

George Munro, of Culcairn, and Captain
 Donald Macneil - - - - - *Appellants*; Case 108.
 Kenneth Mackenzie, of Auchtedonald, and
 Others - - - - - *Respondents*.

31st March 1724.

Costs and Expences.—One of the defenders in a spuilzie, who was an officer in the king's service during the rebellion, being assoilzied, petitions for his expences, which are refused by the Court, but the judgment is reversed upon appeal, and the Court is ordered to tax and ascertain his costs.

Witness.—In a spuilzie brought against the leader of a party, on the king's side during the rebellion, persons belonging to that party were valid witnesses for the defender.

Spuilzie.—The Court having found the leader of said party liable in damages, without hearing him upon the relevancy; their judgment is reversed, and they are ordered to hear the defender on the relevancy.

THE appellant, Munro, being a deputy lieutenant in several counties, and sheriff depute of Ross-shire, was very active on the side of government at the time of the rebellion: The appellant, Macneil, was a captain in the well affected militia. On the 20th of April, 1716, the Earl of Cadogan, then commander in chief in Scotland, did, by his order, direct the appellant, George Munro, to use his utmost endeavours to seize and apprehend forthwith all gentlemen and heritors in the country, belonging to the Earl of Seaforth, and in the shires of Ross and Cromarty, who had been in the rebellion, and send them prisoners to Inverness; and the commanding officer of that garrison was by the same order directed to give him such detachments of the troops as he should judge necessary. By another order of the 23d of same month, the said Earl directed both the appellants to use their utmost endeavours to discover and apprehend all such persons as had been in the rebellion, and to send them prisoners to such of His Majesty's garrisons as should be nearest the place where they might happen to be taken up. In consequence of these orders, the appellants proceeded to the Earl of Seaforth's country, and took several steps against persons who were in arms. The respondent, Mackenzie, and his father, now deceased, being absent from their houses, the appellants resided in them for some days; and the conduct of them, and the party under their command, during these days, became the subject of the following action.

The respondent's father, in October 1721, brought an action of spuilzie before the Court of Session, in his own name, and in the names of his son and of their tenants, against the appellants. This action stated that the appellants did, in a violent manner, take possession of the respondent's father's house, and after having lived there with their whole party for several days, without paying for any thing, did, when they went away, plunder the said house.

house of all the furniture and goods therein, and carried off all the horses, cows, sheep, goats, &c. they could find upon the lands belonging to the respondent's father. And in a week or two after, the said party came to the respondent's house in Lochbroom, and not only plundered and carried off all the goods they could find, but also burned and destroyed several houses: That the respondent's father had always behaved himself as a good and faithful subject to His Majesty's government, and was at the time of committing these violences, attending the lord lieutenant of the county.

This cause coming to be heard, the Lord Ordinary, on the 8th of March, 1722, "restricted the libel to restitution and damages, and before answer allowed the pursuer to prove the same, and the defenders' accession to the taking away of the goods libelled *prout de jure*; and the defenders to instruct that they had a legal warrant and power for marching troops through the country where the pursuer lived, to oblige the inhabitants of that country to deliver up their arms, *scripto*, and assigned the first day of June for proving and producing *ut supra*."

Sundry witnesses were examined on the part of the pursuer, who proved sundry articles of spuilzie; but on the part of the appellants, the said orders of the commander in chief were produced, without examining any witnesses. The term was therefore circumduced against them on the 6th of June, 1722.

They afterwards presented a petition to the Court for leave to examine witnesses, to prove that the cattle and goods, which had been taken away, were afterwards restored; to this request the pursuer conditionally agreed, and the Court, on the 16th of June, 1722, "granted diligence for proving, that the said goods alleged spuilzied were restored to, and recovered by the proprietors, with this quality, that it should not stop advising the pursuer's probation."

On the 14th of November, 1722, the Court having taken into consideration the proof for the pursuers, of that date pronounced an interlocutor, by which they "found it proven, that the appellant, George Munro, with a party of armed men, took up free quarters in the pursuer, Kenneth Mackenzie's house; that he and his party carried away a great many horses, cows, sheep, goats, and other goods belonging to the said Kenneth Mackenzie; and also that the said appellant, with his party, carried away a great many cows, &c. from the lands of Lochbroom, belonging to the respondent, Kenneth Mackenzie," (the values of most of which were stated as proved.) "And found that the said appellant, with his party, did burn nine houses belonging to the tenants of the pursuer, and that the goods therein were partly thrown into the fire, and partly carried off by the party. And ordered the pursuer to give in a condescendance of the values of such of the aforesaid goods, whereof the values were not proved; as also the value of the houses and goods that were burnt, and assuilzied the appellant, Captain Macneil."

Several

Several witnesses having been summoned to give evidence of the restitution of the goods, particularly a Mr. Gordon, who deponed to the restitution of part of them, the appellant, Munro, proposed to examine several persons who had been of his party, to have proved further as to the restitution, particularly William Munro, of Altas; but the respondent having objected to this Munro that, having been of the party, he could not be examined as a witness, the Court, on the 15th of November, 1722, “sustained” the objection against the said William Munro, “and found he could not be received as a witness in the cause.”

The appellant Munro reclaimed against the last-mentioned interlocutors, but after answers for the pursuer the Court, on the 4th of December, 1722, “of consent of the pursuer, found the appellant, Munro, was not liable for the goods contained in Mr. Gordon’s oath, and adhered to the former interlocutor as to all the other goods, and remitted to the Lord Ordinary to proceed accordingly.” And to this interlocutor the Court adhered on the 26th of December, 1722.

On returning to the Lord Ordinary, his Lordship, on the 5th of January, 1723, “settled the value of the deductions conform to Robert Gordon’s deposition, and the other proofs in the cause.” And on the 15th of same month, his lordship “found that after these deductions there remained due of the values of the goods so found proved the sum of 3215*l.* 17*s.* 4*d.* Scots, or 267*l.* 19*s.* 9½*d.* sterling, for which decerned against the appellant, Munro; and also having considered the condescendance given in by the pursuer of the values of the other goods found proved to have been spuilzied, and whereof the values were not found fully proved, amounting by the said condescendance to 760*l.* 6*s.* 8*d.* Scots, or 63*l.* 13*s.* 4*d.* sterling, and that the appellant, Munro, had made no objection against the same; therefore sustained the values as stated in the said condescendance, and decerned likewise against the appellant therefore.”

The appellant, Munro, having given in a representation to the Lord Ordinary, praying his lordship would give him a hearing as to the relevancy, and to find that the condescendance of itself was no sufficient proof; his lordship, on the 18th of January, 1723, “refused the desire of the said petition in so far as concerned the consideration of the relevancy of the libel, the same having been determined in the Inner House, at least not remitted to the Ordinary; but as to the other particulars concerning the values in the condescendance, declared he would hear parties thereon.” Parties were heard accordingly, and the Lord Ordinary, on the 23d of January, “restricted the values of certain particulars in the condescendance, and allowed the decret to be extracted for these sums, and the other sums decerned for.”

Against these interlocutors of the Lord Ordinary the appellant, Munro, presented two several reclaiming petitions to the Court, which

which were refused upon the 13th and 19th of February; 1723.

The appellant Macneil presented a petition to the Court, setting forth that he had been put to considerable expences by the said action of spuilzie, from which he had been assoilzied; and he gave in an account of 264*l.* 18*s.* 4*d.* Scots, of expences which he claimed, together with a further sum of 60*l.* Scots, for extracting the decree; but on the 28th of February, 1723, the Court "refused the desire of the petition."

Entered,
15 Jan.
1723-4.

The appellant, Munro, brought his appeal from "several interlocutors of the Lords of Session of the 14th and 15th of November, 1722, and that part of the interlocutor of the 4th of December following, affirming their former interlocutors, and the interlocutors of the 26th of the said month of December, the 5th, 15th, 18th, and 23d of January, 1723, and the 13th and 19th days of February following."

And the appellant, Macneil, brought his appeal from "the interlocutor of the 28th of February, 1723, refusing him his costs."

The pursuer, in the original action having died, the appeal was transferred against the respondent, Mackenzie, his son.

Argument of the Appellant Munro:

This appellant was acting for His Majesty's service, in pursuance of an order from the general for that purpose; and if any of the persons then under his command committed disorders, or took away some things unknown to him, it were very hard to make that a charge against him. When he came there with a lawful command for the service of government, no evil ought to be imputed to him, except what was done with his own hand, or by his special order; but nothing of that was pretended, nor did any of the things, or of their value, come to his possession.

The Court proceeded to take the proof brought by the pursuer under consideration, and to give judgment upon it, before they heard the evidence brought by the appellants, though by their interlocutor of the 16th of June, they allowed that evidence to be brought. And when it appeared by the evidence of Robert Gordon, that all the goods that were in the hands of the militia were restored, whereby a further proof of the particular quantities became necessary, the Court was pleased to disallow the appellant to bring any further proof.

The appellant conceives it was no good objection against Mr. Munro, of Altas, being a witness, that he was one of the party under the appellant's command. On the contrary, those of that party were the most proper witnesses to prove facts that they saw, and in the event of which they could neither gain nor lose. And since the Court were of opinion, that those of the appellant's party were not proper witnesses, they ought to have allowed him

him to examine other witnesses as to the restitution; and had that liberty been indulged to the appellant, he could have proved that every individual thing was restored; so that he is decreed to pay for what the respondents have in their own possession.

If the appellant must be accountable, the value of the goods ought to be ascertained by witnesses; but he is decreed to pay the sum of 767*l.* 6*s.* 8*d.* Scots for goods, of which there is no other proof of the value, than the statement in the pursuer's condemnation.

Argument of the Appellant Macneil.

This appellant ought to have been allowed his expences, since nothing is proved against him. He conceives, that no countenance ought to be given to the bringing vexatious suits against those who were at that time employed in his majesty's service; and he may be allowed to call this a vexatious suit as to him. The case of both the appellants is the more favourable, that the matters complained of were in June 1716, before the rebellion was at an end in Scotland, and the legislature thought fit so far to interpose, as to indemnify all persons who acted in the defence of his majesty's person and government in the year 1715, from vexatious suits and prosecutions.

Argument of the Respondents.

Any commander of a regular party is answerable for all the outrages committed by the party, unless he proves that he could not prevent the same. And he who has the legal command of a party, and allows them to commit outrages, is much more guilty than he who has no legal command; because he not only does the same injustice to the private persons injured by his party, but likewise commits a great crime against the government, in abusing the power and trust committed to him. But it is remarkable in this case, that the witnesses depone expressly, that the appellant and his party committed all these outrages and depredations, and that they heard him give orders for burning the houses, and saw him receive money for restoring some of the goods to the owners.

It is not the method of proceeding before the Court of Session, nor as the respondents conceive before any other courts, to give liberty and further time for examining witnesses, after the proof is concluded, and circumduction past, without some extraordinary reason for so doing. The appellant Munro obtained a second order for examining witnesses, of consent of the then pursuer, who was most willing to allow deduction of whatever was restored, But he would not consent to a third order, which was desired by the appellant only for delaying the cause; and the Court of Session most reasonably refused it, because the appellant could give no reason for such demand, but only that he had brought up witnesses, against whom the Court had found, that there was an evident objection in law.

With regard to the appellant Macneil, he was upon the same command with the other appellant, Munro, and not far distant, with a party of regular troops, and the respondents conceive that it was therefore proper to make him a party to the action, for it was not known, but that Macneil had the chief command of both parties. And by the custom and practice of Scotland, no person, who has a *probabilis causa litigandi* is ever decreed to pay costs.

Besides, Captain Macneil did not apply for costs, till after the decree was given out, and the suit fully terminated; and by the constant forms of the Court of Session, no costs are given if not moved for before giving out the decree. The respondents were not served with Macneil's petition for costs, and the principal cause being fully terminated below, they were not bound to appear further in court. The Court therefore refused the desire of Macneil's petition, without ordering the respondents to put in answers to it.

Judgment,
31 Mar.
1724.

After hearing counsel, *It is ordered and adjudged, That the interlocutor of the 28th of February, 1722-3, whereby the Lords of Session refused the appellant, Macneil, his costs, be reversed, and that the said Lords of Session do cause his costs to be taxed and ascertained, and when so ascertained, to be forthwith paid to him by the respondents; and it is further ordered and adjudged, That the interlocutor of the 19th of February, 1722-3, be reversed; and it is hereby declared, that it is the opinion of this House, "that William Munro, "and other persons of the party commanded by the appellant George "Munro, may be proper witnesses for the said appellant, in this cause, "notwithstanding their being of the same party, unless there be some "other just cause of objection against that testimony; and that the said "appellant be at liberty to produce witnesses in his defence; and that the "witnesses already examined on behalf of the plaintiff below, be re- "examined; and that the defendant below be at liberty to cross examine "them; and that the appellant, Munro, be heard in the Court below "as to the relevancy of the libel."*

For Appellant, P. Yorke. Dun. Forbes. Will. Hamilton.
For Respondents, Ro. Dundas. C. Talbot.