

1714. February 19.

WILLIAM BRODIE and Others, *against* JOHN WATSON, Tenant of the Mains of Friercarse.

In a process of spuilzie, at the instance of William Brodie and others, against John Watson, for taking some moveables out of the pursuer's house, the defender alleged, for eliding the spuilzie, that he being tenant to James Maxwell of Barncleugh, in the four-pound land of Friercarse, who stood infest therein with the services used and wont called *boon work*, to be paid to the possessors of the neighbouring grounds the pursuers are at present in possession of, viz. the performance of a few days work for labouring the defender's ground, and shearing his corns, the said right had, past memory of man, been usually made effectual by summary drawing of small poulds from deficients answerable to their omissions, which is all the defender did in this case.

Replied for the pursuers: No immemorial custom could warrant intromission with another's goods, without the authority of a Judge, which is *moraliter turpe*. No person can *sibi jus dicere*. *Nec est singulis concedendum quod per magistratum publice potest fieri, ne occasio sit majoris tumultus faciendi*, L. 176. D. De Reg. jur. Stat. of King Robert I. Cap. 1. And lately the Magistrates of Ayr were fined by the Lords in 500 merks for causing summarily incarcerate one Ramsay for not paying some customs due to the meal-market and to the mill, albeit they pleaded immemorial custom of so doing.

Duplied for the defender: The pretence that the pouding ought to have been by warrant, and not summarily, is trifling; for the tenants of the servient tenement could not be compelled to performance in the usual way, by decret or precept of pouding, or the like diligence, the expence whereof would have exhausted the value of the claim; and if the ancient and necessary custom were not sustained for performance of such a day's work, which admits no delay, the servitude would be entirely useless and elusory. Besides, *quilibet coloratus titulus* is a sufficient defence to free from a spuilzie which is penal. Nor is this custom singular; for the Marquis of Annandale and the Earl of Nithsdale are in constant use of exacting payment of their mart-kine in the like way and manner.

The Lords repelled the defence founded on the custom of pouding, and found the same unwarrantable.

Fol. Dic. v. 2. p. 391. Forbes MS. p. 27.

1732. February.

SHAW *against* GRAY.

In a bond of relief, granted to a cautioner, there was a clause obliging the principal debtor to relieve his cautioner, and for that effect to pay the money, not to the cautioner, but to the creditor, betwixt and a certain term. After elapsing of

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Pouding for
services called
boon work,
unwarrant-
able.

No. 64.

- No. 64. the term, the cautioner registered his bond of relief, and obtained a precept of poinding from the Bailies of Edinburgh, which he put in execution. Upon this poinding, unwarrantable in respect the obligation to pay was conceived in favour of the creditor, not of the cautioner, the common debtor intened an action of spuilzie, and the question was, whether the precept of poinding was not a colourable title to defend from the penal consequences of the action. This debated, but not finally determined. See APPENDIX.

Fol. Dic. v. 2. p. 392.

SECT. VII.

Command or Authority of a Superior.

- No. 65. 1528. *February 20.* THOMAS SCOT *against* THOMAS BALFOUR of Burlie.
 Gif ony man be persewit for spuilzie or ejection, he aucht and sould be assoilziet thairfra, gif he did nathing thairintill bot be virtue of our soverane Lord's letteris.

Balfour, p. 471.

- No. 66. 1533. *March 20.* MARGARET HOME *against* THOMAS PORTEOUS.
 Gif ony man, beand callit for spuilzie of ony gudis and geir, alledgis and preivis that he poindit the samin, as officiar, or at the command of the lord of the ground, for the maillis and dewties thairof, he aucht and sould be assoilzeit anent all spoliatioun, except he quha is poindit alledge and preive, that he had maid full payment of the saidis maillis befor the time of the poinding.

Balfour, p. 471.

- No. 67. 1534. *February 4.* TENANTS of STRATHURD *against* NINIAN SEYTOUN.
 Gif ony man, beand persewit for spuilzie of ony gudis and geir, alledgis that he lauchfullie poindit the saidis gudis, and thairfoir did na wrang nor spuilzie, the samin sould be admittit to his probation.

Balfour, p. 471.