

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.

Fol. 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

vassals to the King for payment of a feu-duty only *pro omni alio onere*, and had possessed *ædes liberas* for the space of 48 years, and so could never be burdened with any such duty. *Replied*, The act of prescription was good to maintain their heritable rights of their lands, if they were quarrelled; but not in this case, wherein the right of their lands is not called in question, but only a duty craved out of the same, which can never be prescribed. THE LORDS found the exception relevant.

No 180.

Fol. Dic. v. 2. p. 113. Spottiswood, (DE PRESCRIPTIONE ET USUCAPIONE.) p. 238.

* * * Durie reports this case :

MARGARET FORRESTER, as having right from her father, who, and his predecessors, were infest in the office of the forrestry of Torwood, and for the fees of the said office, had disponed to them certain quantities of victual, to be paid by the feuars and possessors of the lands of Bothkenner, which were the King's property; for payment of the which duty, she pursues the said feuars, for diverse years by-past; and they compearing, and *alleging*, that the summons was not relevant, seeing it was never libelled therein, that the pursuer, or her predecessors, were ever in possession of these duties acclaimed; the LORDS repelled the exception, and found the summons relevant, albeit no possession was libelled therein, of the duties acclaimed at any time, in the pursuer's predecessor's person; for if the defender should propone a peremptory, to elide the pursuit, whereby the pursuer might be urged to reply upon possession, the LORDS found, they would consider it by way of reply, as if it had been libelled. And the defenders *alleging*, that they were infest in the lands libelled by the King, and by virtue of their infestments have been forty years, and past memory of man, in possession of these lands, for payment of a feu-duty of victual to the King's Majesty, there being no other duty contained in the saids rights, either for fee, or for other services to be done for the saids lands; so that they possessing so long without interruption, they ought to be free of this pursuit, seeing the pursuer's right is prescribed, and the act of Parliament anent prescription, *anno 1617*, makes the same become extinct; and the pursuer *replying*, That the prescription militates not in this case; for the pursuer's right is not of the defender's land, but of a fee, and certain duty forth thereof, so that they are *disparata et non circa idem*; for he quarrels not the defender's right of the land, seeing he may bruik his lands, and the pursuer his right of office, and the fees due thereto, and they may subsist together; the LORDS found the exception of prescription relevant, and to militate in this same case, against the pursuer's right to elide the same; the defender *alleging* that he bruiked these forty years by-past, free of any payment, except his feu-duty, and so that he had prescribed *liberum tenementum*, free of this burden libelled; even as if the pursuer had acclaimed an annualrent out of the saids lands, which the like exception of

No 180. prescription would in law and reason have excluded; and because thereafter the pursuer replied upon an interruption lawfully done *debito tempore*, therefore the reply was admitted.

Act. *Nicolson & McGill.*

Alt. *Stuart & Mowat.*

Clerk, *Hay.*

Durie, p. 730.

No 181.

The Lords sustained the defence of prescription of an apprising, notwithstanding the personal action upon the grounds of the comprising was not prescribed.

1705. February 2. WILSON against HELEN INNES of Auchlincart.

WILSON of Finreach having right by progress to an apprising against the lands of Auchlincart, led in the year 1636, pursues a reduction and improbation against the heiress of Auchlincart.

The defender *alleged*; She was not bound to produce her writs, because the apprising, the title of the pursuer's process, was prescribed, being led in the year 1636.

It was *answered*; Diligence was done on the bond which was the ground of that apprising, whereupon the LORDS have found that the prescription is interrupted; and it is certain that diligence against a cautioner interrupts prescription against the principal and cautioner; much more in this case when diligence is done against the defender's predecessor in the lands libelled.

It was *replied*; There is a great difference betwixt prescription in real and in personal actions; a document taken upon the debts interrupts prescription in personal actions as to all the obligants and their heirs; but, in real actions, if no prosecution be used for 40 years, and the lands affected be possessed by virtue of other real rights and titles by that space, without interruption, all actions for prosecuting such real rights are prescribed, otherwise singular successors and purchasers could never be secured; and the like has been found in the case of an inhibition, 1st February 1684, Brown of Colstoun *contra* Hepburn of Berford, Div. 15. *h. t.*

"THE LORDS sustained the defence of prescription of the apprising, notwithstanding the personal action upon the grounds of the apprising was not prescribed."

It was further *alleged*; Prescription was interrupted by a former reduction and improbation in the year 1662, which was not only raised and executed, but called, and a debate and interlocutor in that process.

It was *answered*; *imo*, That process was cast; and the LORDS found, No process, in respect the pursuer was not infeft. *2do*, The process was not renewed every seven years, conform to the act of Parliament 1685. *3tio*, Prescription since that interruption.

It was *replied*; *imo*, Though the LORDS found no process without infeftment, yet the interpellation was sufficient to interrupt, and the process could have been carried on by expeding an infeftment. *2do*, The acts 1669 and 1685, re-