

## SECT. XV.

## Effect of the Positive Prescription.—Title of Prescription in Moveables.

1633. December 7.

PARISHIONERS of ABERSCHERDER *against* PARISH of GEMRIE.

No 179.  
In a pursuit for a church bell, lent by one parish to another, the defence upon the positive prescription was sustained by 40 years possession.

THE minister and session of the kirk of Aberscherder, pursuing the minister and parishioners of the kirk of Gemrie, for restitution of a bell pertaining to the said kirk of Aberscherder, and which was borrowed by one of the parishioners of Gemrie, and ever detained by them since, undelivered again for the space of 40 years, and more, since the borrowing thereof; and they excepting upon prescription of the said action in respect of their possession, uninterrupted for the space of 40 or 45 years bypast, during which time they have possessed the said bell in their kirk, by using the same all manner of ways, as other bells are in use to be used in other kirks in the realm, by convening of the parishioners to sermon, and other exercises of holy action in their kirk, as occasion required, and as are used in other kirks and parishes; and the other kirk *replying* upon their property to the said bell, and that it hung ever in their steeple before the lending thereof to these defenders, and that they only borrowed the same from them; and albeit they had a long lend thereof, yet they ought not to make the pursuers to want their own, and to give the defenders unjustly that which is not theirs, and prescription cannot be admitted in this case, *ubi agitur de causa bonæ fidei ex parte actoris, et ubi intervenit mala fides rei* in a sacred matter, as in this case of borrowing of kirk's gear, especially seeing prescription ought to proceed, conform to a lawful title, but bare possession, *sine legitimo titulo, qui sit probabilis ad transferendum dominium*, ought not to be sustained to induce prescription, neither can prescription have place in favour of one kirk against another, specially *in materia odiosa, nam privilegiatus contra privilegiatum non gaudet privilegio*: Notwithstanding of the which reply, the exception was sustained; and in respect of the 40 years possession bypast, uninterrupted, no action was sustained for the bell libelled.

*Fel. Dic. v. 2. p. 112. Durie, p. 695.*

No 180.

1634. July 22. FORRESTER *against* FEUARS of BOTHKENNER.

MARGARET FORRESTER pursued the feuars of Bothkenner, for payment to her of six pecks of oats for every ox-gang of their lands, which was a duty for forest-fee contained in her infestment. *Alleged*, Absolvitor, because they were