

THE KING'S ADVOCATE, Appellant.—*Lord Advocate (Jeffrey)*. No. 55.

LORD DUNDAS, Respondent.—*Rutherford*.

*Patronage—Prescription.*—After the Reformation, when the Crown was in right of the possessions of the bishops, a royal grant was given of certain lands, &c. in Orkney and Zetland, which had constituted an earldom previously forfeited to the Crown, together with the whole patronages, including expressly those acquired in consequence of the Reformation, as well as those otherwise belonging to the Crown, all being united into a single earldom and lordship. This earldom was subsequently forfeited and annexed to the Crown; and thereafter, on the restoration of episcopacy, but without obtaining a dissolution of the earldom, there was conferred on one of the new bishops the bishoprick of Orkney, including all the patronages previously belonging thereto, and the teinds and kirks of certain parishes specially mentioned, the benefices of which were declared to be suppressed, and the teinds to belong to the bishop, under burden of planting and providing for ministers, and with a general right of patronage of vicarages. The bishoprick was enjoyed by the several bishops during the subsistence of episcopacy, and all rights belonging thereto reverted to the Crown at the Revolution. Thereafter a dissolution of the earldom having been obtained, and a new grant given:—Held (affirming the judgment of the Court of Session) that this grant formed a title of prescription, on which, if followed by possession, to prescribe against the Crown (as coming in place of the bishop) right to the patronage of the parishes specially contained in the titles of the bishoprick.

BEFORE the Reformation, the bishops of Orkney possessed various lands, together with the patronage of several churches, in the Orkney and Shetland Isles. There also existed an earldom of Orkney, which had reverted to the Crown, by forfeiture, prior to the year 1540. In 1565 Queen Mary conferred this earldom on her natural brother Robert Stewart. From the Bishop, (who continued after the Reformation to retain the temporalities of his see,) with consent of the chapter, Robert Stewart, in 1568, obtained to himself in liferent, and his eldest son Henry in fee, a grant of the bishoprick in feu, including the patronage of the churches within the same; and this grant was confirmed by a royal charter in 1585. In 1591, Robert Stewart, (on whom had previously been conferred the title of Earl of Orkney, with a grant of the former earldom,) obtained a new charter from King James, to himself in liferent, and Patrick, now his eldest son, in fee, not only of the rights belonging to the former earldom, but of all that had accrued to the Crown by the Reformation; and, in particular, including “the advocation,

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 “ dignities, parsonages, vicarages of kirks, prebendaries, chap-  
 “ lainries, stewards, and of all other benefices ecclesiastical,  
 “ founded and lying within the foresaid earldom and lordship,  
 “ as well the patronages which pertained to our Sovereign Lord  
 “ and his predecessors of old, as which pertained to ecclesiastical  
 “ persons, and were lately devolved in his Majesty's hands by  
 “ the laws and conditions of his realm.”

The whole subjects conveyed by this charter were united into an earldom and lordship, in which infeftment might be taken at the castle of Kirkwall; and the charter was confirmed by act of Parliament in 1592, which further declared the patronage of all the benefices within Orkney and Shetland to have remained with the earl since his first infeftment, and to belong to him in all time coming. There was, however, no special exception of these patronages in the act of revocation of grants of patronages, which was passed in the following year, 1593.

On the 1st of March 1600, Earl Patrick, who had succeeded his father, obtained from the Crown a charter nearly in the same terms with the one granted to his father:—“ cum advocacione,  
 “ donatione, et jure patronatûs omnium et singularum prela-  
 “ ciarum, rectoriarum, vicariarum, ecclesiarum, prebendariarum,  
 “ capellaniarum, stellariorum, aliorumque beneficiorum eccle-  
 “ siasticorum fundat. et jacen. infra dictum comitatum et  
 “ dominium et integra dominia de Orknay et Zetland, tam  
 “ horum quorum patronatus nobis nostrisque predecessoribus  
 “ perprius spectabant, quam episcopo Orchadie, et aliis personis  
 “ et patronis ecclesiasticis, ab antiquo pertinebant, nuper in  
 “ manibus nostris devenien., per leges, acta, et constitutiones nostri  
 “ regni,” &c. In the month of May of the same year, (in order to include certain other lands belonging to him, but not forming part of the earldom,) Earl Patrick expedite a charter of resignation, in which were granted to him various lands, “ una  
 “ cum advocacionibus, donationibus, et juribus patronatum  
 “ omnium et singularum ecclesiarum, capellaniarum, et bene-  
 “ ficiorum infra dictum episcopatum, prius ad collationem  
 “ ordinarium episcoporum spectan., cum vacare contigerint.”

In February 1605, preparatory to restoring the order of bishops, effected in the Parliament of next year by the act 1606, c. 2, a royal presentation was granted in favour of James

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Law, appointing him Bishop of Orkney and Zetland, and granting to him, during all the days of his life, all and hail the fruits, rents, &c. belonging to the said bishoprick, “ or that in  
 “ ony time by gane sen the foundation of the said bishoprick,  
 “ hes belangit thereto as well temporalitie as spirituality thairof,”  
 and in particular the “ advocatioun, donatioun, richt of patronage  
 “ of the personage and vicarage of all the commoun kirkis, and  
 “ utheris kirkis and beneficeis quhatsumever, perteining, possesst,  
 “ and occupyit of and be the bishops of Orkney and Zetland,  
 “ and their chapter, and quhilkis were at our Soveraine Lordis  
 “ presentatioun and donatioun of or befor, or perteining to ony  
 “ ane of thame, quhilk his Highness declares to be als sufficient  
 “ as gif the samen kirkis and ilk ane of them ware speciallie  
 “ expressit hairintill, sua that the said Maister James may pro-  
 “ vide the samen to sufficient and qualified ministers for serving  
 “ of the cuir at ilk ane of the saids kirkis; and fordir, his  
 “ Majestie, of his princelie and liberal dispositioun for the weill  
 “ and benefite of the said bishoprik, annexis, unitis, and incor-  
 “ poratis in the samen, all and hail the advocatioun, donatioun,  
 “ and richt of patronage of the personages and vicarages of  
 “ Orkney and Zetland, and of all uther benefices thair belangand,  
 “ to the chapter of the samen, quhilkis his Majestie haldis as  
 “ speciallie expressit hairintill, with the fruits, rents, emolu-  
 “ ments, teindis, and all utheris deuties thairof quhatsomever,  
 “ and ordainis the samen to be in all time hairafter ane part of  
 “ the privilege and patrimony of the said bishoprick; and the  
 “ said kirkis to be provydit be the said Maister James during  
 “ his lifetime, and after his deceis be the bishops his successoris  
 “ in the said place and living, to sufficient and qualified minis-  
 “ ters, notwithstanding whatsomever acts of Parliament maid in  
 “ the contrair.” At the same time Queen Anne, with consent of  
 King James her husband, executed in favour of Bishop Law and  
 his successors in office a resignation of “ all and hail the  
 “ fruitis, rentis, emolumentis, teinds, feu-mails, and cains, cus-  
 “ toms, casualties, deuties assignet and perteining to us of the  
 “ said bishoprik of Orkney and Zetland of the crop and zeir of  
 “ God 1604, and of all other years and crops to cum for ever.”

The order of bishops was thereafter restored by the act 1606, which rescinded all prior dispositions by his Majesty of patronages belonging to bishopricks, except such as had been ratified in Par-

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 “ to the said bishops and their chapter in commonty, which are  
 “ disponed by his Majesty to whatsoever person;” &c., and the  
 act further provided, that all who had obtained feu rights or lay  
 tacks of bishoprick lands, while they were permitted to retain them,  
 should pay a reasonable sum to the bishop therefor.

On the 21st January 1607 a contract was entered into between  
 Patrick Earl of Orkney and James Law the Bishop, whereby, on  
 the narrative that “ the said Master James is provided to the haill  
 “ bishoprick of Orkney, and to all lands and teinds, and rents,  
 “ honours, dignities, fees, privileges, casualties, profits, and duties  
 “ whatsoever, pertaining and belonging thereto, for eschewing  
 “ and cutting away of plea, action, question, and controversie,  
 “ that by any occasion may arise betwixt the said earl and the  
 “ said bishop, for the profit and ordinar yearly rent of any lands  
 “ or teinds of the said bishoprick, contained in the said noble  
 “ earl's infestment or tacks, and heretofore possessed and intro-  
 “ mitted with be him, the said Patrick Earl of Orkney as  
 “ principal, and Sir John Arnot as cautioner for him, bind and  
 “ oblige them to pay to the said Master James, Bishop of  
 “ Orkney, during all the days of his lifetime, the sum of 4,000  
 “ merks at Whitsunday and Martinmas by equal portions,  
 “ beginning the first term's payment at the term of Martinmas  
 “ last bypast 1606, and so forth yearly and termly thereafter, in  
 “ full satisfaction, complete payment, and contentation to him of  
 “ all right, title, and interest the said bishop may have, claim,  
 “ or pretend in and to the mails, farms, kains, customs, casual-  
 “ ties, profits, and duties whatsoever of all lands and teinds  
 “ whatsoever pertaining to the said Bishop of Orkney, or to any  
 “ part thereof, or to any other teinds of lands lyand within the  
 “ countrie of Orkney and Zetland whereinto the said bishop has  
 “ or may claim and pretend right and title during his lifetime.  
 “ Attour the said mightie earl, for establishing the estate of the  
 “ said bishop, is content, and for himself, his heirs and succes-  
 “ sors, contents that the said bishop, during his lifetime, shall  
 “ enjoy, bruik, and possess, conform to his said provision, the  
 “ superiority of the haill bishop's lands lyand in the said  
 “ countries of Orkney and Zetland, with the proper kirkis of the  
 “ same bishoprick, and patronage of all other kirks thereof, the  
 “ patronages of old pertaining to the Bishop of Orkney, being

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“ for the time, notwithstanding of any right or title made or  
 “ granted to the said earl or his predecessors of the same at any  
 “ time bygone, with this special provision always, likeas it is  
 “ provided be express provision of this present contract, that  
 “ the said superiority of the said bishop lands, with the proper  
 “ kirks and patronage of the remanent kirks aforesaid, shall in  
 “ noways be prejudicial or hurtfull to the said noble earl, his  
 “ heirs, &c., in their heritable right of the lands, houses, offices,  
 “ and others pertaining to the said bishoprick of Orkney, con-  
 “ tained in their infestment thereof. It is also expressly provided  
 “ hereby, that the said Master James, Bishop of Orkney, shall  
 “ not trouble the present possessors of any benefices pertaining  
 “ to them be virtue of his said provision to the said bishoprick,  
 “ for any cause or occasion preceding the date hereof, but that  
 “ they and every one of them may possess and enjoy the same,  
 “ conform to their provisions in all points, but any question or  
 “ impediment to be made be the said Master James on the con-  
 “ trair; and then, if said benefits shall happen to vaict, that the  
 “ said bishop, as patron foresaid, shall present and admit qualified  
 “ persons thereto, be advise and consent of the said noble earl  
 “ and his foresaids, and no otherwise. And likewise the said  
 “ Master James, Bishop of Orkney, obliges him, during all the  
 “ days of his lifetime, to suffer and permit the said noble earl  
 “ and his foresaids peaceably to bruick and possess the haille  
 “ lands, houses, teinds, rents, offices, privileges, duties, and haille  
 “ commodities of the said bishoprick, conform to their infest-  
 “ ments, tacks, rights, and possessions thereof, without any  
 “ action, question, trouble, or impediment to be made by the said  
 “ bishop or any other having right of him thereto. It is agreed,  
 “ with consent of both the said parties, that the said noble earl  
 “ and his foresaids shall content and pay to the ministers of  
 “ Orkney and Zetland the haille thirds of the said bishoprick of  
 “ Orkney, according to the particular assignations to be made  
 “ and given be the said bishop or lords of the Parliament.”

In April 1611 King James granted to James Law the Bishop  
 “ all and sundry the feu-mails addebtet to our Sovereigne Lord  
 “ of whatsoever lands, mills, woods, fishings, and others per-  
 “ taining to his Highness' property within the lands of Orkney  
 “ and Zetland, and other lands, isles whatsoever, pertaining to  
 “ the earldom of Orkney, together with the feu-mails of all lands,

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 “ whatsoever chapellanries, prebendaries, stallaries, and other  
 “ benefices within the bounds of Orkney and Zetland, and other  
 “ lands and isles pertaining to the said earldom of Orkney.”

Earl Patrick was forfeited and executed in 1612, and thereupon the earldom was annexed to the Crown by act of Parliament, which enumerated among the rights belonging to the earldom so annexed “ the advocation, donation, and right of patronage of  
 “ all benefices, chaplainries, and stalliarries foundit and lyand  
 “ within the boundes of Orknay and Zetland, kirkis, teindis,” &c., and declared that his Majesty should have no power to make any future grant of any part of the earldom without a dissolution of Parliament being first obtained.

In the same year (1612), the King having purchased for 300,000*l.* Scots from Sir John Arnott (the cautioner) and his sons, their rights and interests which they had appraised in Orkney and Shetland, an act of Parliament was passed, (1612, ch. 15,) annexing to the Crown the lands and others pertaining to the earldom, with the advocation, donation, and right of patronage of all benefices, chapellanries, &c. within the same.

A contract, followed by a charter of mortification in implement of it, was entered into in the year 1614 betwixt King James and the bishop, with consent of the provost and other canons of the cathedral church, proceeding upon the narrative of the disorder and confusion which had arisen among the tenants and inhabitants of Orkney and Zetland, which had mostly arisen from the confused lying of the lands within the said bounds, the uncertainty of the marches, and diversity of the superiors, (being partly holden of the King and partly of the Bishop of Orkney,) and whereby the bishop and his chapter resigned into his Majesty's hands, *ad perpetuam remanentiam*, all lands, kirks, teind-sheaves, salmon-fishings, teinds, &c., offices, jurisdictions, regalities, and hails privileges hereof, advocations, donations, and rights of patronages of kirks, altarages, prebendaries, stallaries, and other benefices, with all castles, towns, &c. pertaining to the Bishop of Orkney, to remain with his Majesty and his successors, as united, annexed, and incorporated into the patrimony of the Crown; for which cause his Majesty, (without however having previously obtained a dissolution of any part of the earldom annexed in 1612,) disposed to the bishop and his

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successors, to remain with them in all time coming, as their proper patrimony, various lands, particularly therein narrated, lying in the parishes of Holme, &c., with all and sundry mills, woods, fishings, &c., with the teind-sheaves and other teinds, parsonage and vicarage, and other duties of the whole lands, &c. particularly and generally before mentioned, as well such as pertained of old to the said bishoprick as to any other dignitary, prebendary, chapelanry, channery, altarage, common kirk, or any other benefice whatever; which dignities, &c. his Majesty dissolved, suppressed, and extinguished, to the effect that all the foresaid teind-sheaves and other teinds, as well great as small, with the whole lands and others particularly and generally above mentioned, might remain with the Bishops of Orkney, as part of the said bishoprick, and property and patrimony thereof, in all time coming; providing the said bishop and his successors plant the kirks within the above bounds with ministers, and provide them with sufficient stipends, so that no part of the lands and teinds belonging to his Majesty be any way burdened therewith: and his Majesty made and constituted the Bishops of Orkney patrons of all vicarages within the isles, lands, and bounds of Orkney and Zetland, perpetually and in all time coming, disposing and mortifying to them the advocation, donation, and right of patronage of the said hail vicarages, with power to present qualified ministers to every one of the said kirks as often as the same should happen to become vacant. His Majesty also disposed to the Bishop of Orkney the right and jurisdiction of sheriffship and bailiary within the bounds of the said lands of new mortified to the patrimony of the bishoprick, and exempted the inhabitants within the bounds of the said lands from the sheriffs and other judges of the sheriffdom of Orkney; and his Majesty united and erected the whole lands and others therein enumerated into one whole free benefice and bishoprick, to be called then and in all time coming the Bishoprick of Orkney; and his Majesty also declared to be dissolved from the Crown all the rights thus erected into a bishoprick, and also cased and annulled all advocations, donations, and rights of patronages of whatsoever churches or benefices within the bounds of the said erected bishoprick, to the effect that the foresaid lands, mills, woods, fishings, &c. may remain with the said Bishop of Orkney

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and his successors, as their own proper patrimony, in all time coming.

By this contract, relative acts of Parliament, and charter of mortification, &c., a new bishoprick of Orkney was created and erected, and in virtue thereof it was alleged that the bishop and his successors enjoyed and exercised the sole right to the patronage of the churches and parishes within the bishoprick, and in particular of the parishes of Holme, &c., until the abolition of episcopacy in or about the year 1639. On the other hand it was said, that notwithstanding the mortification of this bishoprick, the patronages in dispute remained a part of the earldom of Orkney, as confirmed by Parliament in 1592, and as inseparably annexed to the patrimony of the Crown in 1612; and that Parliament never having disannexed the earldom, or any part thereof, the mortification in favour of the bishop was only a temporary grant, which, when done away, left the earldom as it was in 1612.

After the forfeiture of Patrick Earl of Orkney the King had granted a lease of the earldom to Lord Ochiltree, under reservation of the lands, teinds, &c., and of the house appropriated to the bishop, with certain lands and teinds as equivalent to the assumed thirds of benefices; and it now appearing that these thirds were almost wholly allotted to the ministers appointed by the bishop, whereby “the haill remanent kirkis of Orkney being of his Majestie’s annexed property, are, for the most part, altogidder unprovydit, and these that have any thing at all hes yet so small means of maintenance, as no honest man will undertake to serve thame,” an overture was made by the commissioners for managing the King’s rents, and the bishop, wherein—“consideratioun being had upone the ane pairtt what great greiff our Soveraine Lord the King’s Most Gracious Majestie, no doubt, would conceive, if sick ane multitude of poor ignorant souls would perish for want of instruction, his Hieness being evir, in all his lyffe, a rare paragan of pietie, and so bountiful and beneficial to the kirk as not sparing his own coffeiris to restore and redeem their ruinat estait,—and respect being had, on the other part, to the “hudge soums of money” the King had paid for Sir John Arnot’s rights,—it was recommended that certain of these other parishes should be



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conjoined, and that a stipend of specified amount (the whole being 1,600*l.* Scots per annum) should be added out of the revenues of the earldom, on condition that this amount should not be increased, even on the expiry of the tack of the earldom. This overture having been approved of by the King, he granted a letter to that effect accordingly. The lease to Lord Ochiltree contained no mention of patronages which were exercised by the King himself, except in regard to the benefices suppressed in the mortification to the bishoprick.

On the abolition of episcopacy in 1638, the bishoprick of Orkney, including the patronage of the churches and parishes above mentioned, devolved upon the Crown; and, on 2d September 1641, King Charles granted in favour of Robert Leslie a tack for the period of two nineteen years of all and hail the lands, rents, &c. which belonged to the late bishoprick of Orkney, with power also to present to the hail vicarages within the hail isles, lands, and bounds of Orkney and Zetland belonging to the said bishoprick.

In November of the same year a charter of mortification was granted by King Charles in favour of the magistrates of Edinburgh of all and hail the rents, teinds, &c. lately pertaining to the bishoprick of Orkney.

In May 1642 the magistrates of Edinburgh acquired by assignation Leslie's tack; and in the same month they obtained a signature of confirmation ratifying the tack, assignation, and charter, and containing a new gift in their favour of all and sundry the hail lands, teinds, kirks, patronages, superiorities, offices of sheriffship, &c., whether pertaining to the said late bishoprick of Orkney, spirituality or temporality, and contained in the renewed foundations of the same; and this was ratified and confirmed in 1644 by act of Parliament.

William Earl of Morton having acquired from his Majesty, on the 15th June 1643, a right to the Earldom of Orkney, granted a declaration (22d June 1644) in favour of the magistrates of Edinburgh, that the contract betwixt his Majesty and him anent the earldom of Orkney and Zetland, and his infestment thereon and ratification thereof, should noways be extended to any lands, teinds, superiorities, offices, and others belonging to the late bishoprick of Orkney the time of the abolition of bishops, and

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contained in the rights and infestments granted by his Majesty of the said bishoprick, &c. in favour of the town of Edinburgh.

Episcopacy having been again restored in 1662, the town of Edinburgh surrendered the bishoprick of Orkney to his Majesty. Thereupon an act of Parliament was passed, (26th August 1662,) whereby the town of Edinburgh obtained an imposition upon wine, upon the narrative, inter alia, that "they have freely surrendered to his Majesty the bishoprick of Orkney," and on 14th January 1664 a commission was issued, appointing Andrew Honeyman Bishop of Orkney, and giving to him "advocationes, donationes, et jura patronatum omnium ecclesiarum, rectoriarum, cappellaniarum, prebendariarum, altaragiorum, omniaque alia beneficia tam, spiritualitates quam temporalitates, quorum presentatio ullo tempore preterito ad episcopam de Orkney pertinuit, ante Reformationem religionis, postea, vel a fundatione ejusdem, vel eidem annexa fuit per quondam nostrum clarissimum patrem æternæ memoriæ, seu quocunque nostrorum illustrissimorum predecessorum."

The rights granted by that commission, and in particular the rights of patronage to the several parishes and churches libelled, were exercised by Andrew Honeyman and his successors until the Revolution in 1688, when the bishoprick estates, and patronages belonging thereto, devolved upon the Crown. The grant to the Earl of Morton had been renewed in 1662, when the King was again in right of the bishoprick; but in 1669 the grants in favour of the Morton family were reduced and set aside by a decree of the Court of Session, in respect there had been no previous dissolution in Parliament to authorize the Crown to make such grants; and this decision was followed by another act of annexation.

In the year 1707, an act (12 Feb.) was passed by the Scottish Parliament, on the representation of James Earl of Morton that those grants had been made in consideration of a debt of 360,000*l.* Scots due to his predecessor by Charles the First, by which the earldom of Orkney and lordship of Zetland, &c. were dissolved from the Crown and patrimony thereof, to the effect that her Majesty might dispense to the said James Earl of Morton, his heirs and successors whatsoever, the foresaid earldom, &c., redeemable, however, by her Majesty and her royal succes-

sors, on payment of the 360,000*l.* Scots, subject to a feu duty of 6,000*l.* Scots, and the payment of 1,600*l.* Scots to the ministers, or such other sums as should be modified out of the teinds. Oct. 1, 1831.

In consequence of this act of dissolution a charter (18 Feb. 1707) was expedie by James Earl of Morton, conveying to him the earldom, under these burdens, with all the privileges, &c., advocations, donations, and rights of patronage of the kirks within the said earldom and lordship, isles, udal lands, and others pertaining thereto, upon which the Earl of Morton was infeft; and an act of the Scottish Parliament (12 Mar. 1707) was passed, ratifying the charter and sasine.

In 1742 an act of Parliament of Great Britain was passed, disannexing the earldom and lordship, with the whole patronage, so as his Majesty might grant the same of new, free of the right of redemption, to the Earl of Morton, irredeemably for ever. A charter (Sept. 1743) was expedie, in virtue of this act of Parliament, in the same terms, upon which the Earl of Morton was infeft.

Sir Lawrence Dundas in 1766 purchased the earldom and lordship from James Earl of Morton; and obtained a charter of resignation from the Crown on the 6th of August 1766, containing the whole lands, feu farms, and others specified in the Earl of Morton's charter, "cum advocationibus, donationibus, et juribus patronatum ecclesiarum, capellaniarum, altaragiorum, et prebendariorum infra dict. comitatum et dominium, insulas et udal terras, aliaq. ad ead. spectan.;" upon which charter Sir Lawrence was infeft.

In virtue of the above titles derived from the Earl of Morton, Lord Dundas the successor of Sir Lawrence claimed right to the patronage of all the churches in Orkney and Shetland, with the exception of that of Kirkwall and St. Ola, which was claimed by the magistrates of Kirkwall, founding on certain alleged royal grants prior and posterior to the Reformation. A claim was likewise made by Robert Heddle of Melsetter to the patronage of Walls. On the other hand, the patronage of all the churches was claimed by the Crown, as coming in place of the bishops of Orkney. To have this matter settled, his Majesty's Advocate in 1825 brought an action of declarator against Lord Dundas, the magistrates of Kirkwall, and against Mr. Heddle of Mel-

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In support of this claim it was pleaded—

1. By the contract betwixt King James and Bishop Law and charter of mortification in 1614, and relative acts of Parliament, the several parishes, and the rights of patronage, were incorporated into the bishoprick and conferred on the bishop; and all former grants or rights were annulled. These rights of patronage thenceforth remained part of the bishoprick, and were never afterwards disjoined therefrom, but devolved upon the Crown upon the abolition of episcopacy in or about 1639. After the abolition of episcopacy, the bishoprick, including the rights of patronage, was granted by the Crown to the magistrates of Edinburgh, by the several deeds and acts of Parliament condescended on, and was enjoyed and exercised by the magistrates until about 1662, when the bishoprick was surrendered entire to his Majesty, whereby the rights of patronage in question were re-acquired by the Crown. But while the bishoprick was thus held by the magistrates of Edinburgh the earldom of Orkney was held in virtue of a separate title by the Earl of Morton, and did not comprehend the rights of patronage in question. After the bishoprick, including the rights of patronage, had been re-acquired by the Crown from the magistrates of Edinburgh, the rights of patronage pertaining to the bishoprick were conferred on Bishop Honeyman in 1664, and were enjoyed and exercised by him and his successors till the Revolution, when the bishoprick, including the patronages, devolved upon the Crown; and by the statute 10th of Queen Anne, c. 12, the patronages were declared to belong to the Crown; and it does not appear that they have since been granted by the Crown to the defenders, or any other person; consequently the rights still remain with the Crown.

2. The titles founded on by Lord Dundas do not convey or carry any part of the bishoprick as constituted in 1614; and, in particular, do not convey or carry any of the patronages in question. These titles are not even sufficient to found a prescriptive right to the patronages in question, which constitute no part of the earldom of Orkney. There are no acts of possession condescended upon as having been exercised by Lord

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Dundas and his predecessors which can establish a prescriptive right to the patronages.

3. The titles founded on by the magistrates of Kirkwall and separately by Heddle were not sufficient to carry right to the patronages claimed by them, nor have they condescended on any acts of possession exercised by them sufficient to support their claim.

4. But even if the alleged acts of possession by the different defenders were established, they could be of no avail, seeing that there was a contrary possession by the Crown and the bishops. The Crown has right to all patronages to which no right can be made out by a subject, and cannot suffer by the negligence of its officers.

Lord Dundas maintained—

1. The act 10th of Anne, c. 12, does not apply to these patronages, which formed part of the earldom of Orkney; and as the defender, his authors and predecessors, had possessed them in virtue of their charters and infestments for upwards of a hundred years, and had, during that time, uniformly exercised the right of presenting to them when vacant, and enjoyed the revenues and emoluments thereto pertaining, and had exercised every other act of lawful possession proper to such subjects, peaceably and without interruption, his title to them was confirmed by the statute 1617, c. 12, which declares that possession, by virtue of infestments standing together for forty years, shall give an unquestionable right, good against all objections, and even against the King. The defender being in the lawful possession of the patronages, the proof of showing a contrary possession is incumbent on the pursuer; but he has not condescended on any exercise of his pretended right within the years of prescription.

The magistrates of Kirkwall pleaded—

1. The positive prescription extends to patronages as well as other heritable rights, and the law does not recognize in favour of the Crown any exception from its operation; and as the magistrates of Kirkwall, in virtue of their titles, had enjoyed the possession and exercised the right of patronage for upwards of forty years, they had effectually established their right by the positive prescription.

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Besides, no title had been produced on the part of the Crown, as in right of the bishops of Orkney, sufficient to found any claims to the patronage of Kirkwall and St. Ola, which was evidently not included in the grant to the bishops.

At all events the titles produced on the part of the Crown, as in right of the Bishop of Orkney, amounted to nothing more than a general conveyance to patronages, and were insufficient, unless explained by continued and prescriptive possession and exercise of the right, to form a title to any particular patronage, and consequently cannot compete with the defenders' titles, which contain a direct and special conveyance to the patronage of Kirkwall and St. Ola; and the proof of such possession, as in right of the bishops of Orkney, is incumbent on the pursuer, who is not entitled, till he establish such possession, to deny effect to the special grants in favour of the defenders, or to require any evidence of possession or exercise of right on their part.

But though the pursuer, in the circumstances of the case, were entitled, under the general grants in favour of the bishops of Orkney, to challenge the validity and effect of the defenders' titles, and to require them to support those titles by evidence of possession on their part, the defenders' preferable rights would be clear, in virtue of their possession, and that at common law, and independently of their plea of positive prescription under the statute 1617, c. 12.

Heddle pleaded—That the patronage of Walls was included, *nominatim*, in a charter by progress in favour of his author, in 1591, and was not affected by the Act 1593, c. 19, which applied only to new grants of patronages: That the patronage was not, *nominatim*, conveyed in, and was not, by possession, specially made to come under the general titles of the pursuer, while Heddle's express title was put beyond challenge by prescriptive possession.

The Lord Ordinary (15th May 1829) found, “ That there  
 “ appears to be in the defender Lord Dundas a sufficient title for  
 “ prescription of the patronage of the eight parishes libelled, with  
 “ the exception of the patronage of Kirkwall and St. Olla;  
 “ finds, that there appears to be in the magistrates of Kirkwall  
 “ a sufficient title for prescription of the patronage of the parish  
 “ of Kirkwall and St. Olla; and appoints the cause to be

“ enrolled, in order that the parties may be heard upon the ad-  
 “ missions or evidence of possession in reference to prescription  
 “ of the above patronages; and in respect to the defender  
 “ Mr. Heddle, and his claim to the patronage of the parish of  
 “ Walls, supersedes further consideration, until the question  
 “ between the pursuer and Lord Dundas, as in regard to that  
 “ parish, shall be further considered.—Note.—There is no  
 “ process here to try the question between Lord Dundas and  
 “ Mr. Heddle; but if Lord Dundas can show sufficient right to  
 “ exclude the Crown, the action by the Crown against Mr. Heddle  
 “ must fall.”

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The Lord Advocate reclaimed, but the Court (18th May 1830) adhered.\*

This being merely of the nature of an interlocutory judgment, as the question of possession had not been disposed of by the Lord Ordinary, it became necessary for the Lord Advocate to apply for leave before he could enter an appeal against it to the House of Lords; and in order to obviate any opposition on the part of the defenders to this proceeding before the cause was finally exhausted, he gave in a minute, “ admitting that the  
 “ judgment of the Court on the question of prescription is to  
 “ decide the cause between the parties, and that no subsequent  
 “ question as to possession remains undisposed of.”

On which he obtained leave to appeal.

*Appellant.*—Besides the reasons already given, the judgment appealed from cannot possibly be supported upon any ground which does not necessarily infer that the rights and possessions of the bishoprick were undistinguishable from the rights and possessions of the earldom. But any such notion is equally erroneous in principle, and inconsistent with the fact. The grounds of the judgment appealed from, as stated by one of the Judges of the Court of Session, would unquestionably import, that the grant founded upon by Lord Dundas gave him the title to all the bishoprick lands, as much as of the bishoprick churches; and yet no such claim or pretension was ever brought forward on the part of Lord Dundas. The bishoprick reverted to the

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\* 8 Shaw and Dunlop, p. 755, where the Judges opinions will be found.

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Crown, but it was a separate estate from the earldom; and when Lord Morton obtained, by favour, a restoration to the grant of the earldom, which had been previously reduced, nothing was truly granted to him, and nothing could be within the contemplation of the grant, but the earldom. Two of the other Judges appear to have taken a different view of the case, and held merely that the grant of the defender Lord Dundas was a title for prescriptive possession, because the terms were general. But this is not a sound construction of the grant. If it is quite clear that the grant was limited to the earldom, then the words employed can only be referable to the subject matter of the grant. The whole general expressions are necessarily limited by the nature and objects of the grant, which was merely to restore Lord Morton against the decree of reduction.

*Respondent.*—*Lord Dundas*, in addition to his arguments in the Court below, pleaded—

He is feudally invested with the right to the patronages claimed by the appellant. These patronages are comprehended in the grant of the earldom of Orkney and lordship of Zetland to Lord Morton in the year 1707, and in the relative act of Parliament, and the right to them has been transmitted, by regular titles, from Lord Morton's family to the respondent. The respondent's titles alone, unaided by prescription, and independently of the effect of possession, in explaining the import and meaning of the original grant to Lord Morton, establish, beyond all doubt, his right to these patronages. The title on which the appellant's claim is founded is excluded by the positive enactments of repeated statutes, repealing and annulling all those intermediate grants of portions of the earldom of Orkney and lordship of Zetland, which were made by the Crown between the years 1612, when they were first annexed to the Crown, and the year 1707, when the right to them was finally granted to Lord Morton. The claim of the appellant rests entirely on the temporary rights granted during that intermediate period; but these temporary grants were entirely swept away by the statute 1707, dissolving from the Crown the lordship and earldom, as it had been originally annexed to the Crown by the act of annexation in the year 1612.



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The admission made by the appellant as to the possession of these patronages, and consequently of the acquiescence on the part of the Crown in a state of possession totally adverse to the plea now maintained by the appellant, is extremely material, in so far as it affords evidence of a very authoritative kind in the interpretation of the grant to Lord Morton, and of the respondent's right to these patronages in virtue of his titles alone.\*

LORD CHANCELLOR.—My Lords, I have looked carefully into the documents in this case, as well as into the elaborate opinions of the learned Judges in the Court below, especially of Lord Cringletie, who goes very much into the case. I have checked his account of the documents with the originals; and, with the exception of one or two unimportant particulars, I have come to the same conclusion, in point of fact, which the learned Judges had come to—that there is a title either in the original grant to Patrick Stewart Earl of Orkney, in 1565, or the subsequent grant confirmatory of the former to Lord Robert Stewart, in 1592. I agree with their Lordships, that there is a sufficient conveyance of the kind of property in question to give a title whereupon the party may prescribe, the rule of the Scotch law differing from ours, in requiring a title whereupon to prescribe; but it is not the rule of the Scotch law that the title shall contain a complete conveyance of the subject, which is the sort of argument that has been urged here; for then, what would be the use of prescription?—But there are words sufficient—livings, advowsons, chapelries, and so forth—in these instruments, upon which the prescription shall run, and upon which the prescription, by affixing a definite meaning to these words, shall exclude one set of advowsons where there has been no enjoyment, and shall infer a valid title where there has been an enjoyment—an uninterrupted enjoyment—on others. There being no doubt that *jus patronatûs* comes within the Statute, and is the subject of prescription—indeed that being now conceded—I hold the production of these documents, and an exercise of right for a couple of hundred years, to suffice for the purpose required. I therefore move your Lordships, that the interlocutors of the Court below, in this case, be affirmed.

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\* The respondents, magistrates of Kirkwall, and Heddle, repeated their arguments in the Court below.

Oct. 1, 1831. . The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

*Appellants' Authorities.*—Stat. 1471; 1540; 1593, c. 19; 1606, c. 2; 1612, c. 14, 15, 16; Peterkin's Rentals of Orkney, p. 66; No. 3, p. 34; App. p. 99; 1669, c. 19; 1707, c. 46; 10 Anne, c. 12, sec. 4; 2 Stair, 8, 35; 1 Ersk. 5, 10.

*Authorities for Lord Dundas.*—1592, c. 94; Record Edit. p. 1; 1606, c. 2; 1612, c. 15; 1669, c. 19; 1707, c. 9; Act 1742; Cochrane, 21st Jan. 1739 (M. 9,909); Graham, 17th Jan. 1758 (M. 9,927); Act, 1594; 1617, c. 12; Earl of Leven, (M. 10,930); 2 Ersk. 6, 18, 3; 3, 23; 3 Ersk. 7. 3. 4. 31; 1, 5, 16; 2 Stair, 1, 24; 3, 45; 12, sec. 23; 8, sec. 35, 1, 8, 35; 2 Craig, 8, 37; Earl of Argyle, (M. 9,631); Duke of Buccleuch, Nov. 30, 1826 (5 S. & D. No. 44); 1712, c. 10.

*Authorities for Magistrates of Kirkwall.*—1670, c. 42; 1617, c. 12; 2 Stair, 12, 23; 3 Ersk. 7, 3.

MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 56.

DONALD ROBB, Appellant.

JAMES FORREST, Respondent.

*Bankruptcy—Sequestration—Stamp.*—Held (affirming the judgment of the Court of Session)—1. That it is competent for a creditor to apply for sequestration, whose debt is of the statutory amount, but consists partly of a sum originally due to himself, and partly of a debt purchased by him at an undervalue, subsequent to the bankruptcy: 2. That the assignation of such a debt requires to be written on a deed, and not on an ad valorem stamp: 3. That as no objection was taken to the assignation, in respect of its being written on a wrong stamp, until after sequestration was awarded, and as there was no room to suppose that the Court was aware of the objection, and as the defect was afterwards supplied, the sequestration was valid.

Oct. 3, 1831.

1ST DIVISION.  
Lord Newton.

ROBB presented a petition to the Court of Session, praying for a recal of the sequestration of his estates which had been awarded at the instance of Forrest under the Bankrupt Act. This he did on the following grounds:

1. The debt of Forrest, the sequestrating creditor, was not of the statutory amount to entitle him to present the application. It was stated in his affidavit as amounting to 135*l.*, but of this 55*l.* consisted of an account originally due to Young and Company, and assigned by them, subsequently to Robb's bankruptcy, for 18*l.* This purchase was illegal, as being, after bankruptcy, for