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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. - - *Appellant;*

SAMUEL SIMPSON of Nunlands, and the Rev. Mr. JOHN BUCHANAN, Minister of the Parish of Foulden, - - } *Respondents.*

House of Lords, 14*th 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?

The solution of this question depended on an accurate view of the law on the subject, and on whether the appellant's lands were to be considered kirk lands, of the nature of unarable lands, or not.

By the law of Scotland, ministers are entitled, in rural parishes, 1st. To a manse; 2d. Four acres for corn glebe; and, 3d. To a grass glebe, sufficient to grass one horse and two cows.

The act 1663, c. 21, which regulates manses and glebes, has the following clause with reference to the grass glebe:— "That every minister (except such ministers of royal burghs, "who have not right to glebes,) have grass for one horse "and two kine, over and above their glebe, to be designed "out of kirk lands; and if there be no kirk lands lying near "the minister's manse out of which the grass glebe for one "horse and two kine may be designed; or *otherwise, if the* "*said kirk lands be arable land*, in either of these cases, or- "dains the heritors to pay to the minister and his succes- "sors yearly the sum of £20 Scots for the said grass for one "horse and two kine; the heritors always being relieved "according to the law standing of other heritors of kirk "lands in said parish." Also, "That in all designations of "glebes, incorporate acres in village or town, where the "heritor hath houses and gardens, the same shall not be "designed, he always giving other lands nearest to the "kirk."

Kirk lands are such as were anciently granted to churchmen for their livings, in consideration of spiritual services: and are still known as such, by their being described in the charters or grant, as *terræ ecclesiasticæ*, and are so distinguished from other lands in the parish, called temporal lands.

By the very nature of grass glebe, and by the express terms of the statute, this behoved to be designed out of kirk lands lying in pasture, not out of arable kirk lands: or, as it was called, infield and outfield. These terms were distinct. The former referring to arable land, and constantly under cultivation; the latter being pasture, and permanently remaining so, for the purpose of feeding cattle.

The appellant, Wilkie, and his ancestors, were proprietors, and infeft in the barony of Foulden, lying in the parish of Foulden, but not comprehending any *kirk lands*.

Another heritor in the parish was one Mr. Rule of Nunland, who fifty years stood infeft "in totis et integris terris

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" ecclesiasticis, rectoris et vicariis ecclesiæ parochialis de " Foulden extend. ad tres husbandias terras jacen in lie " runrig, infra villane de Foulden, cum mercata terræ vocat. " lie park, quæ jacet simul et contigue, ac etiam cum pas- " tura quadraginta duarum soumarum animalium, et pas- " tura septem equorum, dictis terris ecclesiasticis spectan. " annuatim pasturand. super communia et infra bondas an- " tedictæ villæ et territoriæ de Foulden, ac etiam in tota et " integra illa petia terræ vocat Nunland jacen. in villa et " territoria de Foulden."

In 1719 the appellant's father bought of Mr. Rule of Nunlands some small parcels of his lands, called Clartyburn, lying runrig, or intermixt with parts of the lands of Foulden; and, in a charter taken out of those lands in 1721, they are described, " Totas et integras terras et baroniam de Foulden, &c. " Ac etiam totas et integras tales. partes et portiones terrarum " ecclesiasticarum rectoriarum et vicariarum ecclesiæ paro- " chialis de Foulden, extend. ad tres husbandias terras ut " infra mentionat. viz. totas et integras tres quarterias terræ " in Whitecornlees tam outfield quam infield jacen. lie run- " rig cum dicti Jacobi Wilkie terris de Whitecornlees, et " totum et integrum dimidium terræ de lie infield jacen in " occidentali parte de Foulden et dimidium terræ lie infield " vocat Clartyburn."

The respondent, Simpson, purchased the estate of Nunlands from Rule; and the other respondent, Rev. Mr. Buchanan, having possessed nothing as a grass glebe, but a precarious right of pasturage on a common, applied to the presbytery of the bounds, to be designed a grass glebe, in terms of law. His petition was accordingly intimated to the heritors, who appointed inquiry to be made of the kirk lands in the parish. The minister himself fixed upon Clartyburn, which he represented to be kirklands, being those purchased by the appellant's father from Rule. The appellant admitted the purchase of parts of the estate of Nunlands, called Clartyburn, but objected, that as these were now in the natural course of agriculture, ploughed down and blended with parts of his lands of Foulden, that arable kirk lands could not be so designed. That the act of Parliament gave no power to design any but unarable kirk lands; and that he had made offer to pay his share of the £20 Scots, to be paid to the minister in lieu of grass glebe. The presbytery, regarding these objections as well founded in law, were of opinion that they could not

attach the appellant's lands of Clartyburn for the minister's grass glebe, in respect these were infield land; and being satisfied that the nearest unarable kirk lands in the parish were in possession of the respondent, they pronounced decree, designing a grass glebe out of the estate of Nunlands accordingly. A charge of horning being sued out on this decree, the respondent presented a bill of suspension, to which afterwards he added a declarator. Simpson contended, that formerly the heritors and the minister of this parish enjoyed their pastures in common, upon outfield lands and moors belonging to the heritors in common. The heritors divided that common among themselves about thirty-five years ago; and, upon a compromise, Mr. Wilkie undertook the burden of the minister's pasturage, and the minister accordingly possessed the pasturage of one horse and two cows, and twenty sheep upon Mr. Wilkie's lands; and the minister being thus already provided of pasture, had no right to demand a designation of grass glebe under the statute. Even supposing the respondent's lands to be kirk lands, they ought not to be designed, since they lay at a greater distance from the minister's manse, and were actually arable lands, consequently, in terms of the statute, the minister could only be entitled to £20 Scots yearly, in lieu of grass glebe. Answered by the minister.—That the minister's present pasture possession was a precarious right, and could not preclude him from his demand under the statute. That although, during the pendence of the present proceedings, part of the respondent's lands in question were ploughed down, yet this was merely to defeat the minister's right. But this could not be, as it was notorious that the whole of the estate of Nunlands was kirk lands, and described as such in the title-deeds. In reply, the respondent maintained that the statutory provision for ministers' glebes was intended for the benefit of those ministers only who were unprovided of a sufficiency of grass for a horse and two cows. That the minister could not say he was unprovided, since his predecessors had immemorially enjoyed a pasturage of one horse and two cows and 20 sheep on the appellant's lands; and if the minister now seek a designation, it must be out of those lands (the appellant's) from which he has so long enjoyed this right. This latter fact was denied to the extent stated.

The Lords pronounced this interlocutor:—"Having ad- Jan. 25, 1769.
"vised informations given in *hinc inde*, the Lords find that
"the grass for the minister's pasturage must be designed

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" out of John Wilkie of Foulden's lands, in the parish, and " not out of Samuel Simpson of Nunlands, his lands. Find " the said John Wilkie liable to the said Samuel Simpson in " the expenses of process hitherto incurred, and ordains an " account thereof to be given in to the Lord Ordinary, to " whom they remit the cause, to proceed accordingly."

The Lord Ordinary thereafter remitted " to the sheriff- " depute, or his substitute, of the shire of Berwick, to allo- " cate and set apart as much of the lands of Clartyburn, " and grounds adjacent, belonging to John Wilkie of Foul- " den (the appellant), as will be a sufficient grass glebe to " the minister of Foulden for a horse and two cows, with " power to the sheriff to take a proof by witnesses, of the " value of the grounds to be allocated, and to cause make " a plan thereof; all to be reported to the Lord Ordinary."

Against these interloculors the present appeal was brought.

*Pleaded for the Appellant.*—The act warrants only the designing of grass glebes out of kirk lands; and if there be no kirk lands, or if the kirk lands be arable lands, ordains £20 Scots to be paid by the heritors to the minister yearly, in lieu thereof. It being apparent to the presbytery, and to every one, that all the kirk lands that he was possessed of in the parish, were infield or arable lands, and had been in that state for time immemorial, and so described in his charter of 1721, as " dimidium terræ lie infield vocat Clarty- " burn," these lands were not subject to be designed. And the pasture formerly enjoyed by the minister in common with other pasture rights on the common within the parish, could not affect the present question in any manner of way, because the common lands and kirk lands of Clartyburn were distinct.

*Pleaded for the Respondents.*—It is admitted that the minister has had an immemorial right of pasture upon the appellant's lands, on that part of the common allocated to him when the division thereof took place, therefore, if the minister insists for a designation, that designation will fall to be made out of his lands. And it is no answer to this, that the appellant's lands, particularly that part consisting of the kirk lands, have been reduced to culture, and converted into arable land; because the very fact of their being kirk lands informed him of the burden which they were subject to, as from the minister, and therefore he cannot, on this ground, remove that burden from himself and lay it on the respondent.

After hearing counsel, it was
Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed, with £60 costs.

For Appellant, *Ja. Montgomery, Al. Wedderburn.*
For Respondents, *Al. Forrester, Thos. Lockhart.*

*Note.*—Unreported.

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JAMES SIMSON, - - - *Appellant;*
ALEXANDER M'MILLAN, and WILLIAM M'DONALD, Writer, his Attorney, - } *Respondents.*

House of Lords, 16*th March*, 1770.

SALE—ABSOLUTE RIGHT OR RIGHT IN SECURITY.—Circumstances in which a sale of houses by auction was held to be unwarrantable, rigorous, and unfair, from the conduct of the seller, the conduct of the judge, and from the price at which it was sold. Also circumstances in which certain letters proved that an absolute disposition was a right merely in security.

The appellant, a merchant in Glasgow, was in the habit of making advances to the respondent, Alexander M'Millan, a herring and provision merchant in Campbelton. These advances amounted at one time to £1277. 9s. 2d.; and various and repeated letters having been sent to the respondent for payment, his brother thereupon became bound along with him by the following letter:—" 23 *September* 1757. " As you have on the 13 instant advanced £1277. 9s. 2d. " Sterling to my brother Alexander M'Millan and me, I " hereby bind and oblige me to pay the same, with interest, " and one half per cent. likewise, for such sums as you shall " advance for our joint account in time coming."

The appellant, notwithstanding this letter of security, did not receive payment of his advances as he wished; and he resorted once more to pressing letters. In some cases, answers came with small remittances, and promises of the balance when his houses in Campbelton and his ship were sold.

Again the appellant wrote, stating, " As you don't find " any person in your country disposed to purchase your " houses, &c. in Campbelton, rather than they should be " sold under the value, I believe I had better take a right " to them. They may probably become more valuable some