After hearing counsel, it was

Ordered and adjuged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellant, *Robert Forsyth, J. P. Grant.*
For the Respondent, *Wm. Adam, W. G. Adam.*

HIS MAJESTY'S ADVOCATE FOR SCOTLAND
on behalf of His Majesty, . . . *Appellant;*

The Honourable Mrs MARIA MACKENZIE of Cromarty, and EDWARD HAY MACKENZIE, Esq. of Newhall, her Husband, for his interest, ... } *Respondents.*

(*Et e Contra*).

House of Lords, 27th July 1814.

PATRONAGES—CROWN'S RIGHT—PRESCRIPTION.—Certain patronages were claimed by the Crown as coming in place of the Bishop of Ross. The Crown had granted a right to these patronages to Sir William Keith of Delny, and through various singular successors deriving right from him, they at last came into the possession of the Bishop of Ross in 1636; and upon the suppression of Episcopacy, they again devolved on the Crown. The Barony of Delny, together with these patronages, had been acquired in 1656, from Sir Robert Innes, by the Cromarty family. The Earl of Cromarty was attainted in 1746, but afterwards his forfeited estates and patronages were, by 24 Geo. III. c. 57, restored to the heirs of the former owners. The question arose, whether these patronages belonged to the Crown, or to the Cromarty family. Held that fourteen of them belonged to the Cromarty family, but, in regard to the other five, no prescriptive right, and no possession having been established thereto, the Crown was preferred to them. Affirmed in the House of Lords in part, and *quoad ultra* remitted.

An action of declarator was raised by the appellant against the deceased Kenneth Mackenzie, Esq. of Cromarty, for the purpose of having it found and declared that the right of patronage of nineteen churches lying within the ancient diocese of Ross in the counties of Inverness, Ross, and Cromarty respectively, belonged to the Crown, and should be exercised by His Majesty and his royal successors; and that the defender should be found to have no right or title whatever to the patronages of the said churches. The patronages were of the churches of Fodderty, the united parishes of Kil-

1814.

THE CROWN v. MACKENZIE, &C.

muir-Wester, and Suddy (now called Knockbain) of Kilmuir-Easter, Logie-Easter, Kincardine, Tain, Arderseir, Killernan, Urquhart, the united churches and parishes of Killichrist and Urray, of Edderton, Kinnettis alias Kinalty, Cromarty, Rosemarkie of Cullicudden united to Kirkmichael, Roskeen, Allness, and Lochbroom.

A declarator was also brought by the said Kenneth Mackenzie to have the contrary proposition established. Mr Mackenzie having died, the action was carried on by his daughter, the respondent, Mrs Mackenzie.

The case depended upon the rights and titles of the respective claimants.

Case of His Majesty's Advocate.

It was stated by him, *in limine*, and in support of the right of the Crown, that before the Reformation these nineteen patronages had belonged to the Bishop of Ross, and upon the establishment of the Presbyterian Church government, and the consequent suppression of bishops and their chapters, the right thereof, with the other patrimony of the church, devolved on, and was annexed to, the Crown.

Feb. 7, 1588. In the following year, James the VI. granted a charter comprehending the above patronages, which were thereby annexed to the barony of Delny, in favour of Sir William Keith of Delny, and this grant was afterwards ratified in the

June 1, 1592. Scottish Parliament.

From this charter it appears that eighteen of the churches mentioned in the summons (the patronage of the church of Lochbroom having been by mistake included instead of Kilmorack), had formerly belonged to the Bishop and Chapter of the See of Ross, and were possessed by the different members of that chapter, as follows:—the churches of Kilmuir and Arderseer, by the Dean of Ross; Killernan and Fodderty, by the arch-dean; Tayne, Edderton, Cullicudden, Kincardine, Allness and Rosekeen, by the sub-dean; Logie and Urquhart, by the treasurer; Suddy and Kinalty, by the chancellor; Killichrist and Kilmorack, by the precentor; Urray by the sub-chanter; Rosemarky and Cromarty, one-fourth by each of the dean, treasurer, chancellor, and precentor.

In 1594, Sir William Keith conveyed the barony of Delny and the patronage of the above-mentioned churches, to and in favour of his brother, John Keith of Ravenscraig, from whom they were acquired, in 1608, by Lord Balmerino, then Secretary of State and Lord President of the Court of Session; and

Mar. 17 and 31, 1631. of these dates, Lord Balmerino disponed the whole to Sir Robert

Innes of Innes, Baronet, who obtained a charter thereon, and was duly infeft.

By the acts of the Scottish Parliament 1606, cap. 2, and 1617, cap. 2, bishops and their chapters had been successively restored to their patrimony; and soon after the date of the above disposition and charter in favour of Sir Robert Innes, an action of reduction and improbation was brought at the instance of the Bishop of Ross, for setting aside Sir Robert's right to the churches and tithes above mentioned.

The raising of this action led to a contract which was entered into between the Bishop of Ross and Sir Robert Innes, to which the King was also a party, and by which Sir Robert agreed to resign, and did accordingly grant procuratory, resigning the patronages of the said churches and tithes, with the exception of those of Kilmuir, Logie, and Rosekeen, in favour, and for new infeftment of the same, to be granted to the Bishop of Ross and his successors in office. Upon this procuratory a Crown charter was expede of these patronages, and they were *thereby disjoined from the barony of Delny* and united to the bishopric of Ross. May 16, 1636.

Upon the suppression of Episcopacy at the Revolution, the patronages in question again devolved upon the Crown, although the right of presentation was, for sometime, taken away, and was only restored by an Act 10 Queen Anne, c. 12, which enacts,—"That the patronage and right of presen-"tations to all churches which belonged to archbishops, "bishops, or other dignified persons, in the year 1689, before "Episcopacy was abolished," &c., "shall, and do of right "belong to Her Majesty, her heirs and successors, who may "present qualified ministers to such church and churches, "and dispose of the vacant stipends thereof for pious uses, "in the same way and manner as Her Majesty, her heirs "and successors, may do in the case of other patronages be-"longing to the Crown."

The Crown's right being thus deduced, it was contended that there was no subsequent Act of any kind divesting the Crown of the right which had thus devolved upon it by the express terms of the Act of Parliament above recited, and, therefore, the conclusions of their action were irresistible.

Mr Mackenzie's Case.

But on the other hand, it was argued for Mr Mackenzie, the defender, in support of his right, that his ancestor, Sir George Mackenzie of Tarbet, Earl of Cromarty, had in the year 1656, obtained from Sir Robert Innes a disposition con-

1814.

THE CROWN v. MACKENZIE, &c.

veying the patronages in question to him, along with the barony of Delny. Upon this disposition, Sir George took only a base infeftment, which was recorded; but, during the subsistence of Episcopacy, and when the Bishop of Ross must have been in possession of the whole of these patronages, Sir George Mackenzie, it is said, obtained two several charters from the Crown, the one dated 30th September 1678, and the other dated 9th June 1686, proceeding, as has been alleged, upon sign-manuals, and containing, at least the latter of them, a clause of *novodamus*. In these two charters, besides a great variety of lands and other subjects, there are included, "the advocation, donation, and right of patronage "of the kirks and parochins, as well parsonage as vicarage, "of Kilmuir, Fodderty, Logie, Kennettis, and Rosekeen, "lying in the sheriffdom of Ross and diocese of the same, "together with the right of patronage of the chaplainries of "Alness, erected upon the parsonage teinds of the parish "kirk of Alness, and the chaplainries of Nairtie, Newmone, "and Tarlogie, lying within said sheriffdom." On these charters, Sir George Mackenzie was infeft; although no possession of the patronages, it was stated, took place.

April 1698. July 15, 1698.

Sir George Mackenzie became Earl of Cromarty after the revolution, when the order of bishops was laid aside. He executed an entail upon which a charter of resignation was expede under the great seal of Scotland, of a great variety of lands, including the barony of Delny, with the right of patronage of the whole of the above mentioned churches, as well those comprehended in the Bishop of Ross' charter, as the three excepted from it. The whole of the above-mentioned patronages contained in the aforesaid Crown charter 1698, were again enumerated in another Crown charter of the estate of Cromarty under the great seal, expede

Nov. 29, 1722.

29th November 1722, in favour of the last Earl of Cromarty.

This earl was the female respondent's grandfather. He was attainted, and his estates forfeited to the Crown in 1746. They were vested in, and put under the management of, the Government trustees and commissioners, and while they thus remained, the rights of patronage which belonged to them were exercised by the Crown.

24 Geo. III. c. 57.

At last, by the Act 24 Geo. III. c. 57, His Majesty was pleased to express that the forfeited estates should be restored to the heirs of the former owners. They were, therefore, disannexed from the Crown, and, *inter alia*, the estates which had belonged to the female respondent's grandfather, were, by

parliamentary authority, restored to his son, the late Lord Macleod, subject to the debts with which they were charged.

The words of the Act are, "That it shall be lawful for His "Majesty to give, grant, and dispone to the Honourable John "Mackenzie, commonly called Lord Macleod, eldest son of "George, late Earl of Cromarty, and his heirs and assignees, "all and every the lands, lordships, baronies, tithes, parsonages, fishings and other like heritages, which became forfeited to His late Majesty, by the attainder of the said "George, late Earl of Cromarty, now deceased, and were "annexed to the Crown by the foresaid Act, in the 25th "year of the reign of His late Majesty." 24 Geo. III. c. 57.

Lord Macleod accordingly obtained a Crown charter and infeftment, in the broad and comprehensive terms above recited; and being thus vested in the full right of the estates which had belonged to his father, he executed a deed of entail, comprehending, *inter alia*, the various rights of patronage above mentioned, and for several years he continued to exercise these rights to the fullest extent, by granting presentations where the churches became vacant, and otherwise. On his death, Kenneth Mackenzie, his cousin-german, succeeded him, and made up titles as heir of entail under the deed already mentioned.

When the summons of declarator above alluded to was served, he raised also an action of declarator. Mr Kenneth Mackenzie having died, his wife was allowed to carry on the suit; and, after her death, her daughter, the respondent, and next heir of entail, carried on the action.

An interlocutor was pronounced which settled some general points in the cause, viz., 1st, That the title of the Bishop of Ross in 1636, was in general preferable to that of the defender's predecessor in 1656. 2dly, That, by the charter of *novodamus* in 1704, the respondent had an undoubted right to the patronages of Tain and Fodderty. 3dly, That her right was equally undoubted as to the patronages of Lochbroom, which had never belonged to any of the members of the chapter of the Bishop of Ross, but had been acquired by the defender's predecessors, by a quite separate channel. 4thly, That the defender had right to the patronages, which, it is admitted by His Majesty's advocate, had been excepted from the title of the Bishop of Ross in 1636. Still, however, the difficulty remained whether the exception included the two parishes of Kilmuir, Easter and Wester, and those of Logie, Easter and Wester, or only one of each of these

Jan. 26, 1803.

1814.

THE CROWN v. MACKENZIE, &c.

parishes. 5thly, It was agreed on all sides, that so far as the respondent could prove possession for forty years, or more, upon the titles produced for her, she would be entitled to a preference; but that, in computing these forty years, the period during which the estates had been possessed by the Crown, after the forfeiture, and before their restoration to Lord Macleod, was not to be reckoned on either side. In so far as the title of the Bishop of Ross was concerned, the

Feb. 15, 1803. respondent reclaimed, but the Court adhered.

But His Majesty's advocate contended, that, unless so far as the respondent could prove a special exception to the bishop's charter, with regard to particular patronages, the Crown was entitled to a preference, and that the point had been so determined by the Court, and the Lord Ordinary could not do otherwise. It was further contended that the respondent was obliged to establish a right to these class patronages by prescriptive titles and possession, and with regard to the others contained in the bishop's charter, it was contended that the respondent was precluded from entering any claim, either in virtue of special charters from the Crown subsequent to that in favour of the bishop, or by prescriptive possession; and that the reservation in the interlocutor of 26th January 1803, for enabling the respondent to prove a prescriptive right, related only to such patronages as might be claimed by the Crown *de jure communi*, and without any reference to the bishop's right; those contained in the bishop's charter being absolutely and without any qualification adjudged to the Crown.

The Lord Ordinary gave effect to these pleas by interlo-

July 6, 1803. cutor of this date.

After further discussion before him, and various inter-

Feb. 23, and Mar. 11, 1808. locutors, the cause was removed by reclaiming petition to the Court. The Court, of this date, pronounced this interlocutor:—"Find that the defender, Mrs Maria Mackenzie, "has right to the patronages of the parishes of Edderton, "Killernan, Killichrist, and Urray, and Kincardine; and "decern and declare accordingly in the action at her instance, "and assoilzie her from the counter-action at the instance "of His Majesty's advocate against her, in so far as regards "these four patronages; and decern."

His Majesty's advocate reclaimed and the Court pronounced

May 19, 1808. this interlocutor:—"The Lords having heard parties, &c., "and considered this petition, they refuse the desire thereof, "in so far as it complains of their interlocutor of the 23d day

" of February last, reclaimed against, and adhere to that inter-
" locutor; but find that His Majesty has right to the patronages
" of the parishes of Urquhart, Rosemarkie, Cullicuden, Suddy,
" Kirkmichael, and Arderseer, and decern and declare accord-
" ingly in the action, at the instance of His Majesty's ad-
" vocate; and assoilzie His Majesty's advocate from the
" counter-action, at the instance of Mrs Maria Mackenzie
" and her husband, in so far as regards these patronages, and
" decern."

The appellant brought his appeal to the House of Lords against the above interlocutors, in so far as unfavourable to him conceiving that in adjudging to the Crown, the right of patronage to the churches only of Cromarty, Urquhart, Rosemarkie, Callicuden, Suddy united to Kirkmichael and Arderseer, these interlocutors were erroneous.

And the respondent brought a cross appeal. She stated that, having succeeded in establishing her right to fourteen of the patronages in question, she was willing to have acquiesced; but the appeal of the appellant authorised her to lodge a cross appeal as to the remaining patronages which had been disallowed.

Pleaded for the Appellant.—The respondents have not made out a good right to these patronages, either upon the face of their titles, or upon the ground of prescription. The Court of Session has, however, found " That the defender has right " to the patronages in question, which are not contained in " the bishop's charter in 1636, being those of Kilmuir-Wester, " Kilmuir-Easter, Logie-Wester and Easter, and Rosekeen." In point of fact it will, however, be observed that three patronages not included in the Bishop of Ross' charter in 1636 are Kilmuir, Logie, and Rosekeen. It is natural at first sight to suppose that the ancient Kilmuir comprehended both Easter and Wester Kilmuir, which might have been separated by some modern disjunction. But this is not the case, these parishes never having had any connection, and being situated in totally different quarters of the county at a distance of more than twenty miles from each other.

Interlocutor, Nov. 20, 1806.

It appears that, before the Reformation, Kilmuir-Wester was a rectory or parish church, belonging to the Dean of Ross, whereas Kilmuir-Easter was merely a chaplainry; and as the Kilmuir granted to Sir William Keith in 1558 is expressly called a parish church, there can be no doubt that it was the former, and consequently the family of Cromarty, as deriving right from him, can have no claim whatever to the

1814.

THE CROWN v. MACKENZIE, &c.

latter. In support of this state of the fact, the appellant took the liberty of referring to a passage in the answers for Mr Mackenzie of Allangrange to a petition for the solicitor of tithes in 1724, when the Crown had asserted a right to the patronage of Kilmuir-Wester, in the locality of that parish. This passage, in which the fact was distinctly stated in the appellant's petition to the Court of Session, showed that the Kilmuir gifted to Sir William Keith in 1588, and excepted from the bishop's charter in 1636 was Kilmuir-Wester; that there is no reason to suppose from any thing yet seen, that the chaplainry of Kilmuir-Easter belonged to the See of Ross at all; there can, therefore, be no doubt that the title of the Crown to the patronage of that parish ought to have been sustained.

In like manner, it is apprehended that Logie-Wester, which was annexed at a very remote period to the parish of Urquhart, is the parish excepted from the bishop's charter; as Urquhart is close contiguous to Kilmuir-Wester, and at the distance of many miles from Logie-Easter, in the north-east division of the county. This seems to be countenanced by the words of the charter 1588, which, after mentioning Kilmuir and Arderseer as the dean's benefice, and Killichrist and Kilmorack as the precentor's, thus specifies Urquhart and Logie as the treasurer's benefice: "Aliud beneficium in-
"titulatum Theasuraria Rossenau quidem prius omnes et
"singulæ decimæ garbales et rectoriæ ecclesiarum paroch-
"lium de Urquhart et Logie jacens infra vice comitatum et
"diocesin immediaté supra script." The Logie, therefore, that belonged to the precentor of Ross, which was gifted to Sir Wm. Keith in 1588, and excepted in the bishop's charter in 1636, must have been Logie-Wester, adjoining to Urquhart, and now annexed to it, and not Logie-Easter, which is situated in quite a different part of the county. It is submitted, therefore, that the respondents can have no right to the patronage of Logie-Easter, to which the exception in the bishop's charter, no more applies than it does to Kilmuir-Easter.

It is impossible, likewise, that the respondents can derive any right to these two patronages from the charters 1678 and 1686, which have been already noticed. As these two charters were not contained in the original grant to Sir William Keith, they were not excepted from the bishop's charter, 1636, and consequently never were in the person of Sir George Mackenzie or his authors, so as to be the subject of resigna-

tion by him in 1678; that resignation and the charter and the infeftment following on it, being, if good for any thing, applicable solely to the churches of Kilmuir-Wester and Logie-Wester, and the *novodamus* in the charter making mention of only one Kilmuir and one Logie. The respondents, therefore, so far from having shown a valid title to the patronages of Kilmuir-Easter and Logie-Easter, have not produced any document which can create even a presumption, that they ever belonged to the Cromarty family, or their authors.

The appellant, however, is free to admit that the claim of the respondent to Kilmuir-Wester, Logie-Wester, and Rosekeen, stands on a different footing; as these churches belonged to the chapter of Ross were contained in the grant of Sir William Keith, and were excepted from the bishop's charter. But, at the sametime, the right of the respondent, even with regard to them, was not free from great difficulty. No possession appears ever to have followed upon the grant of Sir William Keith as to any of the nineteen patronages, either previous to the contract, 1636, or subsequent to that date. That this was the case previous to the contract, 1636, is plain from a decree in absence obtained at the instance of Balmerino, the successors of Keiths. Subsequent to the contract, 1636, no evidence is produced of a single act of patronage having been exercised by Sir Robert Innes, or the family of Cromarty, his successors, in any of these three parishes. On the contrary, so far back as the records of the presbytery go, it appears either that the Crown exercised the right, or the minister was settled by a call of the presbytery, except that in Urquhart united with Logie, where Mr Forbes of Culloden seems twice to have presented.

Pleaded for the Respondents.—The Crown's general right to patronages, which do not appear to belong to some other owner, cannot here be warrantably urged, the declarator brought at the suit of His Majesty's advocate not being rested on that ground, but confined to the right of the Bishop of Ross, as established by the charter, 1636. But although it had been regularly brought forward and insisted on, it must have been considered to have been unauthorised and inadmissible. So it has been determined by the Court of Session, in reference to another right of patronage standing in the same situation. The female respondent's right, therefore, to the patronages conveyed to Sir William Keith, and not contained in the charter, in favour of the Bishop of Ross, appears to be altogether beyond the reach of challenge.

Urquhart and Officers of State, July 28, 1753, Fac. Coll., vol. i. p. 122, et Mor., p. 9199; et House of Lords, *ante*, vol. i., p. 586.

1814.

THE CROWN v. MACKENZIE, &c.

2. The female respondent has a separate right to several of the patronages which are contained in the charter to the Bishop of Ross in 1636. As to those of Tain and Fodderty, this has been admitted by the appellant in consequence of the Crown charter in 1704, which contains a clause of *novodamus*. And her right to those of Kennetles and to the chaplainries of Alness, as well as those of Kilmuir, Logie, and Rosekeen, is equally clear in virtue of charters from the Crown, 1678 and 1686, and infeftments following thereon. And although the charter, 1686, cannot be found, this cannot here be deemed of any importance, for the evidence of the sasine taken upon it, establishes it beyond doubt.

3. The respondent has a further right to the patronages adjudged to her by prescriptive titles and possession. The Act, 1617, applies to the Crown as well as to the subject. These prescriptive titles are most clear and unquestionable. Even the conveyance, 1656, by Sir Robert Innes to the first Earl of Cromarty, would be alone sufficient, though at the time unwarranted on account of the charter in favour of the bishop, 1636; nothing but an objection on the ground of forgery, or an intrinsic nullity being available against a writing produced as a title of prescription. But besides this, it has been shown that there was a general conveyance in 1698, and another in 1722, containing all the patronages, which, with possession following thereon, would establish a most unquestionable right. And when it is further considered, what has not been so much as disputed by the appellant, that from the date of the first of these rights till about a century after, upon the attainder of the respondent's grandfather, the Crown never exercised, nor attempted to exercise, any act of possession, as coming in the place of the Bishop of Ross, while the respondent's ancestors did every thing, both before and after the unfortunate event, which the most undoubted proprietors could do, in pursuance of such a grant, it must be held that they had all the possession which is required by law for creating a prescriptive right in such a case.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,*

"There was an appeal and a cross appeal heard a considerable time ago, in a case, as it appeared to me, of so much importance

* From Mr Gurney's Short-hand Notes.

as to induce me to think it was right that, after the argument was over, your Lordships should afford me an opportunity of giving as much attention as I could to the circumstances of the case. The question I may represent to your Lordships very shortly, it being my purpose, with a very little alteration indeed, to propose to affirm the judgment of the Court of Session.

The question is of this nature. Upon the forfeiture of the Cromarty family, the property which belonged to that family, of course, came to the Crown; and among other property which had been forfeited, it was asserted on the one hand, and to a certain extent admitted on the other, that there were various advowsons of parish churches in Scotland which His Majesty was graciously pleased (having been enabled by Parliament to do so,) to restore to this family, about 1785, with the property which had become forfeited; and after the charter of restitution was made, a question arose as to a great variety of these patronages. The Cromarty family insisted that they were entitled to all the patronages, the names of which have occurred in the course of these causes; it being contended, on the other hand, that His Majesty was as clearly entitled; and in this case there have been, in all, I think, not less than twelve interlocutors, in which the opinion of the Court of Session has varied, more or less, in favour of the Crown and of the family. But I find in an interlocutor in the month of May 1808, it is declared that this family were entitled to all the patronages, except those specially named, which are the patronages known by the denominations of Cromarty (in reference to which the nature of the title seems to have been more particularly decerned to), and the parishes of Urquhart, Rosemarkie, Cullicudden, Suddy, Kirkmichael, and Arderseer.

"My Lords, there was an appeal brought by His Majesty's Advocate, insisting that the Crown was entitled to various patronages, the title to which had been declared by the ultimate interlocutors to belong to the Cromarty family. On the other hand, the family insisted that the Court of Session was bound, not only to affirm such part of the interlocutor as supported their interest, but to negative such part as declared any of these livings to belong to the Crown. Your Lordships will recollect that the hearing of this cause introduced a great deal of learning in respect of the titles of persons having the appointment of ecclesiastical persons.

"My Lords, upon giving repeatedly the best attention I have been enabled to give to this subject, my persuasion upon the matter is, that the ultimate decisions of the Court of Session are right decisions as between the parties; but your Lordships will permit me to observe, that it occurred in the course of the hearing, that when these great Scotch families were attainted, the acts of Parliament of that day had required that there should be made up an authentic record of all the possessions which came to the

1814.

THE CROWN v. MACKENZIE, &c.

Crown by the forfeitures: That a wish was expressed on the part of the House, intimated first, I think, to be my own individual wish, that we should be able to ascertain, as far as inquiry and research would enable us to ascertain, what had been the property of this family, appearing by the record to which I am now referring, to be forfeited to the Crown. We have not received much useful information upon that head. But another circumstance occurred, which was this, that the Crown being enabled by Act of Parliament to re-grant to this family what had come to the Crown by forfeiture, the Crown executed a charter of restoration; and in the charter of restoration—it recited the Act of Parliament—it recited its purpose to grant what had come to it by forfeiture; and then, in execution of that purpose, it granted all the property, by various denominations, and, amongst others, all the patronages which had come to the Crown by their forfeiture; and it proceeds to state, as it expresses it in substance, without prejudice to the generality of these grants, the subjects following; and among the subjects following, with the exception, I think, of one, but including (which is rather surprising) Cromarty among the rest, it restores all those which are now adjudged to belong to the Crown as patronages which had come to the Crown by virtue of this forfeiture.

"My Lords, the charter of restoration appears to have been the subject of mention in the Court of Session; and, I have no doubt, it was also a subject of much attention in the Court of Session; but it happens that we are not able, by any address that we could make to the bar, and I have not been able, by any such conclusions as my leisure, if I had any since the cause was heard, have enabled me to make, to get over a difficulty, which, unquestionably, would exist with respect to the law of England, though, perhaps, it is a difficulty which may not at all exist as to the law of Scotland. In this charter of restoration you have the fact recited that these patronages, with an exception, came to the Crown by forfeiture;—you have these patronages, with the same exception, restored by the Crown (as having taken them by the forfeiture) to the Cromarty family; and the charter stands, at this moment, an effectual and valid instrument, open, undoubtedly, if we were considering the matter under the law of England, to all the objections that would be made to the Crown's charter, that is, if the Crown has been deceived; if the Crown has granted, as coming by forfeiture, that which did not come by forfeiture, there is no doubt that, by a proceeding for that purpose, the charter might be annulled, or reformed, under our law to the extent that His Majesty has made it under that misunderstanding of the facts.—So I take it also, by the law of Scotland, speaking, however, with great hesitation upon that subject. But, from the knowledge one has gained here of the necessity of reducing deeds which have no effect till reduced, I am

not aware whether there is not a similitude, with respect to grants of the Crown, between English grants and Scotch grants, till, by some process, those grants have been, in both countries, reduced; and, without pronouncing that it is necessary to reduce the Crown's charter, still, by any communication made to us, we have not seen precisely the answer that can be given to the fact that there does not exist, at this moment, of the Crown's charter restoring those patronages, with the exception I have alluded to, as those which had come to the Crown by the forfeiture of the Cromarty family; and if they had come to the Crown by the forfeiture of the Cromarty family, then, I apprehend, it is extremely clear that the Crown cannot have a title adjudged in its favour. Whether it is or not necessary to reduce the charter to which I have been thus especially alluding, I will not venture to pronounce; but I think it would be prudent for your Lordships so to word your affirmance of this judgment, as to give the parties an opportunity, if it be worth their while, of calling the attention of the Court to it, and enabling the Court to determine, whether it is a subject worthy of their attention or not.

"The judgment, therefore, that in this case I shall take the liberty of proposing to your Lordships will be, after reciting the several orders, and so on, to state that the said original appeal—that is, the Lord Advocate's appeal—be, and the same is hereby, dismissed this House; and that the interlocutors complained of, in as far as the same, or any of them, find Mrs Maria Mackenzie and Edward Mackenzie entitled to certain of the patronages mentioned in such interlocutors be, and the same are hereby, affirmed: And further, to order that the interlocutors complained of in the cross-appeal, in as far as such interlocutors find the Lord Advocate, on behalf of His Majesty, entitled to certain of the patronages mentioned in such interlocutors, be remitted back to the Court of Session to reconsider the same, in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall, within six months of the date of this judgment, apply to the said Court, by petition, to reconsider such interlocutors; the said Court, in so reconsidering such interlocutors, having regard to the effect of a certain charter in favour of the Honourable John Mackenzie, commonly called Lord Macleod, of date the 14th February 1785, until such charter be reduced and set aside, and to do in the said cause, or in any action of reduction which may be brought for the purpose of setting aside the charter, if such action shall be necessary, what to the said Court shall appear meet and fit to be done: And in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie should not apply to the said Court within six months, as above directed, the said interlocutors complained of in the said cross appeal, be, and that the same are hereby affirmed; and that the cross appeal in such case be, and it is hereby dismissed this House.

1814.

THE CROWN
v.
MACKENZIE,
&C.

That will give an opportunity of calling the attention of the Court, if they think proper, to it; and it will give the Court an opportunity of giving such attention as the Court, in its wisdom, shall think fit to give to this cause; and if they think proper to pass from it, they will have an opportunity of passing from it. They will have an opportunity of judging for themselves, whether interlocutors which, perhaps, are not otherwise objectionable, it is worth their while to object to, for the purpose of compelling the reduction of the effect of so much of this charter as relates to these patronages, in order to make way for the reiteration, perhaps, of the same interlocutors. That, however, is matter for their consideration; and if your Lordships will give me leave, I will now move, that this minute I have read be the judgment of this House."

It was therefore ordered and adjudged, that the said original appeal be, and the same is, hereby, dismissed this House; and that the said interlocutors therein complained of, in as far as the same, or any of them, find the said Mrs Maria Mackenzie and Edward Hay Mackenzie entitled to certain of the patronages mentioned in such interlocutors, be, and the same are hereby affirmed. And it is further ordered, That the said interlocutors complained of in the said cross-appeal, in as far as such interlocutors find the said Lord Advocate, on behalf of His Majesty, entitled to certain of the patronages mentioned in such interlocutors, be remitted back to the Court of Session to reconsider the same, in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall, within six months of the date of this judgment, apply to the said Court by petition, so as to reconsider such interlocutors; the said Court, in so reconsidering such interlocutors, having regard to the effect of a certain charter in favour of the Honourable John Mackenzie, commonly called Lord M'Leod, of date the 14th February 1785, until such charter be reduced and set aside; and to do in the said cause, or in any action of reduction which may be brought for the purpose of setting aside the said charter, if such action shall be necessary, what to the said Court shall appear meet and fit to be done; and in case the said Mrs Maria Mackenzie and Edward Hay Mackenzie shall not apply to the said Court within six months, as above directed, the said interlocutors complained of in the said cross appeal be, and the same are hereby affirmed: And it is further ordered, That the said cross appeal be, and is, hereby, dismissed this House.

For the Appellant, *Ar. Colquhoun, David Boyle.*
For the Respondents, *Wm. Alexander, Robt. Craigie, Wm. Murray.*

NOTE.—Under the foregoing remit, the following opinions were given by the Court:—

9th March 1816.

LORD JUSTICE-CLERK (BOYLE).—"Whatever objections may have been formerly applicable to the original transferences of the patronages in question by the conveyances of Sir Robert Innes, in 1656, to Sir George Mackenzie, the charters, 1678, 1686, 1698, of the whole barony of Delny, and particularly the Crown charter 1722, including expressly the patronages now in question, followed as they were by the new grant under the sign-manual in the charter of restoration 1785, cannot be viewed but as constituting a sufficient title in favour of the defender, if not cut off by a contrary possession on the part of the Crown. And, considering the exceptions in the Act 1606, c. 2, and in the Act 1617, there is much weight due to the observations in the additional memorial for Mrs Mackenzie, that they amount in reality to a ratification of the early grants.

"As to possession, then, though the Acts are not so long or so numerous as could be wished, yet, considering the circumstances of the times, I think those noticed by the defender, as to vacant stipends as well giving in localities, in the case of Rosemarkie; presenting, in that of Callicudden, the statement to the General Assembly in 1749, and the letter of the incumbent as to Suddy, in the absence of all attempts at possession on the part of the Crown, except the sign-manual in 1770 as to Rosemarkie, during the forfeiture, are sufficient.

"As to any specialty with regard to these parishes, which could place them in a different situation from others awarded to Mrs Mackenzie, I never could see it; and I knew something of this cause before it went to the House of Lords.

"As to the claim for reducing the charter 1785, I cannot see any legal grounds for it. In the absence of contrary evidence, *omnia presumuntur rite et solemniter acta.* We are bound to hold the Crown officers of the day were fully satisfied by the former titles, surveys, or other competent evidence, that the patronages contained in it ought to be restored; and, therefore, having regard to that charter, as directed by the remit to the House of Lords, I hold it an additional reason for sustaining the right of Mrs Mackenzie."

LORD ROBERTSON.—"Lord Balmerino got a charter in 1606, from the Crown, and is of great importance to the case, as showing the grant was protected by the exception in the Act 1606, con-

1814.

THE CROWN v. MACKENZIE, &C.

firmed by decree in 1631. He conveyed to Sir Robert Innes, who also got a charter and afterwards an agreement with the Bishop of Ross, who got back all the patronages, except Logie and two others; and the bishop got a charter confirming his right, and I think it was good at that time. Afterwards, Lord Cromarty got a right to which the bishop's was, however, preferable; yet Lord Cromarty's title will be good if followed by possession. I see none prior to 1690 on either side, and after it till 1712, no room for exercising patronage. When the estate was forfeited, the survey would necessarily comprehend the patronages, and the Crown would get the estate *tantum et tale* as the family held it. When it was restored in 1786, the charter would also comprehend them, as the charter 1785 flows directly from the Crown. The whole rights of parties will just depend upon possession. If the Cromarty family have it during prescription, it will avail; and if none, its title cannot prevail against the Crown; and I see no sufficient evidence of such possession in that family. In the processes of locality, I see none given in. I think the right of the Crown is preferable, both in right of bishops, and *jure coronæ*."

LORD BANNATYNE,—"I think the question is attended with some difficulty. The effect of the charter, 1785, might be removed by a reduction, but I don't hold that necessary. It gave back only what belonged to the family. I have some difficulty as to the (prescriptive?) right, which depends altogether upon possession; and *jus coronæ* is out of the question, as these patronages belonged to the Bishop of Ross. I think it *jus tertii* to the Crown to argue there was a better right in another. He can't prevail, without showing the bishop's right is not in the Cromarty family. It was transferred in 1688, and subsequent charters. I see no right to exercise possession in any party, either Cromarty or others, in right of the bishop, as Sir Robert Innes' right never returned to the Crown. There was no patronage after the Revolution, yet the family of Cromarty remained in all other respects as patrons, and I see no distinction between the three in question, and those already finally adjudged to the Cromarty family."

LORD GLENLEE.—"I agree with Lord Robertson, except as to the necessity of the reduction of the charter, 1785. But it would be directly contrary to a judgment of Court, affirming that of Lord Craigie. This charter was to restore merely what was in the forfeited family; and if more, it followed *a non habente potestatem*. No occasion for reduction in competition with another right during the years of prescription. By charter of the bishop from the Crown, after the transaction with Sir Robert Innes, the latter was completely denuded. This grant was of no use unless followed by prescription. There was no exception of all former dispositions of the patronages. Now the Crown is in absolute

right of the Bishop of Ross. The defender's right requires possession, but the Crown's right does not. If the party has a right from a proper author, prescription is not necessary, but only to show that another party has not had it. No *terminis habilis* for prescription before the rebellion. There should be other acts. Is there forty years' possession? Nothing like it. I think the remit shows that the House of Lords had no doubt."

LORD PITMILLY.—"I am quite clear, 1*st*, That it is plain the act vesting in the Crown took only what was in the family; and the charter, 1789, only restored what was forfeited, neither better nor worse. The effect of the charter, 1785, may be considered in two views. 1*st*, Was there a mistake in it? If so, it might be reduced accordingly, as passing *a non habente potestatem*. I think the reduction is not necessary, as coming in competition with another right, and no prescription run on it. There are authorities for this in the older decisions. One in Durie. The charter, 1785, conveyed nothing more than was in the Cromarty family before the forfeiture. The Bishop of Ross, in 1636, had been vested in these patronages. In 1656, Innes erroneously granted conveyance to Mackenzie. These patronages were included in the Crown charter erroneously; and, therefore, it is absolutely necessary that they should be included in the survey, and restored by the Act 1785, just as they stood in the persons of the family. But they stood erroneously in that situation, and this is a separate reason for no reduction. We must go back to the older titles. The charter, 1636, shows the right of the Crown, and 1656 that of the Cromarty family. The Crown came in place of the Bishop of Ross. The Crown's right was thereby complete, and prescription is not necessary to validate it. But the right of the Cromarty family flowed under the express reservation of all former rights by charter, 1636. The Cromarty title is incomplete and erroneous. Has it been made good or valid? It may be by prescription; but I think none sufficient has followed on this erroneous title, and, therefore, the right of the Crown is preferable."

The Court, therefore, preferred the right of the Crown to the patronages of the parishes in question, and Mrs Mackenzie persisted in the suit no longer.