1776.

ROSS
v.
MACKENZIE.

"upon their lands, for whatever cause or occasion, in all time "coming."

When a new manse was built, demand was made against these feuars for their rateable proportion of the expense. In consequence, they sought relief against the respondent, contending that the above clause in their charters exempted them from the expenses of building or repairing churches or manses as public burdens. It was answered by the respondent, that the words "public burdens" legally comprehended land-tax, ministers' stipends, and schoolmasters' salaries, the only fixed and permanent taxes on land in Scotland; but that this term, public burdens, did not include the rebuilding or repairing of churches or ministers' manses, which is of a personal nature, and uncertain in its nature, event, and amount.

July 11, 1772. The Lord Ordinary found the appellants "had no claim of "relief for any part of the expenses laid out by them in their re-"building or repairing the church, manse, or office-houses belong-"ing to the parish of Kinross; therefore, repel the defence founded "on that claim, and refuse the desire of the representation."

Jan. 23, 1773. On reclaiming petition, the Lords adhered. And, on second reMar. 5, —— claiming petition, and a third, the Court refused the prayers thereof.
Apr. 13, ——

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Al. Wedderburn, Ar. Macdonald.*
For Respondents, *Henry Dundas, Al. Forrester.*

JOHN Ross of Auchnacloich, ... *Appellant;*
MURDOCH MACKENZIE of Ardross, . . . *Respondent.*

House of Lords, 29th April 1776.

EXCLUSIVE TITLE — PRESCRIPTION — MINORITY — RES JUDICATA.—A deed was executed in favour of an infant, narrating that the granter was on the eve of going abroad, and conveying his estate. Thereafter debts were contracted by him, and a party having obtained right to certain adjudications over his estate, and obtained charter and infeftment thereon, and having thereafter obtained possession of the estate, and held it for more than forty years, held that the granter of the deed was not divested of the estate, and that the adjudging creditor had acquired an exclusive title by the positive prescription, and the minorities pleaded not sufficient to elide it. Also, that the decree formerly pronounced in the same matter was *res judicata.*

Alexander Mackenzie of Coul obtained judgment or decree of apprising against John Ross of Tollie, as charged to enter heir to his father, *Hugh Ross*, for the amount of four several bonds due by the father, and adjudging the lands of Tollie, and others therein mentioned, in payment and satisfaction of the accumulated sum of

£13,950 merks Scots, and 697 merks, 6s. 8d. of Sheriff's fee. The decree stated, "That the process of apprising having been reported, "seen, and considered by the Lords of Council and Session, they, "by decreet of allowance, found the same orderly proceeded; and "therefore ordained letters to be directed to command and charge "the respective superiors of the said lands therein mentioned, to "infeft the said Alexander Mackenzie of Coul, his heirs and assig- "nees, to be holden of them respectively, as therein mentioned." Upon this decree of adjudication charter was obtained, and he was infeft. 1776. ROSS v. MACKENZIE.

Alexander Mackenzie also procured another decree of apprising of these lands in payment of four other bonds. And it was admitted that Alexander Mackenzie, under these titles, got soon thereafter possession of these lands, though the precise date was not ascertained. Mar. 2, 164

Alexander Mackenzie of Pitglassie, the respondent's ancestor, purchased from the heir of Mackenzie of Coul, the subjects contained in these decrees of apprising; and, having made up and completed a proper title, entered upon possession of the whole of these lands of Tollie, except a parcel that had been given off in wadset prior to the apprisings, and that possession has continued ever since in Mackenzie of Pitglassie's descendants.

In 1650, Thomas Manson obtained a decree of apprising against the said John Ross, as charged to enter heir to Hugh Ross, his father, for the accumulated sum of £4560 Scots. 1650.

In 1652, Thomas Mackenzie of Inveraal likewise obtained a decree of apprising against the said John Ross for the accumulated sum of 6660 merks. 1652.

This John having, in 1653 and 1658, acquired right to the two last decrees of apprisings, brought an action in the Court of Session in 1662, against Mackenzie of Coul and Mackenzie of Pitglassie, setting forth, that by their *possessions* and *intromissions*, or receipts from the lands within the legal, the sums in the apprisings were satisfied and extinguished, and concluding for an account, and that they should be decreed to yield up possession. 1662.

The plaintiff, after some litigation, was allowed to prove his allegations, that the defendant's receipts had been sufficient to extinguish the sums in the apprisings, but did not proceed on the proof, stopt short in his proceedings, and during the remainder of his life, and part of his son John, a space almost of forty years, the respondent's ancestors enjoyed the estate unmolested and without challenge.

In 1708, Hugh Ross, (son of John Ross, the second of that name,) thought proper to revive that suit which had lain asleep since 1669, and was within a year of prescription. It was accordingly revived and transferred, but no further proceedings occurred. 1708.

Hugh Ross, in 1710, abandoning the above suit, brought an 1710.

1776.

ROSS
v.
MACKENZIE.

action of reduction and improbation of the two apprisings obtained at the instance of Mackenzie of Coul.

The respondent's grandfather, then in possession of the estate, appeared in this action, and, by virtue of his titles before stated, exhibited the charter and infeftment called for by the action; and pleaded, that having been in possession by virtue of these titles for upwards of forty years, his right was protected by prescription under the act 1617.

In reply, it was pleaded, that prescription was interrupted by the former action of declarator and count and reckoning. It was answered for the defendant, that he admitted that the action of declarator of extinction of the apprisings and counting within the legal was not prescribed; but as that action necessarily implied an *acknowledgment* of the defendant's right and title, it could not save from prescription.

Feb. 3, 1714. The Court "sustained the defence of prescription, as to all other "grounds of reduction and nullities, except those particularly libelled in the count and reckoning and falsehood."

Feb. 24, —— On reclaiming petition, the Court adhered. On going back to the Ordinary, the pursuer still insisted that the defender should make the production called for. And the Lord Ordinary being of this June 3, —— opinion, ordered this to be done. The defender then represented July 28, —— against this interlocutor, and the Lord Ordinary ordered this to be answered; but nothing further occurred for forty-two years.

Hugh Ross, in the action of 1710, was succeeded by his son John. And, on John's death, without issue, the appellant's father, Robert Ross, succeeded to his elder brother.

1756. In 1756, Robert Ross brought another action to revive that of 1710, but nothing farther was done.

1772. In 1772, the appellant, son of Robert, revived and transferred the old action of 1710 against the respondent. It occurred to the respondent that the original action was prescribed and out of Court; but the Lord Ordinary being of a different opinion, the old action proceeded at the point where it was dropped.

July 24, 1773. The Lord Ordinary pronounced this interlocutor: "Finds, that "the interlocutor of the Court in 1714, by which the defence of "prescription is sustained, as to all other grounds of reductions and "nullities, except those particularly libelled on in the former pro-"cess of count and reckoning, and which was adhered to, and not "reclaimed against in due time, is a final interlocutor as to that "point, and therefore finds the pursuer's plea, founded on the sup-"posal it was still open for him to insist, in the same way that he "might were there no prescription run, is not competent; and with "respect to the pursuer's plea that prescription is interrupted by "minorities, which it is not disputed, is still competent for him, "Finds, that he has not brought sufficient evidence in support "thereof; and in respect, 1. It does not appear that he can found

" on any part of the 20 years' minority of Hugh, the son of John " the second; for though there is a disposition by John, the father " to Hugh, who was at the time a child a year old, there is no evi- " dence, nor by the words of the disposition, that it was delivered to " any body on the child's account; and as it proceeds on the recital " that the father was going abroad, which it was clearly proven he " did not, every circumstance concurs to show that it was never out " of the father's power; and as he lived till after the son's majority, " the minority of the son cannot aid the pursuer; and, 2dly, The " pursuer cannot plead on the twelve years' minority of John the " second, supposing these proved, as the right did not at that time " stand in John, but in Balnagowan, as a proper purchaser; and, " therefore, upon the whole, sustains the defences, assoilzies, and " decerns."

1776.

DUKE OF GORDON v. GRANT, &c.

On representation, the Lord Ordinary adhered. And on reclaiming petition to the Court, " The Lords adhere to the Lord Ordinary's in- " terlocutor, in so far as it finds the interlocutor of the Court, of the " 3d Feb. 1714, is a final interlocutor, and is to be held a *res judicata*, " and in so far refuse the desire of the petition. But in respect of " certain new productions, made on the part of the petitioner, and " which were not before the Lord Ordinary, they remit to his Lord- " ship to hear parties thereon."

Dec. 11, 1773.

After memorials were given in, the Lord Ordinary, in a special interlocutor, found prescriptive possession run; and also that the minorities pleaded were not sufficient to interrupt that prescription."

Mar. 2, 1775.

On reclaiming petition, the Court finally adhered to the Lord Ordinary's interlocutor.

Jan. 31, 1776.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Alex. Wedderburn, Alex. Murray, Ilay Campbell.*
For Respondent, *E. Thurlow, Henry Dundas, Ar. Macdonald.*

ALEX. DUKE OF GORDON, ... *Appellant;*

SIR JAMES GRANT, Bart., COLONEL JAMES GRANT, COLONEL ALEXANDER GRANT, the EARL OF FIFE, and Others . . . . . } *Respondents.*

House of Lords, 22d March 1776.

CRUIVE DYKES—CRUIVE FISHING—FLOATING TIMBER DOWN A RIVER.—Circumstances in which a party was held to have a cruive fishing, and entitled to erect dykes for that purpose, but so as not to obstruct the floating down the river to the sea, the wood and timber belonging to the superior heritors.

This was a dispute between the appellant and the respondents be-