nistration from the Prerogative Court in England, and thereupon obtains payment of his debt on that title, from the Earl and his Colonel. Bailie Hope, Ascog, Blantyre-farm, and other creditors to the said Muirhead, confirm themselves executors-creditors to him by the Commissaries of Edinburgh, and then pursue the Earl as intromitter with their debtor's effects. The defence was, *bona fide* payment made long before your citation; and it is against natural equity *bis idem exigi.*

ALLEGED,—There can be no *bona fides* in this case, wanting both its necessary requisites, *viz.* probable ignorance on the payer's side, and a colourable title on the receiver's, none of which is to be found here; for it is a Scotsman, not dying in England but in Flanders, having no effects in England but with himself. The intromitters are Scotsmen, and so is Wishaw, the obtainer of the payment; so there is not so much as the shadow of a pretence to found a title, by an English administration, for uplifting the money, it neither being *locus originis domicilii nec mortis:* but the Commissaries of Edinburgh, as the *communis patria* to all Scotsmen dying abroad, were the only competent judges thereto. *2do, Esto* their Prerogative Court had been a *forum competens,* yet voluntary payment was both collusive and unwarrantable, there being neither judgment, decree, nor sentence obtained against them; so that the other creditors in Scotland could never come to the knowledge of such a contrivance. And this would defeat that excellent Act of Sederunt in 1662, bringing in all creditors confirming within six months to be *pari passu.*

ANSWERED,—Whatever defect there may be in the payment, it is always relevant to assoilyie the defenders against the odious claims of double payment, and sufficient to assoilyie the Earl, reserving their recourse of repetition against Wishaw, the administrator, who received it. *2do,* Though he was a Scotsman, yet he was received into an English regiment, and so incorporated into their privileges: likeas, the Earl has his lady and family in England, and has no residence nor domicile in Scotland; and so it was competent to make up the title where he dwelt. And *l.* 23 *D. ad municipal.* says,—*Miles ibi domicilium habet ubi stipendium mæret.* Some make it the place where he dwelt *ante militiam vel expeditionem ab eo susceptam.*

The Lords superseded to determine the Earl's *bona fides* in paying, till Wishaw the administrator should be brought into the field, to defend himself, which would lay the whole matter entirely before the Lords; but allowed Wishaw to be heard, whether he be obliged to answer summarily, being called *incidenter*; though the Lords have frequently allowed those citations *incidenter* arising from another process. *Vol. II. Page* 596.

1710. *November* 11. ALEXANDER GILLON of WELLHOUSE *against* His TENANT in SOUTH HILDERSTON.

THE Lords advised the concluded cause, Alexander Gillon of Wellhouse against his tenant in South Hilderston, who, by his tack, was obliged to leave the lands and houses in as good condition as he got them at his entry, the master furnishing lime and great timber to the repairing of the houses, and he leaving as many threaves of steelbow straw as he received at his removal.

The heritor ALLEGED,—He had worn out the land by his bad labourage, and

all the houses near ruinous, so that he was damnified in more than £1000 Scots, and was forced, by the deterioration of the ground, to set the roum two chalders of victual down of the rent it paid formerly. Whereon he raised a process of damages against him, wherein the Lords, before answer, allowed a conjunct probation anent the condition of the lands and houses, both at his entry and at his removal, and what might be the difference betwixt the two as to the deterioration, and the master's damage, and about the usual way and manner of labouring ground in that part of the country; and if he, by forced and scourged crops, exceeded the same, to the impoverishing the land, when he was removed; and what was the quantity and sufficiency betwixt the straw he got and that he left behind him; and anent his cutting of some trees during his possession, and their age, with the value of the damage, &c. Probation being led on both sides, it appeared, by Wellhouse, the pursuer's witnesses, that the method of labouring outfield there, was by often liming, dunging, faulding, and faughing: they took four or five crops, and then let it rest as long; and if any took more, it wore out and wronged the ground; whereas this defender took eight crops, which they conceived put the land in that bad case that it would take four or five years to bring it in again; and some of them estimated this loss of the master's at £200 yearly, others only to 200 merks; so that one part valued it to 1200 merks, others to 1000, and the lowest any of the witnesses came to was 800 merks; and so the roum was not by far so good at his removal as it was at his entry: and also deponed, That some trees were cut, but they knew not by whose order; and that the straw left was a small insufficient sheaf, three of them not so good as two of the steelbow-sheaves he got at his entry; and that the last year of his possession he laboured only the top or crown of the rigs, and left the sides or furrows, contrary to custom, lee: but some of them added, the rigs were stony, and yet he reproved his servants for tilling so unequally.

ALLEGED for the tenant,—That there were many other reasons to make the rental fall, without ascribing it to his bad labourage; for it might arise from the badness of the ground, or the unseasonable weather and inclemency of the air; and the witnesses were moveable tenants.

But this being OBJECTED, was not verified or referred to their oaths, as use is.

The Lords thought the probation wholly conjectural: though it appeared he had overlaboured the ground for his own advantage and the master's prejudice, and therefore they might as well guess as the witnesses had done. Some were for fixing on 800 merks as the lowest probation; but, considering it was a poor tenant, they took down 100 merks, and modified 700 merks, in full satisfaction of all, both land, houses, straw, and trees. The pursuer craved something for his expenses of process, but the Lords had no regard thereto.

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1710. *November* 14. WILLIAM TURNER *against* ROSS of TILLISNAUGHT.

[See the prior part of the report of this case, Dictionary, page 11802.]

Ross of Tillisnaught having obtained a decreet *in foro*, against William Turner, notary in Birse, for exhibition and delivery of some bonds that were a part of Robert Middleton's executry; and Turner being incarcerated thereon, he gave