

PRESIDENT. The cords of penal irritancies are not to be drawn closer in this age: the plea of *bona fides* will not authorise one to draw rents, and yet keep up the debt for which possession of such rents was granted.

COALSTON,—for adhering. The disposition 1737 was granted by a debtor in order to prevent diligence, not for a full price.—Redemption for equitable considerations is still competent. If so, how can we change an improper wadset into a proper one, and find the defender not accountable for the rents since 1742.

KAIMES. A *pactum legis commissoriæ in pignoribus* is good in our law, but reducible. The rents from 1742 were levied by the creditor, *qua* proprietor. Suppose these rents had fallen one half, the creditor would have had no demand for the deficiency, so as to make up his interests.

1766. August 6. FRANCIS BRODIE, Wright in Edinburgh, *against* the TRUSTEES of the MIDDLE DISTRICT in the County of MID-LOTHIAN, and THOMAS DICKSON, their Servant.

PUBLIC POLICE.

Powers of Road Trustees in widening a public road to the statutory breadth.

FRANCIS Brodie is proprietor of a tenement in the Canongate of Edinburgh, bounded on the east by the common vennel, called the Horse-Wynd: that vennel is a public road leading from Edinburgh, but at present it is not above ten feet wide. The trustees for the high roads in Mid-Lothian ordered Thomas Dickson one of their overseers to widen that road, in terms of law. In consequence of those orders, the overseer set about cleaning away rubbish, and was preparing to demolish some low houses within the limits of Brodie's property. Brodie made application to the sheriff for stopping this work. On the 25th July 1766, the sheriff pronounced an interlocutor to the following purpose:—"In respect this vennel is the only entry to one of the public avenues leading to the town of Edinburgh, finds it falls properly under the administration of the trustees, and that they have power to widen the same, in terms of the Acts of Parliament concerning public roads, upon provision that they pay the value to the proprietors for such houses as they shall be under necessity of taking down." Brodie offered a bill of advocation, which was refused by the Lord Kaimes, Ordinary on the Bills. He then applied to the Court by petition, to which answers were put in.

ARGUMENT FOR BRODIE:—

The damages arising to the petitioner from the plan of the trustees are obvious: part of his area will be seized for enlarging the vennel; his houses will be demolished, and the remaining part of his area will be rendered of no value on account of its narrowness. In these circumstances he pleads that the trustees have exceeded their legal powers. Whenever the property of a private man is taken from him for the public good, he is entitled in law to receive its full

value. By the turnpike acts, not even the materials for making of a highway are to be taken without payment of damages to the proprietor of such materials. And, by the statute 28 Geo. II., respecting the highways in Mid-Lothian, the trustees are empowered to treat for and agree with any proprietors of lands, &c. "lying contiguous to or near the said roads, for such lands or grounds, and for the loss or damage which they may anywise receive, by turning or altering the roads; and thereupon, and upon payment of such sum of money so agreed upon accordingly, it shall be lawful for the trustees to turn the said road over the said ground or land." Thus the indemnification is to be paid before the trustees can inroach upon any man's property; and the sheriff committed iniquity in allowing the work to proceed before the terms of the indemnification were adjusted, as well as in restricting the indemnification to houses without mentioning lands.

ARGUMENT FOR THE TRUSTEES :—

The petitioner has misunderstood the laws relating to highways: he has also misunderstood the powers of the trustees. The statute law of Scotland requires, that all highways be 20 feet broad.—When a highway is not of that breadth, the trustees are authorised, nay, required to enlarge it to the statutory standard. In such case, no damages are due to any one; for the public does thereby vindicate its own right, not encroach upon the right of another. The vennen in question is a highway,—at present not above ten feet wide: the trustees seek no more than to enlarge it to the statutory standard. The Act, 28th Geo. II., relates not to the case where a highway is widened to the statutory standard, but the case where the old road is deserted and a new one made in another direction: but this is foreign to the question in issue, where the old road remains, and no alteration is made but that of bestowing on it its lawful breadth. Besides, by an Act 24th Geo. II., the trustees have power, when they see cause, to extend a road beyond the legal standard, "to pull down and demolish any house or building whose side walls shall not exceed twelve feet in height, for that purpose." This surely implies that they may do the same thing, when they only extend a road to its legal standard. The damages that are given on account of materials used in highways, cannot affect the present question. Although that law has ordered all roads to be of a certain breadth, yet there is no law nor reason which requires that any private person should furnish, gratis, the materials necessary for making such roads. Although the trustees are not bound to indemnify Brodie, yet, *ex gratia*, they have offered to indemnify him according to the same rates which they have paid to other proprietors in similar circumstances: but their willingness to confer a favour on him, cannot alter the statute law, or authorise him to stop this necessary work until the *quantum* of the indemnification shall be ascertained.

On the 6th August 1766, "The Lords remitted to the Sheriff, with this instruction, that he reserve to Brodie a liberty of applying to the trustees for a recompense."

Act. G. Wallace. Alt. H. Dundas.

OPINIONS.

PRESIDENT. The trustees may give a recompense; but thinks that it is proper to remit to the Sheriff, with an instruction for determining the recom-

ALEMORE,—Proposed that the reservation should be, that Brodie might apply to the trustees for a recompense.

This was done with consent of the trustees.

1766. *August 8.* DOCTOR JOHN EUSTACE of the City of New York, Physician, *against* MRS ANN PRINGLE, Widow of Colonel John Young.

BILL OF EXCHANGE.

The payee of a Bill, bearing to be for value, found obliged to condescend upon the value, in respect that it was not a mercantile transaction, but a Bill drawn by an officer of the army in favour of his physician.

On the 21st April 1762, Colonel Young, of the 46th regiment of foot, drew and accepted a bill upon himself, payable three months after date, at his agent's, Mr Henry Drummond of London, to Doctor Eustace, for L. 400 sterling value received.

On the 24th July 1762, the bill, having been presented at Mr Drummond's, and payment refused, was regularly protested.

In April 1766, Colonel Young died: his widow was decerned executrix to him. Dr Eustace insisted in an action against her for payment of the bill. The widow, suspecting that the bill was not for value, but impetrated gratuitously from the Colonel while at New York in a weak condition of mind as well as body, insisted that the Doctor should make answer to special interrogatories put to him concerning the cause of this bill, and the nature of the transactions between him and the Colonel.

On the 5th August, "The Lord Gardenston, Ordinary, ordained the pursuer, by a writing under his hand, to condescend on the value of the bill, and to answer the special interrogatories relative thereto."

The pursuer reclaimed and pleaded, That, in all mercantile countries, when a bill is granted, value is presumed, even although not expressed, unless the contrary be instructed by writing or oath of party; and this *a fortiori* must be the case when, as here, the bill expressly bears value received. There is no example where the *onus probandi* of value, or even of condescending on the value, was laid upon the porteur of the bill, when the bill itself bore value received. See 11th February 1701, *Wightman* against *Moncur*, observed by Fountainhall. If the defender is not satisfied of the onerosity of the bill, or suspects any fraud, she may bring a reduction of the bill. The pursuer con-