

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 roun 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 out-field 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 roun 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 decret *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

in a bill of suspension and charge to set at liberty, on thir reasons : *1mo*, That, having appealed from the sentence of the Lords of Session to the British Parliament, he went to London to prosecute the same, when Mr James Ferguson, advocate for Tillisnaught, prevailed with him to forbear tabling of his cause for that time, and enter into a submission, wherein Mr James took burden for Tillisnaught, and an arbiter was filled up for either party, and a blank left for the names of other two ; which four were to concur, and, in case of discrepance, to name an oversman, and to take in the claims before the 1st of August 1710, and to give out their decreet-arbitral betwixt and the 1st of September thereafter. It seems, on this prospect, Turner returned to Scotland ; but the two blank arbiters were not filled up, nor condescended on, before the 1st of August ; nor were the claims given in ; so that Tillisnaught, looking upon himself as at liberty, and the submission expired, executed his caption against Turner about the 20th August, and put him into Brechin prison. Against which procedure, as wholly unjust, unwarrantable, and illegal, Turner reclaimed, as being first wheedled and decoyed into a submission, when he was just ready to table his affair, and then imprisoned during the dependance and currency of the submission, which did not expire till the 1st of September. *2do*, He was charged to deliver up bonds from which he was assoilyed, as being given up already.

ANSWERED for Tillisnaught,—That Mr Ferguson had no warrant nor commission to propose any such overtures or submission ; and, though he believes he undertook for him with a good design, yet his subscription can never bind him, unless he show either his mandate or ratihabition. But, *2do*, Let it be as valid a submission as Turner pleases, it is clearly fallen and expired ; for, by its precise tenor, the other two arbiters were to be named, and claims to be given in before the 1st of August ; neither of which being done, it certainly determined and came to an end. *Vid. l. 32, sec. 1, D. de Recept.* Besides, he is arrested by her Majesty's Advocate, for breach of prison ; for, being formerly incarcerated there, he, in the night-time, put fire to the prison, and in the hurry and confusion made his escape. To the *second*, The messenger who apprehended him, by an express note under his hand, declared he did not insist for those papers already delivered ; and he was willing to consent to his liberation on his finding caution, or consigning the papers called for. But so it is, he craved it on juratory caution, which is expressly contrary to the Act of Sederunt in November 1682, where one is in prison.

The Lords thought they might take out any man without caution or consignation, where it plainly appeared that he was illegally or unwarrantably imprisoned ; but here they found no such thing ; but, on the contrary, that the submission was expired and fallen before his incarceration ; and so, not being current, they refused to set him at liberty. In this bill, the Lords noticed another point complained of, That there was a plain disconformity betwixt the extract taken out by Tillisnaught, and that of Turner's the suspender. The inquiry whereof was remitted to the Ordinary, that the extractor may be debarred the clerk's chamber if guilty.

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1712. *July 30.*—William Turner, the notary, gave in an appeal and protest for remeid of law, against Ross of Tillisnaught, because the Lords did not find it wrongous imprisonment for delivering up writs which he had given in already ; because the Lords found the caption restricted in the margin.

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