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" possession, and draw the rents of the heritable property. " But before further answer, appoints the pursuer to give in " a specific condescendence of the debts due to the deceased " Mr Waddell, and of all other moveables belonging to him " which she has, or might have intromitted with, and of the " amount of the debts due by him which she has paid, or are " still resting, distinguishing the interest from the principal; " and when the said condescendence is lodged, allows the de- " fenders to see and answer the same."

On representation, the Lord Ordinary reported the case to
June 16, 1814. the Court, and the Court, of this date, pronounced this interlocutor: " Upon report of Lord Balmuto, and having advised " the informations for the parties, the Lords find and declare " in terms of the Lord Ordinary's interlocutor, of date 11th " Dec. 1813; and remit to the Lord Ordinary to proceed ac- " cordingly; but find the defenders not liable in the expenses " of process." On reclaiming petition the Court adhered.
Dec. 22, 1814. Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged by the Lords, that the said interlocutors therein complained of be, and the same are hereby reversed; and that the defenders (appellants) be assoilzied; but without prejudice to any claim, if any such the pursuer could sustain, against the defenders (appellants) in case the interest she derived under the disposition stated, should fall short of the amount of the debts paid, or to be paid, by the pursuer (respondent).

For the Appellants, *Sir Saml. Romilly, John Clerk, John Fullerton.*

For the Respondent, *John Leach, John Cunninghame.*

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MACKENZIE, &C. *v.* MACKENZIE, &C.

SIR HECTOR MACKENZIE of Gairloch, Bart., and ALEX. MACKENZIE, Esq. of Hilton, . *Appellants;*

The Hon. Mrs MARIA HAY MACKENZIE of Cromarty, and EDWARD HAY MACKENZIE, Esq., her Husband, for his interest, and HENRY DAVIDSON, Esq., of Tulloch, ... } *Respondents.*

House of Lords, 18th March 1818.

PRESCRIPTIVE POSSESSION—GRAZING GROUNDS—PART AND PERTINENTS.—A proprietor, who had possessed from time immemo-

rial certain grazing grounds, as part and pertinent of his estate of Cromarty, which possession was fortified by a possessory judgment and other articles of evidence, was held entitled to be preferred to the exclusive right and possession, in preference to another party whose titles bore expressly to convey to him the property of these grazing grounds, but who had not so clear a possession.

An action of declarator was brought by the appellants before the Court of Session, to have it found, 1st, As to Sir Hector Mackenzie, that there was, agreeably to charter in his favour, a vested right of property in a piece of pasture land of considerable extent, denominated the grazing of Orra; and, 2d, To have it found that, by disposition from Sir Hector, there was also vested in the other appellant, Mr Mackenzie, a servitude of commonty, or common pasturage, in that grazing, for certain lands. Mr Mackenzie also claimed a similiar right of commonty, as *pertinent* of certain other lands held by him in respect of *possession*.

In defence, the respondents pleaded, 1st, That the pasture lands in question belonged exclusively to them, as a part or pendicle of the estate of Cromarty; 2d, That they had not only a prescriptive possession of these lands, but that they had possessed the lands in question in virtue of a possessory judgment of the Sheriff, acquiesced in by the pursuers.

The statement made by the respondents was, that though no express mention of the grazings of Orra appeared in their title deeds, yet that the tract of ground known as such, adjoining to, or forming part of the hill of Weaves, or (as it was sometimes spelled) Weyvas, was almost entirely surrounded by that part of the Cromarty estate which is situated in the valley called Strathpeffer, and had accordingly been considered, for time immemorial, as part of the estate. It lay in the immediate vicinity of Castle-leod, which was formerly the mansion house of Cromarty, and at which the family was still accustomed to spend part of the summer season. That this grazing was proved to belong to the Cromarty estate, by the plans of the estate, taken when the lands were surveyed when forfeited to the Crown. It had always been included in the barony of Castle-leod; and they had exercised every act of ownership over it, from the earliest times down to the present day.

The respondents admitted that, by the appellant, Sir Hector Mackenzie's titles, there was an express right conferred to the grazings of Orra; but they contended that, in

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law, immemorial or prescriptive possession was superior to any written grant whatever, and that such possession, as *part* and *pertinent* of his contiguous estate, was sufficient to carry the property of that subject, even against an express infeftment in favour of another party, taken upon it as a separate tenement.

Young *v.* Carmichael, Nov. 17, 1671; Mor. p. 9636.

On the other hand, the appellants pleaded, that a party who claims a subject in virtue of an express grant is, *in dubio*, to be preferred to one who claims it only as *part and pertinent.*

Countess of Moray *v.* Wemyss, Feb. 20, 1675; Mor. p. 9636. Dec. 1, 1812.

The proof of possession having been allowed by the Lord Ordinary (Armadale) and reported, his Lordship pronounced this interlocutor: "Having considered the mutual memorials "for the parties, proof adduced, and plans, together with the "whole proceedings; Finds, that the defenders, proprietors "of the estate of Cromarty, have not only possessed the "lands in question, in virtue of a possessory judgment of the "Sheriff, acquiesced in by the pursuer at the time, but have "also produced a complete title to the lands in question, "supported and explained, not only by the parole evidence, "but by a plan made out by Mr May, the surveyor appointed "by those acting for the Crown, in 1756, when the estate of "Cromarty was in the hands of the Crown, for the purpose "of establishing and shewing the boundaries of that pro-"perty; therefore, and upon the whole other circumstances "and evidence corroborative thereof, sustains the defences, "assoilzies the defenders, and decerns accordingly."

June 3 and 5, 1813. Nov. 26, 1813.

On reclaiming petition to the First Division of the Court, the Lords adhered; and a further reclaiming petition was unanimously refused.

Against these interlocutors, the present appeal was brought by the pursuers (appellants) to the House of Lords.

Pleaded for the Appellants.—The respondents founded much on the possessory judgment of the Sheriff, pronounced in their favour; but the mere circumstance, that the appellants did not carry that judgment to a higher court, and that they delayed, for some years, in bringing forward the present declarator, is of no importance, and does not establish any acquiescence. The appellant, Sir Hector Mackenzie, and the other appellant as his disponee in the lands of Dochcairn and Dochpollo, are entitled to found on an express infeftment in the grazing of Orra, the subject in dispute, granted above two hundred years ago, and continued ever since in the charters of Sir Hector's estate of Gairloch, and are, therefore, to be preferred to the respondents, who have no infeftment in which this grazing ground of Orra is mentioned. Besides,

the Orra has always been immemorially known by a distinct name, as a separate subject. Under his titles, Sir Hector Mackenzie has further possessed the Orra in general, by his tenants, who grazed their cattle upon it, without hinderance or objection from any one, from time immemorial down to the year 1802. Any possession, therefore, had by the Cromarty family, must have been *joint* with that enjoyed by Sir Hector and his tenants. In these circumstances, therefore, and agreeably to the rules of law of Scotland, the appellant, Sir Hector Mackenzie, must be preferred to the sole property of the Orra, leaving the respondents a *servitude* of *pasturage;* and *a fortiori* that subject cannot be found to be the exclusive property of the respondents.

Pleaded for the Respondents.—The right of the respondents to the grazing of Orra, is established by constant and uninterrupted possession, and the exercise, from time immemorial, of every act of ownership, of which the nature of the ground and circumstances of the country rendered it susceptible. Any possession, on the other hand, which the appellants have enjoyed, was merely by the tolerance or express permission of the respondents or their tenants, and is totally insufficient to support a right of property or even of servitude, over this grazing. 2d, The right of the respondents being thus supported by possession, could not be at all affected by any written title which might be produced by the appellants, even though that title referred directly to the ground in question, and was liable to no objection. Possession by one party of a subject as part and pertinent of his contiguous estate, has often been found to carry the property of that subject, even against an express infeftment, in favour of another party, taken upon it as a separate tenement. But 3d, The written title of the appellants is liable to insuperable objections, and so far from supporting, is in itself destructive of their plea. On the other hand, the infeftment of the respondents, as illustrated by the topographical situation of the ground to which it refers, evidently comprehends the grazing of Orra, now in dispute.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, affirmed.

For the Appellants, *Sir Saml. Romilly, J. H. Mackenzie.*

For the Respondents, *Wm. Murray, Ja. Walker.*

NOTE.—Unreported in the Court of Session.