

1740. July 17. SCOT *against* M'GARROCH, Minister of Eskdalemuir.

[Kilk., No. 1, *Suspension*; C. Home, No. 153, and No. 31, *Rem. Dec.*]

THE Lords found, by the President's casting vote, (against the opinion of Arniston and Elchies,) That the suspension could not pass without consignation.

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1740. November 16. HUME of BILLY *against* HUME of NINEWELLS.

[Elch., No. 4, *Forfeiture.*]

THE Laird of Wetherburn entered into a submission with his vassal, Hume of Ninewells, and, by the decret-arbitral, was decerned to dispone to Ninewells the superiority of Ninewells' own lands; and, on the other hand, Ninewells was decerned to pay to Wetherburn 4000 merks. Wetherburn, before he performed his part of the decret, assigned the 4000 merks to Hume of Billy, and soon after, was attainted of high treason, committed in the year 1715. Ninewells, his vassal, took the benefit of the Clan Act, by which means he got the superiority of his own lands, and took a charter of them, holding of the Crown. Hume of Billy, Wetherburn's assignee, now brings an action against him for payment of the 4000 merks.

Ninewells' defence was,—That he was not bound to pay, since Wetherburn had not implemented his part of the decret; and that it was now become imprestable, because the superiority was out of the person of Wetherburn, and in his.

To this it was answered,—That it was true, indeed, Wetherburn had not implemented his part of the contract, but that it was still prestable; for Ninewells, having got the superiority by the Clan Act, was, by Act *quinto Georgii*, solely liable for all the debts affecting the superiority, and therefore bound to implement Wetherburn's obligation to dispone, which to be sure he could do, as he had the superiority in his own person, and was himself both debtor and creditor.

Ninewells replied,—That, supposing all this was true, there lay no action against him, at the instance of the assignee, to dispone the superiority or implement Wetherburn's obligation, since no such action would have been competent even against Wetherburn himself, against whom his only recourse was, an action of warrandice upon the assignation: that he, as donatar of Wetherburn's forfeiture, might be liable to this action; but then he would be bound by the clan act only to pay a proportional part, in respect of the rest of the forfeited person's estate.

It was answered for Billy,—That the assignee of one part of a mutual contract could have an action against the other party, either to perform, or to assign to him the part of his cedent who has not performed, that he might oblige him to per-