And if any scruple arose from the unclear conception of the contract, the mist was fully dispelled by the second disposition fully transmitting the fee; *et in claris non locus conjecturis;* and his taking a simultaneous seasine with the institutes was most unwarrantable, he having no right till the failyie existed; as was decided, 14*th January* 1663, *Beg* against *Nicolson.* And here no other could be fiar but either his father or the heirs of the marriage; but it were absurd to suppose the fee pendent, and hanging in the clouds, aye till an heir of the marriage should exist, which is both contrary to the principles of law and the current of our decisions; 12*th December* 1665, *Pearson* against *Martin;* and 23*d January* 1668, *Justice* against *Stirling.* So she being absolute and illimited fiar, and under no prohibitory clause, what hindered her to do a rational deed in favours of her husband, failing children of her body; and to prefer her husband in that case to an extraneous substitute? as was found by that famous decision, 1*st* and 21*st December* 1680, *Anderson* against *Bruce.* And *esto* Mr Bell's substitution were onerous, yet that lays no restraint on the fiar, to impede them from rational deeds; and was so found in a mutual tailyie, 14*th Junuary* 1631, *Sharp* against *Sharp;* and President Newton, *February* 1683, *Bonnar* against *Arnot,* tells, the Lords found a substitution of 30,000 merks evacuated by a legacy of a person that was minor.

Answered for Bell,—Whatever may be pled in gratuitous substitutions, only made for love and favour, he is nowise in that case; for this was his purchase, and he had bought it with his money: it was a real emption and vendition, which must not claudicate and stand singly on the will and arbitrament of the seller. *Bona fides contractuum* will not allow such an inequality, nor permit the first institute to evacuate and elude it, except for most necessary and onerous causes. Muir's contract of marriage is as clear as the sun can make it, and gives him no more but a pure liferent. The subsequent disposition is *donatio inter virum et uxorem stante matrimonio,* and so could never prejudge the onerous substitute, and irrefragably demonstrates no more to have been intended by the contract but a liferent, else what needed the second disposition? And by sundry decisions the Lords have found, that voluntary and unnecessary deeds of institutes cannot evacuate onerous substitutions; as 31*st January* 1679, *Drummond;* and 10*th February* 1685, *The Executors of Mortimer* against *The College of Edinburgh,* in President Falconer's collection; and more lately, 15*th January* 1697, and 18*th November* 1697, *Yorkston* against *Burn and Shiels;* where the Lords annulled a minor's testament, because it crossed her father's substitution, and found she could not prejudge it.

The Lords, in this case of Bell and Muir, found, by plurality of votes, the daughter's disposition could not prejudge the onerous substitute; and so preferred Bell to the acres. *Vol. II. Page* 594.

1710. *November* 8. Hope, Stewart, &c. Creditors of Muirhead of Steinson, *against* The Earl of Orkney and Hamilton of Wishaw.

The Lord Dun, Probationer, reported Hope, &c. against the Earl of Orkney and Colonel Hamilton. Muirhead of Steinson having died in Flanders in 1706, the Earl and Colonel, as his superior officers, intromitted with his money and effects. Hamilton of Wishaw, being creditor to him, takes out letters of admi-

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