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right, unless interrupted. The act 1664 could have no such effect, as passed in an assembly held against the will of the Sovereign, where he could not be presumed present, and where, therefore, the proceedings in such a matter, could not be considered as a document taken against the Crown, or have more force than a private protest. The exception in the rescissory act 1661 does not apply to this case, as it related only to rights and securities granted to private persons; whereas here no right or security was granted to the Earl in 1644, as no charter passed upon the act, which was at best only a simple ratification of the procuratory of resignation, and such ratifications, even in lawful Parliaments, passed *periculo petentium, et salvo jure cujuslibet.* Nor can the presentation granted by Lord Home in 1728 be considered as an interruption, unless it could be said, that the presentee was settled in consequence thereof, and not upon the Crown's presentation, which is proved to have been the case, by Mr Waugh's obtaining the gift of the vacant stipends from the Crown.

It appeared to be the opinion of the Court, *1mo*, That where no private person can shew a right to a patronage, it is presumed to belong to the Crown; and, *2do*, That the act 1617 extends to patronages in so far as they may be acquired by the positive prescription. But some of the Judges doubted as to this second point. By the first interlocutor, the Crown was preferred to the patronage in question; but on advising a reclaiming petition, and answers, the decision was altered, as it seemed chiefly in respect of the act 1644 being considered as an interruption, and of the Crown's possession in the *vice* of Hutton not being of sufficient length for completing the prescription.

"The Lords preferred the Earl of Home to the patronage of Hutton."

Act. *Lockhart, Ferguson.* Alt. *A. Pringle, Advocatus.* Reporter, *Woodhall.*

D. R. *Fol. Dic. v. 4. p. 94. Fac. Col. No 129. p. 238.*

*** This case was appealed:

1759. *March* 7.—The House of Lords Ordered and Adjudged, that the interlocutor complained of be reversed, and that the interlocutor of June 27th, preferring the Crown to the patronage in question, be affirmed.

1769. *March* 1.

Lord Kennet, and Others, *against* Lady Francis Erskine.

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Instance of a right to tolls and customs acquired by the positive prescription.

By a charter *anno* 1602, James VI. erected the town and port of Alloa into a burgh of regality and barony, in favour of John Earl of Mar, 'cum omnibus privilegiis et liberatibus liberarum nundinarum, et ut recipiant et exigant omnes tholas, custumas, aliasque divorias earund. sicuti recipiuntur, et ut spec-

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tant alicui foro, seu liberis nundinis burgorum liberorum baroniæ et regalitatis infra regnum nostrum; et generaliter, cum potestate agendi, utendi, et exercendi omnes alias libertates et commoditates quascunque, ad liberum burgum baroniae et regalitatis, forum hebdomadale, liberum nundinum, liberum portum marinum, et littus spectand.'

This clause was repeated in succeeding charters; and, upon the forfeiture of the last Earl, the estate being purchased by Lord Grange, was disponed to him by the commissioners of enquiry, 'with the yearly fairs and markets thereof, and tolls and customs belonging to the said Earldom.' In these terms, a charter under the Great Seal passed in 1725, and new charters were afterward expede by Lord Erskine, and Lady Francis Erskine.

Under these titles, the family of Mar had been in possession of levying, *1st*, A duty upon goods landed at the shore; *2dly*, A duty upon goods brought from the country, and passing through the town; *3dly*, Certain dues at fairs and markets.

In a declarator of immunity, it was *pleaded*; That such exactions could not be supported upon mere possession, without a title; and that the charter was no title, since it conferred no other rights but such as belonged to all boroughs of barony as such.

Answered; The clause in the charter is broad enough to carry the customs in questions; 15th November 1754, Town of Lauder *contra* Brown, No 101. p. 1987.

At the same time, it was contended, that immemorial possession was sufficient of itself; at least, that it presumed a title. The statute 1587, c. 54, plainly proceeds upon that supposition; and so it is understood by Sir George Mackenzie, in his observations.

'The Lords sustained the defence, and assoilzied.'

Act. *Alex. Abercromby*. Alt. *Wight*. Reporter, *Auchinleck*. Clerk, *Ross*.

G. F. *Fac. Col. No. 91. p. 342.*