

1754. November 19.

THOMAS DUNDAS, Esquire *against* Mr JOHN MACLEOD, Advocate.

ROBERT SIMPSON, a collier, belonging to the coal-work of Quarrel, having differed with the tacksman of the coal, deserted the work in the year 1737, and went to Mr John M'Leod's coal-work at Bowhouse.

Mr Dundas afterwards purchased the lands and coal of Quarrel, and got an assignation to the coaliers, and, among others, to Robert Simpson; whereupon he brought a process against Mr Macleod, concluding for the delivery of the said Robert Simpson.

Pleaded for the defender; That Robert Simpson had been away several years from the coal-work of Quarrel, and had been several years at the defender's coal-works without interruption, and without being redemanded by his former master; and therefore the defender was not obliged to restore him; for, by a collier's being absent above the space of one year from his master, the master loses his property in him; and if the collier has wrought during the space of one year at another work, he becomes a bound collier to that work. And that such is the common law with respect to coaliers, appears from the 11th act of parliament 1606; whereby it is enacted, 'That in case any receive or entertain coaliers, salters, or coal-bearers, without a sufficient testimonial of their master whom they last served, the master from whom they came, challenging their servants within year and day, that the party whom frae they are challenged, shall deliver them back again within twenty-four hours, under the pain of one hundred pound Scots, to be paid to the persons whom frae they passed.'

From which act, it is to be observed, *1mo*, That possession gives the right to the coaliers; for they are to be restored to the master whom they last served, and not to him to whom they first belonged; *2do*, That their former master loses his right to them, if he do not redemand them within year and day after their leaving his service; seeing the order for restoring them is only in case requisition be made within year and day of their leaving their service. It cannot be alleged, That the statute only meant that the penalty of L. 100 Scots could not be claimed, if requisition be not made within year and day; for the statute has made no provision for restoring coaliers after their being year and day absent from their former master; which it surely would have done, if the property of them remained with him after the year.

Answered for the pursuer; That no law has introduced so short a negative or positive prescription of the right to coaliers as is contended for by the defender; and no such prescriptions are either enacted, or supposed, by the statute 1606. That act has declared it to be unlawful to receive or entertain another man's coaliers, without a testimonial from the master whom they last served, or at least an attestation of a reasonable cause of their removing, subscribed by a

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The proprietor of a collier had a *rei vindicatio* at common law, though more than year and day had elapsed, since the collier had left his service.

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magistrate ; and a coal-master receiving a coalier without such testimonial or attestation, is guilty of a direct transgression of the law ; and therefore a possession so unlawfully attained can never entitle the offender to the property of the coalier.

The remedy introduced by the statute is a summary and possessory one, in favour of him who had the recent possession of the coalier, against the unlawful receiver and detainer, in case requisition be made within year and day ; but if requisition be not made within that space, the master does not thereby lose his property in the coalier, but may recover him by an action at common law. Thus, though the action of spuilzie be limited by statute to three years, yet this prescription of the summary and penal remedy does not give the spoliator a right of property in the goods spuilzied after the three years ; but an action for restitution and damages is competent against him at any time within forty years.

‘ THE LORDS found, That the pursuer had right to the property of the coalier.’

Reporter, *Drummore*. Act. *Lockhart et Bruce*. Alt. *Tho. Hay et A. Pringle*. Clerk, *Forbes*.

Fol. Dic. v. 3. p. 136. Fac. Col. No 117. p. 174.

* * * Lord Kames reports the same case :

IN the year 1737, John Drummond of Quarrel, having set a coalery within his land to James Club, delivered over by inventory his coaliers and bearers, under obligation to restore them at the issue of the tack ; and, among others, Robert Simpson, his wife and their four sons. This tack expired in the 1749 ; and the same year Mr Dundas purchased the estate of Quarrel, with the coaleries, and also the coaliers contained in the foresaid inventory. The purchaser coming to be informed, that Robert Simpson, with his wife and children had left the coalery, and that they were employed by Mr M'Leod at his coalery of Bowhouses, raised a process against Mr M'Leod, subsuming, That Robert Simpson, his wife and children, were the pursuer's property, and concluding for restitution. The defence was laid upon the act 11th, Parl. 1606, entitling coal-masters within year and day only, to demand restitution of their coaliers. As an inference from this act, it was urged, that after year and day action does not lie ; and therefore that the defender must be assoilzied, with whom Simpson and his family have wrought several years peaceably and uninterruptedly. It was *answered*, That the pursuer's property cannot be taken from him but by his consent, or by prescription ; that the prescription introduced by the statute is only of the extraordinary remedy introduced by the same statute, for obtaining restitution of coaliers who desert their service, who, upon requisition, must within twenty-four hours be restored, under the penalty of L. 100 Scots. ; but that there is nothing in the statute to infer, that the possessor of another man's

coalier acquires the property by lapse of year and day without requisition. After the lapse of year and day, the extraordinary remedy is gone; but the ordinary remedy of a *rei vindicatio* remains.

'THE LORDS sustained the action, and preferred Mr Dundas.'

I was not satisfied with this interlocutor. One fact not ascertained nor mentioned, appeared to me of consequence, viz. whether Simpson and his family left the Quarrel coalery, because they could not find employment. If they did, I am clear that they were free after the year and day. For in general, there subsists a mutual contract betwixt the proprietor of a coal and his coaliers; they live by their work, and have no other subsistence. If they are bound to work to him, he is equally bound to furnish them work. Hence, from the nature of the thing, they cannot remain his slaves longer than he furnishes them with work. In this view, it appears to me that the year and day has been justly established to ascertain matters between a master and his coalier; that if a coalier be allowed to be absent for year and day, this is a *probatio probata* either that there was no work for him, or that he was allowed to go with his master's consent. And this appears to be the most natural construction of the aforesaid act; for as it provides only for the case where coaliers are claimed within year and day, it appears to be understood by the legislature, that no claim lies after year and day, because the statute is altogether silent upon that case. If this construction be not admitted, I see not that any man can have the property of a coalier, except the first proprietor with whom the coalier was born, and in whose coalery the man first wrought. In the present case, Mr Dundas founded his right upon possession only; and supposing Simpson to have been formerly the property of another, Mr Dundas, according to his own argument, could have no title; and yet this fact was not enquired into. If he had a title, it must be of a singular nature: he must be held *quoad* the former proprietor a precarious possessor only; and at the same time *quoad* Mr M'Leod must be held as the real proprietor.

Sel. Dec. No 69. p. 93.

1758. March 1. ROBERT BOGLE *against* ROBERT CROSS.

JAMES GRAY of Dalmarnock, proprietor of a coal work near Glasgow, gave it up some years ago, and allowed his coaliers to go to what masters they pleased. Six of them, at length, with consent of James Gray, settled at a coal-work belonging to Robert Bogle of Shettlestone; where some of them remained less, and others more, than a year, when they were enticed away by Robert Cross of Barrachny to his coal.

James Gray, notwithstanding the dismissal of his coaliers, had been in the regular use of requiring them back annually from the masters they worked with,

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A coalier working without paction at a coal to which he was not *adscriptus*, might desert it when he pleased.