

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-

descends, that it was granted on account of 18 months' entertainment of the Colonel, and of the pursuer's personal attendance on him as a physician during that space : and he is bound to do no more : Perhaps he has done already more than was incumbent on him. " His compliance might be fatal, in point of precedent, to the established laws of every mercantile country."

On the 8th August 1766, " The Lords adhered."

Petitioner.—William M'Kenzie.

OPINIONS.

HAILES. The petitioner is very anxious for the law of merchants. This, however, is not a mercantile transaction,—a bill drawn by an officer of the army in favour of his physician.

1766. *August 8.* MRS ANNE and MARY SELLERS, Heirs-Portioners of Mr William Seller, Writer in Edinburgh, *against* JOHN BROWN, Merchant in Edinburgh.

TACK.

Construction of a clause in the lease of a brewery, binding the tenant to uphold the brewing looms and vessels, &c. and restore them in good condition at the end of the lease, tear and wear excepted.

In 1756, the deceased William Seller granted to the deceased Simon Bennet, brewer in Edinburgh, a lease of a dwelling-house, brewery, and pertinents, together with the brewing utensils therein mentioned, and that for the space of 15 years, from Martinmas 1756. William Seller " bound and obliged himself to uphold and maintain the roofs of the dwelling-house, brewery, and hail pertinents thereof, wind and water-tight, during the continuance of the tack." Simon Bennet, the lessee, and John Brown, his cautioner, " bound and obliged themselves, conjunctly and severally, to uphold and maintain all the brewing looms and vessels, and others above specified, and the going graith upon the well, in sufficient repair, during the currency of this tack ; and to restore and deliver back the said brewing looms, and others above mentioned, and the going graith upon the well, all in good condition, at the expiry of the present tack, tear and wear always excepted, according as the same shall be determined by two men, one to be chosen by each part."

The lessee was allowed a breach at the end of each three years, upon a notification of six months. After the death of William Sellers, a question arose between Bennet, the lessee, and Seller's heirs, whether the brewing looms and appurtenances were to be maintained by the master or by the tenant? A submission, in terms of the tack, was entered into, but proved fruitless. Bennet withheld his rents, on pretence of repairs laid out by him. He died bankrupt: the heirs of Sellers charged his cautioner with horning, for payment of