

1773. December 15. [COMMISSIONERS of the ANNEXED ESTATES against SIR ROBERT MENZIES.

KING—PRESCRIPTION.

Operation of Prescription against the Crown.

[*Dictionary*, 7860.]

HAILES. It is singular that this question has never been determined one way or other. It would have occurred in a case, 1686, between *Sir George Mackenzie*, as king's advocate, and the *Landholders*, about the skirts of Drumshorelan Muir; but that question stopped at some preliminaries: I will not say by what means. [There is a tradition that the defenders gave Irish money, and compounded.] It occurred again in 1711, in a case where the *Earl of Leven* was a party; but that cause went off upon positive prescription. I do not think that the king could plead on the negligence of his officers. If that plea had been held tenable, it would have been used in 1590, in the following case recorded by Spotiswood. Cardinal Beaton had granted an obligation for a considerable sum to the treasurer for the behoof of James V. This debt was made over by James VI. to the Duke of Lennox. He pursued the heir of Cardinal Beaton. He pleaded, action is lost by negative prescription. It was answered by the Duke, not that the negligence of the king's officers could not prejudice him, but that Q. Mary and James VI. had been minors during great part of the time which had intervened. Spotiswood, Title *de Usucapionibus*.

As this argument was not then urged, though *rege præsente*, I think that it must be founded on the Act 1600, or not at all. I do not think that it is founded on the Act 1600:—1st, Because it seems to relate to a different matter; and 2dly, Because Sir George Mackenzie does not venture to say that it relates to this supposed privilege of the Crown. There is a passage, indeed, quoted from Vinnius, which is abundantly strong, but it proves too much. For he says, or seems to say, that the *procurator fisci* has so much business to take up his attention, that the negative prescription ought not to take place against him, either in his own causes or in the sovereign's causes. This, with great submission, I hold to be very bad law. I consider it to be a compliment which Vinnius meant to pay to some great man in power.

JUSTICE-CLERK. There have been many occasions for the king's pleading this exception, but it never has been pleaded.

AUCHINLECK. The plea might have had a face in the reign of Charles II. but it has not in the reign of Geo. III.

COALSTON. There is an error which runs through the argument for the king's advocate, namely, that both the negative and the positive prescription are *in pœnam negligentia*. All that the statutes do, is to confirm the natural presumption that, after long taciturnity, the debt was either not due or has been paid; and to make this a legal presumption, the argument in effect is, that natural and legal presumptions are not to operate against the Crown.

On the 15th December 1773, the Lords assoilyied.

Act. Advocatus. Alt. R. M'Queen. Teind-Court.