1779. *December* 9.

Sir JOHN & Sir ROBERT ANSTRUTHERS, Barts. *against* The COUNTESS of ROTHES.

No 21.
How the negative prescription applies to claims of relief.

IN 1716, John Earl of Rothes, Sir John and Sir Robert Anstruthers, granted bond, conjunctly and severally, to Mr Philp, for the sum of 5000 merks, payable at Lammas then next, with interest from the term of payment.

The first two years annualrents were paid by the Earl of Rothes, and those of the subsequent years, till 1749, by Sir John and Sir Robert Anstruthers.

In 1755, Mr Philp brought an action against the then Earl of Rothes, Sir John and Sir Robert Anstruthers, as representing the original debtors, for the principal sum, and for the annualrents incurred since 1749. Sir John and Sir Robert Anstruthers paid the whole; and, in 1776, brought an action against the Countess of Rothes, the representative of Earl John, the original obligant, for relief of the sums paid by them and their predecessors.

In this action it was found, "That, in respect all the three original obligants were bound conjunctly and severally, they were cautioners for each other to the extent of their respective shares." And, on this footing, a demand was made by the pursuers for a third part of the annualrents paid by their predecessors from 1718 to 1749.

To this demand, so far as regarded the annualrents paid 40 years prior to the commencement of the action in 1776, the defender objected the negative prescription; and

Pleaded; The claim of the original creditor, for the annualrents now in dispute, was completely extinguished by the annual payments from Sir John and Sir Robert Anstruthers, and in its place were substituted the claims of relief competent to these Gentlemen, for the sums advanced by them beyond their proportion of the debt.—Here, then, the original contract underwent a total innovation. The creditors were no longer the same. As the annualrents of the different years, when paid by the co-obligants, in their character of cautioners, became capital sums, each bearing interest; Erskine, b. 3. tit. 3. § 78. the debts themselves were essentially different. Even the actions competent to the co-obligants, for effectuating their relief, were not coeval with the original obligation, but arose in an annual progression, corresponding to the several payments. These annualrents are, therefore, to be viewed as totally distinct and independent debts, each affording a separate ground of action, and suffering a separate extinction by prescription; and as no document whatever has been taken on any of these debts for 40 years, this legal exception must be fatal to the present claim.

In the case of personal bonds, bearing annualrent, it has been laid down, Erskine, b. 3. tit. 7. § 13. that the annualrents being accessory to the principal sum, the preservation of the latter from prescription will keep alive a claim for the former for any length of time; and it may from thence be said, that, as in

No 21. this case, the principal sum is still exigible, the interest must be in the same situation. But, although accessions of this kind, while they remain in their original state, participate the nature of those rights to which they are annexed, they are not, however, so closely connected, as to be inseparable from them. Thus had these annualrents, as they fell due, been assigned to a third party, or to one of the pursuers, it will not be disputed, that they would have become distinct debts, subject to prescription, although the principal obligation remained entire, and capable of being preserved, though the negligence of the creditor, in the principal obligation, should have vacated his right. Or suppose, that, after the cautioners having paid one year's annualrent, the principal obligation had been destroyed or departed from, it surely could not have been maintained, that the cautioners claim of relief for the sum paid, being accessory to that of being relieved from the whole obligation, was at an end when that event took place.

Answered; It is a mistake to imagine, that the original obligation of the principal debtor was dissolved upon payment by the cautioner. The law supposes the cautioner, whether he takes a discharge or an assignation for the sums paid by him, to have advanced the money merely to relieve himself. The obligation on the principal debtor is still entire and unimpaired. Nothing, therefore, hinders the creditor, so long as the principal obligation is not cut off by prescription, to assign both principal and annualrent to the cautioner; nor can the debtor object to a transaction which equity requires, and in which, being no party, he has no title to interfere. With regard to him, the creditor still stands in the full right of the debt; and the judgment of the Court must, in this case, be the same as if the creditor, upon payment of the principal sum, had expressly assigned to the pursuers the annualrents now in question, or had taken up his different receipts for these, and given one discharge for the whole.

This matter may be viewed in another light.—Here no bond of relief was given to the co-obligants. Equity, however, supplies that defect, rendering their claim as effectual as if that obligation had expressly intervened. Their claim is, therefore, co-extensive with the debt which gives rise to it, including not only the principal sum, but also the bygone annualrents, as accessories; and so long as the principal debt is kept alive, the accessories must, in like manner, be exigible. The cautioners might, indeed, have sued for relief of each year's annualrent, as it was paid; but they were under no necessity of doing so, any more than the creditor was obliged to accept of partial payments. Let it be supposed, that a cautioner, having a bond of relief, had made payment of the annualrents for 50 years, as they fell due, and had afterwards paid the principal sum, his claim against the principal debtor could not be limited to those annualrents which had been paid within the 40 years. It is in truth a

claim of damages, arising from an individual transaction, and cannot admit of a partial prescription. No 21.

" THE LORDS repelled the defence."

Lord Ordinary, *Covington.* Act. *Ilay Campbell, John Anstruther,* junior.
Alt. *Solicitor-General Murray, Rae.*

C. *Fol. Dic. v. 4. p. 93. Fac. Col. No 93. p. 178.*

1794. *February 7.* JOHN MILL *against* GEORGE SKENE.

No 22.
When a proprietor sells a part of his lands, his right to be relieved from payment of a proportional part of the public burdens, cannot be lost by the negative prescription.

THE lands of Waterston were separated from the barony of Fearn in 1713, in consequence of a minute of sale, by which the purchaser became bound to relieve the seller from a proportional share of the cess.

In 1722, these lands were purchased, and they have ever since been possessed by the family of Skene of Skene.

In 1766, the barony of Fearn was purchased by the father of John Mill, who, in 1792, brought an action against Mr Skene, in which he stated, that the valuation of the lands of Waterston had never been disjoined from that of the barony of Fearn, the proprietor of the latter having always paid the same quota of public burdens since, as before the sale, and concluded for repetition of those which he and his father had paid for Waterston since 1766, and that he should be relieved from payment of them in all time coming.

Mr Skene, on the other hand, stated, That for 70 years past the lands of Waterston had been considered as part of the barony of Carriston: That during all that period he and his predecessors had paid public burdens, according to a *cumulo* valuation, for the lands of Carriston and others: That most probably the valuation of the lands of Waterston had been disjoined from that of the barony of Fearn, though, owing to the irregularity with which the records of the county were formerly kept, no traces of that transaction were now to be found; and that this was rendered the more probable from this circumstance, that the *cumulo* valuation for his whole property exceeded the valuation stated in the cess-books for the different parts of it by L. 66 Scots; and further, in point of law, he

Pleaded, Even admitting that at a distant period a certain degree of irregularity in the payment of the public burdens took place, all claim on that account must, *post tantum temporis,* be presumed to have been derelinquished, or settled in some way or other now forgotten. A charter and sasine 40 years back would have precluded the pursuer from claiming the property of the lands. He is now demanding a certain payment out of them, and cannot be in a better situation.

It is true, that every piece of land is liable to the public for its proportion of the public burdens; but, even in a question with the Commissioners of Supply,