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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.

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

House of Lords, 12th 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

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to him along with his barony or lands of Aberlady, and declarator was brought by him against the Officers of State, to have his right ascertained. The parish originally belonged to the Bishop of Dunkeld, as part of his see; and the churches called Mensal churches, were a part of the estates of Scots bishoprics. They were so called, from being inseparably annexed to the bishopric, for the support of the bishop, who was perpetual rector, and had the appointment of the vicar, to whom a stipend was allotted out of the living. He could not assign this to any other body or person, spiritual or lay, which was expressly forbid by the canon law; and wherever the great tithes of a parish belonged, before the Reformation, to a bishop, or other ecclesiastical body, the right of presentation adhered thereto, and was not separable therefrom.

The respondent claims his right, through a sale or conveyance made on the part of the titular Bishop of Dunkeld to Patrick Douglas, of the parish of Aberlady, as one of his mensal churches, in 1589, which disposition is signed by his dean and chapter, and contains a conveyance of the right of patronage thereof. The lands were thereafter sold by Patrick Douglas to Sir Robert Douglas, and next to Alexander Hay, who obtained a new charter, without mentioning the patronage of Aberlady; and they were then by him sold to Fletcher, and by Fletcher to the respondent.

The Crown contended, that, by the act of Charles II. 1585, dispositions of the benefice, and leases of the tithes thereof, were strictly prohibited; and two years thereafter, all bishops' estates were, by act of Parliament, annexed to the Crown. The bishops were thereafter restored, in 1606, to "their honours, privileges, livings, and rents, as the same were in the Reformed Kirk most amply before the Act of Annexation, 1587, excepting all dispositions of patronages disposed by the titulars and his Majesty, provided they be ratified in Parliament." In 1617 another act passed, declaring it not lawful for any prelate to dispoise or alienate any of his casualties longer than for his own lifetime. The Crown further stated, that the right of the respondent flowed from the disposition of 1589, which being granted by the titular Bishop of Dunkeld, was inept under the above statutes;—that his predecessors were conscious of this, because no possession had followed upon it. On the contrary, the Bishop of Dunkeld, many years afterwards, and when Episcopacy was restored in 1606, entered into possession of

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the whole rights of the benefice and of the tithes of this parish ; and so satisfied was Patrick Douglas himself of the invalidity of his title, that, in 1611, he obtained a *lease* from the said bishop, and under this lease sold to the different landholders the tithes of their lands.

On the other hand, it was maintained by the respondent, that possession in such troublous times was not much to be regarded ;—that a right of patronage could not be injured or lost *non utendo* ;—that several acts of Parliament, above referred to, were intended to save the church from dilapidations, and couched in spirit and intention to benefit the church and bishops, so as their successors might not, by such alienations, be impoverished. But the Crown cannot derive any benefit from pleading these statutes. They can only be pleaded to the effect of favouring the bishops them-

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It further appeared, that in 1669 this conveyance of 1589 was ratified in Parliament, whereby his Majesty disposed to Sir Andrew Fletcher, the respondent's author, the foresaid lands, with the right of patronage, teinds, and others foresaid. Sir Andrew Fletcher continued to possess

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under this title till the year 1733, when the lands, with the right of patronage of Aberlady, came into the respondent's possession. And in regard to the point of possession, it was further urged, that between 1589 and 1645, no opportunity ever occurred for the patrons to present. During the period which intervened, the vacancies had been filled up by parochial calls, or settlements without recourse to presentations from the patron. A vacancy occurred in 1684, and on the minutes it appears that John Gray was inducted "upon presentation." but of whom is not said, a usual style when the presentation emanated from the bishop. After this, patronages being abolished in 1690, the two vacancies which occurred before the present vacancy, was made by parochial settlements, so that up to the present, no opportunity occurred of exercising possession under the right.

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The Lord Ordinary, of this date, "found that the right of presentation in question was in Lord Portmore, the pursuer, and decerned and declared accordingly."

Feb. 8, 1769.

On reclaiming petition to the whole Court, they, by an interlocutor, of this date, "sustained the defences, and decerned, and assoilzing the officers of state." The respondent reclaimed, whereupon the Court, of this date, pronounced this interlocutor :—

March 9, ———

"Having advised this petition, with the answers thereto, find that the right to the patron-

“ age of the church of Aberlady is in Lord Portmore, and  
 “ decern and declare accordingly, superseding extract till  
 “ the 20th June next.”

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Against this interlocutor the appellant presented the present appeal.

*Pleaded for the Appellant.*—The respondent himself all but gives up the ancient title of 1589. This title was void from the beginning, and, accordingly, his own authors acted upon this distinct understanding, abandoned it, and it was never completed by possession. A different right, that of a lease, was soon thereafter obtained by the same party who had obtained the disposition of 1589; and it is under this lease that the respondent can alone ascribe his title, right, and possession, for under it alone the teinds or tithes were uplifted and enjoyed by them, while the attendant right of presentation remained with the bishop, or those who had come or been put into his place, so that any claim on these ancient titles is lost by the negative prescription, as well as barred by the positive prescription. Thus prescription will equally operate against the ratification title of 1669, because no possession followed on it on the part of Sir Alexander Fletcher, and although no opportunity may have occurred of presenting, yet the substantial estate, namely, the parsonage and tithes, were never claimed, far less taken possession of by him.

*Pleaded for the Respondent.*—The charter from the Crown of 1589, to Patrick Douglas, proceeded upon a disposition and resignation from the bishop, with consent of his dean and chapter, erecting the lands and patronage, &c. into a barony, completed by infeftment—the most formal and perfect feudal right that could be contrived; all persons and powers having concurred therein. The uncertain state of public affairs in those days made it customary to obtain ratifications in Parliament of all grants from the Crown, and accordingly it appears from the ratifications 1669, that the grant had been ratified; and it is there again ratified. The patronage did pass as a part of the barony in the after charters and conveyances; and in that manner was conveyed by Alexander Hay to Sir Alexander Fletcher, who, having resigned the barony in the hands of the Crown, in 1669, obtained a new charter, with a novodamus, granting of new the lands and patronage; and that charter having been ratified in Parliament the same year, the right to the patronage became vested in Sir Alexander Fletcher. The Crown and church

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being thus divested of all right to the patronage, and it being incorporated with the lands, by the creation into a barony, no possession was necessary for the preservation of their right, it being an established principle in the law of Scotland, that rights of property cannot be lost or injured *non utendo*. But, in point of fact, possession had followed. The grantees of this right of 1669 granted presentations when they happened; as patrons they obtained exemption from ministers' stipend 1673 and 1749. But, above all, possession of the barony lands was possession of the patronage, upon the principle that possession of any part is possession of the whole, in lands so erected.

After hearing counsel, it was

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

For Appellant, *Al. Wedderburn, Al. Forrester.*

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

*Note.*—Unreported in Court of Session.

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JOHN WILKIE of Foulden, Esq. - -	-	<i>Appellant;</i>
SAMUEL SIMPSON of Nunlands, and the Rev.	}	<i>Respondents.</i>
Mr. JOHN BUCHANAN, Minister of the Parish of Foulden, - -		

House of Lords, 14th March, 1770.

GRASS GLEBE.—In the selection of any individual lands, out of which to design a grass glebe to the minister—(1.) Held, that kirk lands, though for sometime turned into culture as arable land, were to be designed in preference to other kirk lands *in pasture* at a greater distance from the manse. Also, (2.) Held, that the minister had a right to insist on such designation, though the proprietor of the arable land had agreed, in a division of a common within the parish, to give the minister the right of pasture, for one horse and two cows, in lieu of grass glebe, and the minister had enjoyed this right on the part of the common allocated to that heritor, for time immemorial.

The question in this case was, Whether a certain part of the appellant's estate was subject to be designed as a grass glebe for the minister, and had been lawfully so designed; and whether other lands ought not to have been taken in their stead?