

1806. *November 21.**Bogue against Wight.*

THIS was a dispute between George Bogue, Esq; of Woodhall, proprietor of the farm of Foulstruther, and David Wight, his tenant, regarding the right of the latter to cut down and sell willow trees growing upon the farm, some of which were fifty years old.

NO. 2.

A tenant is not entitled to cut saugh or willow trees, when they are of a large size.

It was maintained upon the part of the tenant, *1st*, That willow trees not being mentioned in the acts 6th Geo. III. cap. 48., 9th Geo. III. cap. 41., and 13th Geo. III. cap. 33., which contains a full enumeration of the different species of trees which are understood to be "timber," were not to be held as the property of the landlord, and as they were often cut when young for baskets or hoops, they were to be considered as a species of crop at the disposal of the tenant; *2dly*, That by the custom in that part of the country, tenants were in use to cut saugh or willow trees without any permission from their landlord.

It was contended, on the other hand, by the landlord, *1st*, That though willows might be cut as a crop when young, if they were allowed to grow to be trees, there was no reasonable distinction between them and other timber, which was the property of the landlord, although planted by the tenant; and, *2dly*, In point of fact, that there was no such usage in that part of the country, as was represented by the tenant.

A good deal of procedure took place before the Lord Ordinary, which it is not material to notice, as it went to ascertain the number and value of the trees which were cut, and the custom of the country, about which the parties differed in point of fact.

His Lordship pronounced the following interlocutor, (14th November 1804,) "Finds, That the practice of particular farms or baronies cannot have the force of law, in derogation of the established rules of the law of Scotland, though such practice may have effect in interpreting the contracts and agreements of parties: Finds, there is no sufficient ground in this case for ascribing to the defender, as tenant of Foulstruther, a right to sell saugh trees containing measurable timber growing on that farm, whether planted by the tenant or proprietor; but that, under the circumstances of this case, he is liable to the pursuer only for the price of such trees sold since the citation in the present action: Finds, That under the terms of his lease, the defender is entitled to employ trees, whether saugh or not, growing in hedge-rows upon the farm, for constructing a threshing machine for the use thereof, as well as other farm utensils, but not for the service of his other farms."

The Court, by a great majority, went into the distinction laid down by the Lord Ordinary; and, upon advising a reclaiming petition on the part

NO. 2. of the tenant, with answers for the landlord, adhered to his Lordship's interlocutor, with this explanation, "That the defender was entitled to use " the trees growing in hedge-rows, for all purposes of the farm ;" and to this interlocutor the Court (9th June 1807), adhered, upon advising another petition with answers.

Lord Ordinary, *Meadowbank.* A. S. *Jeffrey.* Agent, *Hay Donaldson, W. S.*
Alt. *Baird.* Agent, *A. Cunningham, W. S.* Clerk, *Ferrier.*

J.

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