1726. *February* 4. MAGISTRATES of HAMILTON *against* DUKE of HAMILTON.

No 47.

THE town of Hamilton was erected into a royal burgh, by a charter from Queen Mary, 1548, giving them power to chuse their own Magistrates, &c.—This charter, as it would seem, having been neglected, the town afterwards, in the year 1670, accepted of a charter from the family of Hamilton, erecting it into a burgh of regality, with a power to the Duke of Hamilton to create Magistrates, admit burgesses, &c. as in other such burghs. In consequence of this charter, the family of Hamilton continued to exercise the privileges and powers of Lords of Regality upwards of 40 years, till a declarator of their privileges, as a royal burgh, was raised, and insisted in by the town; and they *pleaded*, That the privileges of a royal burgh, as being *juris publici*, can neither be lost by the negative or positive prescription; the LORDS sustained the prescription in favour of the Duke, as to the way and manner of the election of the Magistrates and Town Council of the burgh. See APPENDIX.

Fol. Dic. v. 2. *p.* 102.

1729. *December.* NICOLSON of Glenbervie *against* VISCOUNT of ARBUTHNOT.

No 75.

TEINDS belonging to a parsonage, and consequently *extra commercium* before the act 1693, whether such could be carried by positive prescription, debated, but not finally determined. See APPENDIX.

Fol. Dic. v. 2. *p.* 103.

1758. *July* 28.
WILLIAM EARL of HOME *against* THE OFFICERS of STATE.

No 76.
Instance of a right of patronage acquired to the Crown by the positive prescription.

IN 1403, Alexander Home of that Ilk, the Earl of Home's predecessor, founded the provostry of Dunglas; and that foundation was confirmed by a charter under the Great Seal in 1450; and since that period, the patronage of the provostry, and prebendaries thereto belonging, was carried down in all the title-deeds of the family.

William Earl of Douglass, in 1451, disponed the parish-kirk of Hutton, to the college-kirk of Dunglass, and the patronage thereof to the said Alexander Home, and his heirs and assignees. This grant was confirmed by a charter under the Great Seal in 1458.

In 1565, the Archbishop of St Andrew's granted a collation to Mr John Home, upon Lord Home's presentation, of the said provostry of Dunglas, proceeding upon the recital of the same being vacant, with all its parts and per-

No 76. tinents, viz. Ecclesia parochialis de Hutton, nempe, rectoria et vicaria perpetua ejusdem, &c.

Some time before the 1614, the parish of Hutton was united with the parish of Fishwick, whereof the patronage belonged to the Crown.

In 1614, Mr Allan Lundie was presented by the Crown to be minister of the united parishes.

In 1636, the Crown presented Mr James Lundie to the united parishes. He was afterwards deposed, and his deposition was approved by the Assembly 1649.

In 1644, the provost aud prebendaries of Dunglas, and James Earl of Home, as patron thereof, granted procuratory for surrendering the said college-kirk, and right of patronage thereof, together with all lands and patronages of kirks thereto belonging, in the hands of his Majesty, to the effect the name of the said college-kirk might be *simpliciter* suppressed, and that his Majesty might give and dispone the same in manner therein mentioned. An application was thereupon made to Parliament; and the estates of Parliament, on the 29th July 1644, passed an act, ratifying and approving of the said procuratory, and ordaining a charter and infeftment to be granted under the Great Seal, disponing to the said Earl of Home, and his heirs-male, heritably, all lands, teinds, and right of patronages, which pertained of old to the said college-kirk, viz. the patronage of the parish-kirk of Hutton, &c. containing an union of the hail lands, to be called the barony of Upsettlington. It did not however appear, that any charter was actually expede on this act of Parliament.

From that time, as patronages were abolished, the kirk of the foresaid united parishes was possessed by ministers who entered upon calls, till 1679, when the Crown presented Mr James Orr, who survived the next abolition of patronages in 1690.

After Mr Orr's death, Mr Gilbert Laurie was admitted on a call, and continued till his death in 1728; when a presentation was granted by the Crown, and another by the Earl of Home, to Mr Robert Waugh, who was settled. He applied to, and got a gift from the Crown, of two and a half year's vacant stipend, which he uplifted accordingly.

Upon Mr Waugh's death, the Earl of Home pursued a declarator of his right to the patronage of Hutton, and of his having thereby a joint right with the Crown to the patronages of the united parishes of Hutton and Fishwick. To this process he called the Officers of State as defenders in behalf of the Crown, and they accordingly appeared, and maintained, that the Crown had acquired the sole right to the patronage of Hutton as well as Fishwick, by the positive prescription.

Answered for the pursuer, *1mo*, The positive prescription does not apply to rights of patronages, which, by their nature, do not admit of that continued possession which prescription essentially requires. It is the negligence of the proprietor which justifies such an acquisition of property to another. Now, a

patron has no proper possession, but rather a right to exercise a power at such periods as a vacancy occurs. Suppose, on a vacancy, the true patron neglects his right, and another person gives a presentation in favour of one who is admitted, and lives above forty years thereafter, the true patron has no method to repair his error, or access to assert his right during the common years of prescription. Thus, if prescription operated in such a case, he might be stripped of his right by the encroachment of another in one single act, which would be extremely hard.

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2*do*, Supposing the prescription to apply, yet the Crown has here no sufficient title to acquire this patronage by it. The foundation of patronages depends on endowment, which may originally have been made by a subject, as well as by the King. The Crown's presumptive title to all lands to which some other does not show a right, does therefore not extend to patronages. All lands must be derived from the Crown originally; but patronages may have come from a subject. At any rate, *præsumptio cedit veritati;* and as here it appears the Crown was once denuded of the patronage, or had acknowledged the right to be in another, the presumptive title must fly off, and cannot be revived by mere possession, without a new title to found it. And,

3*tio*, Were the title of the Crown sufficient, yet there has been no sufficient possession upon it for acquiring this right—After the union of the two parishes, the patrons were entitled to present *per vices*. The Crown was therefore entitled to present Mr Lundie in 1614, being the first *vice*. The same was the case as to the third presentation of Mr Orr in 1679. The possession of these two presentees, and the thirty years before the 1679, when the possession was held without any presentation, must be laid aside.—The only possession, therefore, on which the Crown can found, is that of Mr James Lundie, the second presentee, who only possessed for thirteen years, which is far short of prescription; and during that period, the Earl's predecessor asserted his right in the most public manner, by obtaining the act of Parliament 1644, whereby a new grant of the patronage was ordered to be made to him. The acts of that Parliament were indeed rescinded after the Restoration; but the rescissory act 1661 contains a declaration, That all acts, rights, &c. in favour of any particular persons, passed in the pretended Parliaments, should stand good and valid until taken into further consideration; and at any rate, the obtaining such an act in the 1644 was a solemn document taken on the Earl's right, sufficient to interrupt prescription.—Further, as Mr Orr's possession after the 1679 cannot be presumed to have been unlawful, when it can admit of a lawful construction, as founded on the Crown's right to the patronage of Fishwick, there was no prescription run before the abolition of patronages in 1690; and the subsequent settlement, on a call, cannot affect the Earl, nor that of Mr Waugh in 1728, as the Earl, as well as the Crown, presented him.—Upon the whole, therefore, the Crown has no continued possession for forty years; and consequently the Earl's right still stands good.

No 76.

Replied for the Crown, 1*mo*, The act 1617 extends to all heritable right whatever. Although it speaks of subjects which pass by charter and infeftment, yet it has always been explained to comprehend tacks and other such rights, constituted without infeftment. Upon the same principle, it has been understood to extend to patronages, Stair, lib. 2. tit. 12. § 23.—Few rights admit of a possession that can be exercised every moment of the forty years; it is sufficient, if they are such as can be exercised occasionally within that space. Thus a fishing is not daily exercised; yet a right thereto, or to a road to a church, or a burial-place, may certainly be acquired by prescription. Besides, there are other rights belonging to patrons, as well as the power of presentation, which may be exercised while the benefice is full, and the consequences of debarring the force of prescription as to such rights, would be fatal to many.

2*do*, The Sovereign, *jure coronæ*, has certainly a right to possess all patronages to which no other person can instruct a title. The title for prescription by a private person, in acquiring lands, is charter and sasine; because that gives him right to possess; but as the Crown needs not an infeftment, the *jus coronæ* must be a sufficient title, by the nature of the thing, for acquiring a patronage, upon the same principle that a person possessing on a long tack for forty years, is allowed the benefit of the positive prescription without infeftment. After possession had upon the *jus coronæ* for the years of prescription, every deed and title which is set up against the right thus established, must be held, in the eye of law, to be false and forged, agreeable to the act 1617. And,

3*tio*, It is evident, that from the 1614, down at least to the 1728, the Crown only presented upon every occasion that offered; and no evidence is produced of the family of Home having ever presented to this parish during that time; so that the Crown's possession is immemorial. Again, it does not appear when the two parishes were united; consequently it is not certain that the presentation 1614 was given in the right of Fishwick. But supposing it was, the presentation in 1636 was confessedly in right of Hutton; so on the vacancy 1649 the *vice* belonged to Fishwick; and of course that in 1679 belonged to Hutton. Hence it follows, that this last settlement was another direct act of possession by the Crown. In the same manner, the right of presentation in 1693 belonged to Fishwick, and in 1728 to Hutton; when the Crown not only presented, but disposed of the vacant stipend; for although, by the acts of Parliament 1649 and 1690, the right of presentation was taken away, yet the right of patronage, in other respects, still continued; and consequently in *vice* patronages, the patron who was deprived of his right of presenting by the public law, could not, upon restoration of that right, encroach upon the privilege of the other patron, by claiming the *vice* which did not belong to him. Now, where possession of the patronage once commenced, prescription continued to run, notwithstanding those statutes by which the right of presentation was for some time taken away; and that prescription must necessarily establish the

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.

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It appeared to be the opinion of the Court, 1*mo*, That where no private person can shew a right to a patronage, it is presumed to belong to the Crown; and, 2*do*, 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.

No 77.
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-