

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.

No 8. in order to preserve his right to them, in case he should ever set up his coal again.

Mr Bogle, upon the desertion of the coaliers, as above, reclaimed them from Mr Cross, alleging, that he had a preferable right to them, in respect of their having been fixed to his coal with consent of the former proprietor.

Answered for Mr Cross, The laws respecting coaliers give this right of reclaiming only to the original master. But here Gray is the master, and Bogle has the enjoyment of them only *pro tempore*, by his allowance. *2do*, At any rate, the right of reclaiming belongs only to that master who has been in possession of the coalier for year and day ; and therefore the pursuer cannot reclaim such of the coaliers as have not served him for that time.

' THE LORDS found the pursuer not entitled to recover any of the coaliers in question.'

Act. *Miller, Hamilton-Gordon.*

Alt. *Dav. Dalrymple.*

J. D.

Fol. Dic. v. 3. p. 136. Fac. Col. No 104. p. 186.

* * * Lord Kames reports the same case :

JAMES GRAY of Dalmarnock, having resolved to discontinue his coal-work for some time, permitted his coaliers, till he should have again occasion for them, to seek for employment in the neighbourhood. Six of them accordingly were hired by Bogle of Shettlestone, and entered to his coalery. But after having wrought there some months, they left that work for another coalery in the neighbourhood belonging to Cross of Barrachny. Bogle of Shettlestone, apprehending himself to have the benefit of the act 11. P. 1606, required back the coaliers, and brought an action before the Sheriff for the penalty of L. 100 Scots for each of them, in terms of the statute. The following defences were offered. *1st*, That the six coaliers did not belong to the complainer's coalery, but to that of James Gray of Dalmarnock, and therefore, that James Gray only was entitled to make the requisition. *2dly*, Independent of Mr Gray's right, that the complainer was not entitled to the privilege of the statute, in regard the six persons claimed had not served at his coalery for year and day, and therefore were not his property, but at full liberty to hire themselves where they thought proper. The Sheriff having pronounced an interlocutor, ' Finding that the possession had by the pursuer of the coaliers libelled, not being for the space of year and day, does not make him proprietor of these coaliers, so as to found him in a claim for the penalties imposed by the statute,' the cause was advocated, and an interlocutor was pronounced by the Court of Session, finding, ' That Mr Bogle the pursuer is entitled to recover the coaliers in question, as the master whom they last served ; and decerning the defender to restore them accordingly ; but assoilzieing from the penalties in the statute.' This interlocutor goes upon the supposition, that a coalier working at a coal to which he is not

descriptus, cannot however desert that coal at pleasure, but may be reclaimed by the proprietor of the coal; and the President endeavoured to support this proposition by the words of the statute above mentioned, giving power to the master whom the coalier last served to require him back within year and day. But, upon a reclaiming petition and answers, this interlocutor was altered, and the Sheriff's interlocutor was adhered to, finding that the pursuer had no claim to the coaliers in question.

It occurred to me at advising, that the statute could not intend the privilege of reclaiming a coalier under a penalty to any but to the proprietor of the coalery to which the coalier is bound for life; because such privilege ought not to be given to any other, as it would be absurd to give any man a power of reclaiming a coalier who is not bound to him by law or paction.

The clause giving power to the master whom the coalier last served to require, clearly means the master to whose coalery the coalier was last a slave; and it may well happen that a coalier may be successively a slave in different coaleries. The coalery to which he is first a slave runs out; he is thereby free. For a man cannot be a slave in a coalery which no longer exists. The coalier enters to another coalery, which also running out, he may be successively a slave to many. What time may be requisite to enslave him to a new coalery seems a little uncertain. My reason for fixing upon year and day is the following. A native bondman is free, if suffered to remain quietly in a town for a year and day, Reg. Maj. L. 2. cap. 12, § 17. Therefore a coalier should be also made free, if his master demand him not back within year and day, supposing it to be known where he is. The above mentioned act appears to proceed upon this footing; for the requisition is confined to the year and day; and if this be right, the master has not even a *rei vindicatio* after year and day.

Sel. Dec. No 145. p. 201.

1761. January 22.

THOMAS DUNDAS of Quarrole, Esq; against JOHN KIRK, Overseer of the Coal-works at Grange.

MR DUNDAS, in the beginning of 1760, brought an action against John Kirk upon the statute 1606, for the re-delivery of some coaliers, who, he *alleged*, had been enticed away from his Coal-works, at Quarrole, by the defender; as also, for the statutory penalty of L. 100 Scots, for having detained each of the said coaliers, after having been legally required by the pursuer to deliver them up.

James Brown, one of these coaliers, had worked in the Grange coalery from September 1756, to October 1757; and, in November 1757, he began to work in Quarrole coal-work, belonging to Mr Dundas, and continued to work there pretty regularly till the end of March 1759, when he returned to Grange works.

No 8.

No 9.

The proprietor of a coal-work, in possession of a coalier for year and day, could reclaim such coalier, and recover the penalty of the statute 1606 from any third party, to whose coal-work he had betaken himself.