onus probandi lay with the respondent, to prove that it was not.

Pleaded for the Respondent.—The intention of the parties by the marriage contract, must be taken from the whole tenor of the instrument. The 100 merks were expressly given in full satisfaction of every claim, and having taken this specific gift, they were not also entitled to claim the benefit of the conquest provision. Besides, to maintain a claim for conquest, it must be proved that the deceased, at the time of the dissolution of the marriage by that event, had acquired means over and above that which he possessed at the time of his marriage. The evidence in the cause proves the contrary; and the tenement purchased during the marriage, was purchased entirely with the funds which he had at his own disposal at the commencement thereof, so was not conquest.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

Note.—The appellant did not deliver in his case.

For Respondent, *J. Dalrymple*, *Thos. Lockhart.*

WILLIAM GRAY and WILLIAM STUART, Merchants, Perth, - - *Appellants;*

ALEXANDER OGILVIE, Merchant, Leith, *Respondent.*

House of Lords, 2*d March*, 1770.

SALE.—A bargain was entered into for the sale of 100 hogsheads of *Philadelphia* lintseed, of Messrs. Alexander's Importation, for which £4. 4s. per hogshead was agreed to be paid. Instead of this, the seller purchased himself Virginia lintseed of inferior quality, at £3. 10s. per hogshead, and sent it to the buyer as the Philadelphia lintseed which he had bargained for. Held, reversing the judgment of the Court of Session, that the buyer was not liable for the price.

William Gray bargained for 100 hogsheads lintseed, of Philadelphia quality, with the respondent, a merchant in Leith, who stated in answer, "the Philadelphia flax seed is now some- " time arrived in Clyde, and there is part of that cargo or-

" dered here overland; none yet arrived, but will be here in " a few days. You may, if it can be brought forward in " time to ship for you, have the quantity you mention, being " 100 hogsheads at £4. 5s. a hogshead, delivered here, and " payable in six months.—This, you may be satisfied, is as low " as it can be sold, considering the original cost and land car- " riage from Clyde here, and should the 100 hogsheads be " too much for you to venture on, in case of its being by ac- " cident too late of coming to your market, you may, in the " first instance, confine it to a less quantity, but I cannot " propose keeping it for you after other purchasers offer."

The appellants answered:—" We are favoured with yours " of the 19th, and notice that your lintseed is arrived in " Clyde. We will take fifty hogsheads, although the price " is very high, £4. 5s., payable six months after delivery, be- " sides the freight. We think you should deliver it here as " you did last year. And this we hope you will do, consid- " ering the risk we run of the markets. We have sent the " bearer, William Gray's son, to be satisfied on the above " particulars."

Instead of the *Philadelphia* lintseed, he sent *Virginia* lintseed, which was of inferior quality, and which had arrived the same day in Leith as the above letter, consigned to one Mason, merchant, Leith. Gray's son was taken to the warehouse to be shewn this lintseed; on looking at it he remarked that it was " dirty;" but as he was only authorized to settle the price and carriage, he had nothing further to say. Ogilvie never said any thing to make the son understand that this was not the lintseed his father had bargained for. The sum of £4. 4s. per hogshead was agreed on as the price. Thereupon Ogilvie bought from Mason 62 hogsheads at £3. 10s. per hogshead, and sent it to Gray and Stuart that night for £4. 4s. In the bill of parcels, the seed was described as American flax seed at four guineas.

On the faith of this bargain, the appellants had sold several hogsheads of Philadelphia lintseed. But on arrival of it in Perth, and about two or three days afterwards, it was discovered to be bad, whereupon they wrote the respondent stating that it was unsaleable,—that it was old lintseed, abounded with mites, and by quantities run together in it, not at the sides of the casks, but rather in the heart of the casks, it was shewn plainly, that it had been dried and turned over from damaged casks into these;—and asking " orders what to do with it." The respondent came to Perth, and inspect-

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ed the seed; but refused any satisfaction, or to take back the lintseed.

The lintseed was thereafter seized, under the act 13 Geo. I., against the importation of mixed or damnified seed.

Thereafter Ogilvie raised action for the price, to which the defence stated by the appellant was, that the seed was unsaleable, and unfit for the purpose for which it was bought. That he had all along bargained for Philadelphia lintseed, shipped by Messrs. Alexander, and not for Virginia seed, as that sent turned out to be.—That even the lintseed sent was so bad as to come under the operation of the act 13 Geo. I., and was seized accordingly. Answered:—That the appellant's son had purchased the seed in question, after having carefully examined it, and being satisfied of its goodness. That the bill of parcels or invoice sent, bore *American* seed; and the last paragraph of his letter, which accompanied these invoices, plainly inferred that it was not the growth of Philadelphia. This letter said, "62 hogsheads of lint-" seed,—you will, I am hopeful, bring it to a good market, " as there is no appearance of your being rivalled from this " quarter. There is now some hogsheads Philadelphia seed " come in here overland, but they are sold at £4. 5s., ready " money."

After various steps of procedure, the Court of Session, on advising the case on informations, pronounced this interlocutor:—"Repel the defences proponed for Gray and Stew-" art, and therefore find them conjunctly and severally liable " to Alexander Ogilvie, in the price of the lintseed sold by " him to them, amounting to the sum of £260. 8s. Sterling " libelled, with the interest thereof, from and since 26th " October, 1765, until payment, and decern."

On reclaiming petition the Court adhered.

Mar. 7, 1769.

Pleaded for the Appellants.—The appellants have been grossly defrauded by the respondent, in the present case, they treated with him for, and he agreed to sell them, Philadelphia seed of Messrs. Alexander's importation, and the whole correspondence that passed proves this. Instead of sending Philadelphia he sent Virginia seed, by a scheme which enabled him to pocket the difference between £4. 4s. and £3. 10s. on each hogshead sold, effecting thus a profit of 14s. per hogshead. Besides, the Virginia seed sent was bad and unsaleable, it was so bad, as finally to be condemned under the 13 Geo. I.

Pleaded for the Respondent.—The transaction on the re-

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spondent's part was fair, open, and candid. Had he meant to pass the seed bought of Mason, for seed imported from Philadelphia by Messrs. Alexander, the seed would have been moved to Messrs. Alexander's warehouse, and there sold. The fairness of his dealing is further made manifest, by his letter to the appellants sending the seed, and acquainting them that young Gray had likely reported their agreement; and concluding there is *now* some hogsheads of Philadelphia seed come in here overland. In his answer, complaining of the seed, when its defects disclosed themselves, he does not object to the bargain, on the ground that one kind of seed had been substituted for another, and that the seed sent was not the seed bargained for. Besides, it was too manifest that the subsequent seizure of the seed arose from the appellants acting in collusion with the officers of the customs.

After hearing counsel, the Lords

Ordered and adjudged that the interlocutors complained of in these two appeals be reversed.

For Appellants, *Al. Wedderburn.*
For Respondent, *Ja. Montgomery, J. Dalrymple.*

Not reported in Court of Session.

The Rev. Mr. WILLIAM HEPBURN, - *Appellant;*
CHARLES, EARL of PORTMORE, - *Respondent.*

House of Lords, 12*th March* 1770.

RIGHT OF PATRONAGE.—On a vacancy occurring in the parish of Aberlady, the Crown and Lord Portmore respectively claimed the right to present. Lord Portmore founded his claim upon a disposition granted by the titular Bishop of Dunkeld, in 1589, (to whose see Aberlady was attached, as one of his mensal benefices.) which contained conveyance of the right of patronage: Held, that though such alienations were prohibited at that time by the act 1585, and the church benefices annexed to the Crown in 1587, and though no possession followed, by exercising the right to present on this title, yet Lord Portmore had best right to the patronage in question, which could not be lost by *non utendo;* and which had been ratified in Parliament in 1669.

The parish of Aberlady having become vacant, the right of presentation was claimed respectively by His Majesty (who presented the appellant), and by the respondent, who claimed the right of patronage, as having been conveyed