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ton, was sustained for necessaries furnished to the Earl in prison and on his trial; and the judgment affirmed by the House of Peers.

Interest is due for furnishings when payment is delayed; and this is no penalty, which by the vesting act is not due, but is the equitable right of the merchant.

Answered, No debt of Lord Lovat's, contracted after his estate was vested in the King, can be recovered out of it, as was found 8th November 1750, Baron against the King's Advocate, *voce* FORFEITURE. There was a special statute after 1715, saving debts *bona fide* contracted after the time of vesting; interest is allowed to merchants *nomine damni*, which is a penalty for delay of payment, conventional penalties being considered as only liquidations of the damage, and restricted thereto if they exceed.

Replied, There is a difference betwixt a bill granted after the time of vesting which was Baron's case, and articles continued to be furnished, when the account begun before.

THE LORDS dismissed the claim for the articles furnished after 24th June 1745, and found interest not due out of the estate on any of the accounts; and dismissed the claim therefor.

Act. *Hamilton-Gordon.*

Alt. *Advocatus.*

D. Falconer, v. 2. p. 267.

1773. December 15.

COMMISSIONERS of ANNEXED ESTATES *against* SIR ROBERT MENZIES.

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An old report, ascertaining the teinds of a parish, (of which parish a forfeited estate formed part), being found among the records, it appeared from it, that the stipend which had been paid for above forty years, exceeded the valued teind. The commissioners for the annexed estates, brought an

THE stipend of the united parishes of Fortingall and Killichonnan, was augmented by a decree of this Court in 1727 and the augmented stipend was localled in 1729.

Some years ago, upon opening a hogshead of papers in the Low Parliament House, many reports were found of the sub-commissioners who had been appointed in the reign of Charles I. for ascertaining the teinds of the lands in the different presbyteries; and, among others, there was found a report of the value of the teinds of the parishes of Fortingall and Killichonnan; and many of the heritors of these parishes did institute actions, and obtain decrees, approving the report, with regard to their respective lands.

The heritors who obtained such decrees, finding the teinds of their lands more than exhausted, by their respective shares of the augmented stipend, which had been localled upon them, did institute actions for reducing the decree of locality; and the Court accordingly reduced, in so far as it allocated more stipend upon the lands of the pursuers 'than the value of their teinds, conform to their decrees of valuation and approbation produced;'

saving, at the same time, the minister's right to recover payment by the old locality, until a new locality should be settled by an extracted decree.

Part of the forfeited estate of Strowan is in the parish of Killichonnan, the valued teind whereof by report of the sub-commissioners, is L. 8 : 18 : 6d eight-twelfths Sterling ; but the stipend in use to be paid, since the minister's decree of locality, exceeded the valued teind in L. 6 : 7 : 0 six-twelfths Sterling ; and an action having been now instituted in name of the Commissioners of the annexed estates, for having the report of the sub-commissioners approved, so far as respected the teinds of that part of the estate of Strowan, situated in the parish of Killichonnan ; Sir Robert Menzies, the patron, and titular of the teinds of that parish *objected*, That, as the pursuers had not commenced their action within 40 years of the decree of locality, but had continued to pay the surplus stipend for more than the years of prescription, the report of the sub-commissioners could not now be approved, the same having been derelinqushed by the contrary use of payment.

The answer made on the part of the pursuers to the plea of dereliction, led to an argument upon two questions in law ; *1st*, Whether the negative prescription operates against the crown ? and, *2dly*, Whether the statute, 14th parl. 1600, founded on by the pursuers, is applicable to this case ?

Argued for the pursuers, in the *first* place, that, although no case has been discovered where the question has been tried, whether the negative prescription is good against the crown or not ; yet it seemed to be the opinion of all the writers upon our law, that the negative prescription does not operate against the crown. Dirleton, p. 140. Tit. Prescription against the King, Stair, b. 2. tit. 12. b. 2. tit. 3. § 33. Bankton, b. 2. tit. 12.

2dly, *Nullum tempus occurrit regi*, is a maxim in the law of our neighbouring country ; and there it is held, that no prerogative, right, or privilege of the King, can be affected by any statute, unless the statute is made, by express words, to extend to the King. And our legislature seems to have been governed by these principles, when forming the statute of prescription 1617 ; for, by that statute, the positive prescription is declared to be effectual, in express terms, against the King ; which clearly implies, that otherwise it would not have been effectual ; and, by omitting to declare the negative prescription, likewise enacted by that statute, to be effectual against the King, it is plain, that it was not intended to be so ; and that the statute 1600 was allowed to have its full operation with regard to the negative prescription.

As to the *second* point, *argued* ; The words of the act 1600 import, that the King shall not be hurt by the negligence of his officers. And Sir George Mackenzie, in his observations, says, ' by this act, it is declared, that the negligence of the King's officers, in pursuing or defending a cause, shall not prejudice the King ; and, therefore, competent and omitted, is never received against the King, though it be against private parties ; and by this act, it would appear, that the King may propone a nullity of a decree obtained

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action of approbation of this report, but it being objected, that the report was cut off by the negative prescription and contrary use of payment, the Court dismissed the action, altho' it was pleaded, that the negative prescription does not operate against the Crown.

No 15. against him, even *in foro*, before the Lords of Session, by way of exception or suspension, without a formal reduction.'

The reports of sub-commissioners who were appointed to take evidence for ascertaining the value of teinds, as a matter of public police, did resemble the reports and proofs upon acts and commissions; and being evidence of a fact, they could not be hurt or weakened by the lapse of time, or subject to the negative prescription; and accordingly, the plea offered in bar of the report of the sub-commissioners being approved, in this case, is not, that the report is lost or cut off by the negative prescription; for that would operate against all reports not approved within the years of prescription; but that the right of having the report approved, is *præsumptione juris et de jure*, derelinquished by a contrary use of payment for above forty years.

The adverse party will admit, that the statute is sufficient to prevent the Crown being hurt by any neglect in the conducting of a process; and, if so, it must be sufficient to prevent the Crown being hurt by its officers neglecting to commence an action, in due time, so as to bar the presumption of dereliction; and, indeed, the very word dereliction implies that kind of neglect that must have been intended to be prevented by the statute 1600.

Moreover, it appears a strange contradiction and solecism to suppose, that any person, in justice or reason, can lose, or be losing a right by dereliction, while he is ignorant that such right exists, or had it in his power to discover it. That was the case, with regard to the reports of the sub-commissioners, found in the hogsheads. The pursuers were ignorant of them, and, by no care or attention, could come at the knowledge of them, until they were discovered by curiosity and accident. How then could they, or any person in such circumstances, derelinquish what they did not know?

Argued for the defender: *Imo*, It is clear, from the statute itself, that it was calculated merely to prevent any loss that might arise to the Crown by the misconduct of its officers in the management of processes in which the Crown was interested; but there is nothing in the statute from which it can be inferred, that it was meant and intended to remedy any loss that might arise to the Crown, by its proper officers neglecting to bring in due time actions that were competent to the Crown. If it were to receive such construction, it would lead to great confusion and embarrassment, and to perplex and render insecure the rights of the subjects.

There is, too, no room for maintaining that the negative prescription does not run against the Crown. As it was a general and wise measure for quieting the minds of the subject, so the statutes by which the negative prescription stands established in the law of Scotland, are clearly conceived in general terms, without any exception of any person or persons whatever, minority alone excepted; the defender, therefore, cannot discover any rule by which it is not to run against the Crown, as well as against the subject. The great object of the law could not be obtained, were the subjects to be exposed to actions at the in-

stance of the Crown, at the distance of 500 years from the date of the obligation upon which the claim was founded, and notwithstanding the same had never been heard of in the memory of the oldest man living, and that no vestige appeared in the records of any court, of any demand ever having made upon it.

The express exception of minority, in the latter clause of the statute 1617, establishing the negative prescription, as to heritable bonds, reversions, contracts, &c. shews that the Legislature had in view the persons against whom the prescription ought not to strike; and, as the Legislature had, in the prior part of the statute, establishing the positive prescription of heritable rights, expressly declared, that such prescription should militate against his Majesty, it is impossible to doubt, that, when the Legislature appears to have had under view the persons against whom the negative prescription should not militate, that it would not have been declared in express terms, that the negative prescription, introduced by the latter part of the statute, should not militate against the Crown, if it had been so intended by the Legislature; and when, under the foresaid circumstances, the law is conceived in general terms, under the special exception of minority, it is plain that it was intended by the Legislature to have a general effect.

Neither can any argument arise in favour of the pursuers, from the circumstance, that, by that statute 1617, the positive prescription is declared expressly to run against his Majesty; whereas, the prior statutes introducing the negative prescription, are silent upon that point, and contain no such declaration. The declaration in the statute 1617, was properly insert, in order to prevent the very plea that is now maintained by the pursuers. The statute now founded upon by them, did not exist either at the date of the statute 1469, or 1474; and, therefore, it was sufficient that these statutes should be conceived in general terms, without any exception. It did not occur to the Legislature as necessary to insert a special proviso, declaring that his Majesty's right and property should be governed by the laws calculated for the general good of the kingdom; but, as the statute now founded upon by the pursuers, was made anterior to the statute establishing the positive prescription; so, in order to prevent any doubt whether that statute would prevent prescription from running against the Crown, it is declared, in express terms, that the prescription thereby established, should militate against the Crown, as well as against the subject; so that this anxious provision in the statute, does truly afford a strong argument in favour of the proposition now maintained by the defender, as it shows, that, in the question of prescription, the Legislature did not mean to distinguish betwixt the rights of the Crown and the rights of the subject.

And, indeed, there is no solid ground in reason for distinguishing betwixt the case of the positive and negative prescription. Both the one and the other was a proper and a salutary measure, and a general remedy wisely calculated for the security of property, and quieting the minds of the subject; and, therefore, the

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In fine, as the statutes establishing the negative prescription are general, without exception, farther than that of minority, the same must, therefore, run against the Crown; and, as the statute 1600, founded on by the pursuers, does not apply to the case of the officers of the Crown neglecting to institute proper actions for vindicating the rights of the Crown in due time, the pursuers cannot difference the present question from the case that hath been so frequently determined by the Court, viz. that the reports of the sub-commissioners are subject to dereliction; and that, where a higher teind than the teind ascertained by the report, has been paid for the space of 40 years, the same is a clear abandon and dereliction upon the part of the heritor, and is, of itself, a sufficient bar to a process of approbation.

But, *2do*, Even were the Court of opinion, that the negative prescription did not run against the Crown, the defender, notwithstanding, would be well founded in the defence of dereliction. The negative prescription arises merely *non utendo*. It runs by the creditors neglecting to prosecute, or to take a proper document upon his right; whereas dereliction does not arise merely *non utendo*. Accordingly, it has been found, and is now understood, that the reports of the sub-commissioners are not liable to the negative prescription; but dereliction is founded on the act and deed of the heritor, acting inconsistently with the decree he had obtained before the sub-commissioners.

Now, although the statute 1600 should be so construed as to apply to every case where the Crown suffers by the neglect of its officers, whether in the course of conducting causes, or of not raising the proper actions that are necessary for vindicating and ascertaining the rights of the Crown; yet there is not a word in the statute that will apply to acts of commission. It clearly applies to omissions only; and, although the Crown is not to be hurt by the sloth and negligence of its officers, yet the defender hoped the plea would never be maintained (far less sustained by the Court), that the Crown is not to be bound, or that the rights of the Crown are not to be affected by its own acts and deeds, or the acts and deeds of those that are properly authorised by the Crown. Where a greater sum than the valued teinds, as ascertained by the report of the sub-commissioners, has been paid by those in the right of the lands for the space of 40 years, it establishes a presumption, *juris et de jure*, that the report of the sub-commissioners had never been looked upon as the real and just value of the teinds, but that it had been abandoned, *ab initio*, by the parties interested in it; and that an approbation of it had not been applied for, because they knew that such objections did lie against it, as would have been an effectual bar to the approbation, if the same had been applied for. This question was accordingly so determined by the Court in the 1751, in the well known case, the Earl of Morton and Captain Stewart of Dunearn, against the Officers of State and the Marquis of Tweeddale; and, in the very late case of Lord Elibank against the Officers of

State, the report of the sub-commissioners was found in the hogsheads as well as the present, and yet the Court sustained the plea of dereliction, as sufficient to bar the approbation. And in this question there is no ground, either in law or in reason, for distinguishing betwixt the case of the Crown and that of the subject. The statute 1600, founded upon by the pursuers, is entirely foreign to this question.

THE COURT 'assoilzied from the approbation.'

N. B. See decision, Stair, 1st February 1671, Ferguson against Parishioners of Kingarth, *voce* PRESCRIPTION.

Act. Lord Advocate. *Alt. R. Macquoen.* *Clerk of Teinds.*
Fol. Dic. v. 3. p. 368. *Fac. Col. No 96. p. 243.*

No 15.

S E C T. II.

Not to be prejudiced by the neglect of his Officers.

1528. December 16. THE KING against JOHN GRAHAME.

GIF ony action be intentit at the King's instance, the defendar aucht not to obtene ony protestatioun aganis him, albeit he persewit not in time, nor maid na instance; because na protestatioun sould be admittit in the King's actionis.

Fol. Dic. v. 1. p. 524. *Balfour, (DEFENDER.) No 13. p. 296.*

No 16.

A. against B.

IN all matters where the King has interest, albeit his officers be not called, yet if the party be perceived to collude to the King's prejudice, the King's advocate may cause call the cause, and get the King admitted for his interest.

Kerse, MS. f. 20.

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1633. March 12. THE KING against EARL OF STRATHERN.

THE KING, by his advocate, having compeared at a service, and consented thereto, and done several other deeds of homologation thereof afterwards;

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