

[M. 10,777.]

HIS MAJESTY'S ADVOCATE, - - - *Appellant*;
 EARL OF HOME, - - - *Respondent.*

1759.

HIS MAJESTY'S
 ADVOCATE
 v.
 EARL OF HOME.

House of Lords, 7th March 1759.

PATRONAGE—PRESCRIPTION—POSSESSION—COMPETITION OF RIGHT TO PRESENT.—Held the right of patronage reverted back to the Crown by 40 years' possession of the right of presenting, although an ancient right existed in a subject on which no possession had followed.

ON the church of the united parishes of Hutton and Fishwick becoming vacant, by the death of the incumbent, his Majesty was pleased to present the Rev. Mr. Philip Redpath to the vacant benefice. The Earl of Home, also claiming the patronage of the parishes, presented Mr. George Bell, and brought an action of declarator to have it found that he had best right to present to the vacant benefice, on the ground, although he had no right to the patronage of Fishwick, and admitted his Majesty's right to present *per vices* to the united parish, yet with respect to Hutton, he had right to the patronage of the same, by charter from William Earl of Douglas, dated 26th April 1451, granting the parish kirk of Hutton to the collegiate kirk of Douglas, and the patronage thereof, to Sir Alexander Home of that ilk, which grant was confirmed by a charter under the great seal, of 8th May 1458, and that the patronage had continued in all the subsequent investitures of the estate of Home. The respondent pleaded that possession had followed in 1728, when his guardians presented to the living. Defence. The king is by law patron of all benefices in Scotland, and rights of subjects to patronages have all originally flowed from grants of the crown; and that the antiquity of the Earl's charter, obtained from the Earl of Douglas, was not good without possession, which had not followed upon it. On the contrary, the crown had been in possession, and had presented for more than forty years. Answer. That prescription did not take place in the case of patronages. Reply. Both by the law and practice, prescription did run in the case of patronages. The Lords of Session at first preferred the crown to the patronage; but, on reclaiming petition, the Court altered and preferred the Earl of Home. The crown appealed.

June 27, 1758.

1759.

 GORDON
v.
 GORDON.

For the appellant it was pleaded, That his Majesty, *jure coronæ*, is by law the original patron of all the benefices in Scotland. The crown can only be divested of this right by one of two ways; either by special grant from the king, or by forty years' uninterrupted possession following on a charter and sasine in favour of a subject. In the present case, no possession is alleged, and of consequence, the charter from Earl Douglas, on which the respondent's right is solely founded, can be no title, in competition with the crown. The right is returned to the crown by non-use, under the old charter, whereby the appellant has separately acquired a title by positive prescription, and uninterrupted possession.

Counsel were called in, and counsel appearing for the appellant (but none for the respondent), they were heard to state and argue the case on behalf of the appellant: and having prayed a reversal of the interlocutor complained of, they were directed to withdraw; and due consideration being had of what was offered, it was

Ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is, hereby reversed; and the interlocutor of the Lords of Session of the 27th June 1758, preferring the crown to the patronage be, and the same is hereby affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*

Note.—Lord (Chancellor) Hardwicke has this note on his appeal papers, “Reversed, the respondent making default. The Crown is great patron of all livings in Scotland, unless a title be shewn against the king.”

 [Mor. 6678.]

DUKE OF GORDON,	-	-	-	<i>Appellant;</i>
JOHN GORDON,	-	-	-	<i>Respondent.</i>

House of Lords, 21st March 1759.

PROOF—FRAUD—RELEVANCY.—General allegations of fraud are not relevant to go to proof.

IN this case (which see reported in Morison, p. 6678), it was held, in a reduction of a lease, that general allegations