: That there were three methods of interrupting the negative prescription, to wit, a document taken on the debt, voluntary payment, and possession of the debtor's estate, and in neither of these cases did there occur any such thing as a partial saving.

For the petitioner, That this process was a mails and duties on an apprising, and if no part thereof remained with Helen Trotter, but only a faculty, as the pursuer pleaded, the process had no title: That the Earl claimed the estate, in so far as it had not been possessed by the positive prescription; at the same time, he denied that a right of property could not be lost by the negative, unless the possessor had acquired it by the positive, since the Court had gone no further than to refuse to allow a person, who shewed no title himself, to object the negative prescription. This he pleaded, if the pursuer insisted on her right as a claim of property; and if as a debt, he urged that the interests in the apprising being quite separate, any interruptions could operate no further than to save the person's right who used it. It would be the same case in a right of annualrent, if it came to be divided amongst different proprietors; and this apprising was as much divided, as if heirs-portioners had succeeded to it.

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