

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.

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,

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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.

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it would be incumbent on them, in order to subject the defender, to show, not only that there was a deficiency in the *cumulo* valuation of the county, but also to point out certain lands for which no assessments were paid; and this they cannot do with regard to the defender's lands, after he has been assessed for 40 years, according to a *cumulo* valuation for the whole lands possessed by him.

*Answered*, When a proprietor sells a part of his estate, the part sold and the part retained are each liable to public burdens, in proportion to their value, though, till a disjunction of the valuation takes place in the cess-books, they continue to be levied *pro indiviso* from the whole lands. No agreement of the parties can affect the right of the public in this respect. In the present case, however, the purchaser is expressly bound to pay the public burdens. And no length of time can prevent the pursuer from insisting on his doing so. For, although all claims arising from a bond or other obligation, of which payment or performance can be exacted at once, may be lost by the negative prescription, it is a settled point, that wherever the obligation consists solely in certain annual prestations, as in the present case, each annual payment runs a separate prescription, but the right of exaction in future cannot be lost *non utendo*; Erskine, b. 3. tit. 7. § 13.

THE LORD ORDINARY sustained the plea of the negative prescription, both against the claim for bygone payments, and for relief in future.

On advising a reclaiming petition and answers, it was

*Observed* on the Bench, Even though there had been no stipulation to that purpose, the lands sold must have born their proportion of the public burdens, and the claim of relief cannot be lost by the negative prescription.

THE LORDS UNANIMOUSLY altered the interlocutor of the Lord Ordinary, and repelled the plea of prescription. See PUBLIC BURDEN.

Lord Ordinary, *Swinton*. Act. *Dean of Faculty Erskine*. Alt. *C. Hay*. Clerk, *Pringle*.  
D. D. *Fol. Dic. v. 4. p. 91*. *Fac. Col. No 102. p. 227*.

## S E C T. III.

Of the Act 28. Parl. 5. Jas. III. 1469, which enacts, that "Obligations" not followed out within 40 Years shall prescribe.

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Before the act 1617, heritable titles could not prescribe, notwithstanding the terms of the act 1469.

1585. *February*. LORD CATHCART against LD. of GADZAT.

THE Lord Cathcart, by virtue of a bond and obligation made by the Laird of Gathart, goodsir to his goodsir, pursued the Laird of Gadzat for the deliverance of a reversion recording to the said bond. It was *alleged* by Gadzat, That he