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.

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 decreet-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 decreet, 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 decreet; 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-

form; and by that means likewise to force the other to perform. And to apply this to the present case, Billy, as assignee from Wetherburn, could pursue Ninewells to pay or assign his action against Wetherburn, *i. e.* against himself, who represents Wetherburn. Now, to assign the action, and to do the thing, is the same; and, therefore, the bargain is considered as implemented on the part of Wetherburn: and for that reason Ninewells is liable to pay the money. Which the Lords found, *Dissent.* Arniston, who was of opinion that the obligation to dispone was no debt affecting the superiority.

1740. *November* 18. CAMPBELL *against* HEDDERWICK.

[Elch. No. 13, *D. Bed*; C. Home, No. 158.]

THE case here was,—A man upon death-bed disponed his estate to his only daughter and heir, and substituted to her a stranger, to the exclusion of his next heir of line. The daughter entered into a contract of marriage, wherein she disponed to her husband the lands she got from her father, as having right by the disposition from him there narrated, and afterwards died before she was of age, and without leaving any issue. The next heir of line now brings an action for reduction of the father's disposition upon the head of death-bed,—and of the daughter's upon the head of minority and lesion. The Lords were of opinion that the reduction upon the head of death-bed was competent at the instance of the remoter heir, even though the immediate heir was institute, unless the immediate heir homologated the deed by some act of his. But in this case they found, That the daughter disponing, as having right from her father, was a homologation of the father's settlement, which was valid against the next heir, though done in minority. And here a doubt was started from the bench, How far she could have been reponed against such homologation herself? and How far she could have insisted in a reduction of her father's settlement upon the head of death-bed, though she was first in the disposition? Lord Elchies thought she could; and quoted a late decision to that purpose. His reason was, That the daughter was injured by the substitution of a stranger, to the exclusion of her heir-at-law; especially as during her minority she could make no alteration in the succession. Upon this arose another doubt, How far a minor could make a settlement of his heritage?

1740. *December* 20. SIR JAMES CARNEGIE *against* ELSIC and TILQUHILLY.

[Elch. No. 2 and 5, *Member of Parliament.*]

THIS was an election affair, in which there were two principal questions:—1*mo*, Whether head courts have a power to expunge where no alterations have happened in the circumstances.