

APPENDIX.

PART I.

BONA ET MALA FIDES.

1770. February 15.

JAMES BRUCE, Multurer of the Mills of Alloa, against ALEXANDER WILSON and Others, Brewers in Alloa.

THE pursuer, who in 1759 became multurer of the mills of Alloa, in 1766 brought an action against the defenders, who had been guilty of some abstractions; concluding, that they should be found liable for such as had been committed by them for three years preceding the citation.

A question having arisen, whether the defenders were astricted to the mills of Alloa or not, the Lords, on the 10th March 1769, found that they were, and remitted to the Ordinary to proceed; who accordingly found, "That the defenders had reason to believe that they were not thirled to the mills of Alloa, but that this *bona fides* continued only down to the citation in the process, and that abstracted multures are due only from that time."

In a reclaiming petition, the pursuer pleaded:

1^{mo}, The present action was not a declaratory action for establishing the right of the proprietor of the mill to the thirlage, but a possessory action at the instance of the multurer for the abstractions. The defenders had from time immemorial been astricted to these mills; they were therefore bound to make good to him any damage he might have sustained by attempting to subvert this possession; and although for some years they had erected steel mills, and had not been regular in coming to the mills in question; yet as they had not been in this practice long enough to acquire immunity from the servitude, their apprehending they were not astricted could be no defence in bar of the bygone dues. As the pursuer was in possession, they ought to have conformed to the former usage; and nothing could put them *in bona fide* but the judgment of a proper court, declaring that the possessor had no right.

2^{do}, *Bona fide* possession was only admitted where the case stood very favour-

No. 1.

The defence of *bona fides* not sustained in a process for abstracted multure, but the defenders found liable for a period even prior to citation in the action.

No. 1. able for the person pleading it : But if a debtor, in a bond bearing interest, was pursued for payment, if the obligation was good, it would be no reason for *asoilzieing*, that the debtor believed himself not bound. This was precisely the present case ; the pursuer's claim was a claim of debt ; and although the defenders, by having a *probabilis causa*, might plead to get free of expenses of suit, this could be no reason for not implementing the contract, express or implied, by which they and their authors were astricted to these mills.

Answered for the defenders :

1mo, It was immaterial whether the present action was in its form declaratory or possessory. It was brought at the instance of the pursuer, but it had in fact been carried on by the proprietor of the mill in order to establish the thirlage. The defenders had not indeed been in the disuse of going to the pursuer's mill so long as to found them in the defence of the negative prescription as to the right, but they had been in the disuse of doing so since the year 1745, a term long enough to found them in the defence of *bona fides* against the claim for bygone abstractions.

2do No case could be figured where the application of this defence was more proper than the present. The exception of *bona fides* was introduced in odium of the negligence of the true proprietor, and was even sustained where the possessor had been rendered *locupletior* by enjoyment of the fruits. Now the defenders had not been possessing a subject belonging to another ; nor had they, by abstracting their grain from the pursuer's mill, been enriched. The present could not be called a claim of debt ; all that ever could have been claimed was the privilege of performing a certain piece of work for a certain hire ; and if the pursuer had not insisted to do that work, upon what principle of equity could he demand his hire ?

The Court, by a narrow majority, altered the Ordinary's interlocutor :
 " Repelled the defence of *bona fides* ; and found the defenders liable for their
 " abstractions for three years preceding the citation in the pursuer's libel or
 " claim."

Lord Ordinary, *Monbodo*.
 Clerk, *Kirkpatrick*.

For Bruce, *Macqueen*.
 For Wilsons, *Maclaurin*

R. H.

Fac. Coll. No. 22. p. 53.

1771. *March 13.*

JAMES BREMNER, against COLONEL ST. CLAIR of St. Clair.

No. 2.

Money found in the repositories of a factor intrmitted with *bona fide* by his constituent,

THE defender appointed John Ross his factor ; who, after two or three months employment, and having uplifted about £140 of the rents, died, being then, on account of his intrmissions, £20 in the defender's debt. The sum of £25. was found in Ross's repositories after his death ; and Colonel St. Clair having demanded payment of the balance due to him out of that sum, as being