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.

It was argued against the power of the head courts,—1*mo*, That, to give them such a power, would be to give them a privilege of reviewing their own sentences, which no inferior court in Scotland has, except the Court of Admiralty, which has it by particular statute. 2*do*, That this would not only be contrary to the general principles of law, by which *par in parem non habet imperium*, but likewise contrary to the act 1681, from which head courts derive all their powers; for by that act they can only make such alterations *as have occurred since their last meeting*. 3*tio*, If this were law, the consequences would be terrible; one head court would undo what another had done,—the roll would be continually fluctuating and uncertain,—liable to be altered according as the one or the other party happened to be uppermost,—no man was sure of his vote, though he had stood never so long upon the roll and voted at never so many elections;—he might be turned out at any time by a combination against him, and that too by surprise, without so much as being present, (which was the case here,) or without any warning or citation whatever. 4*to*, In cases of this nature, there can hardly be any evidence before the court whereupon it can proceed. When any person is enrolled, his title is produced in court; or when any alteration has happened in the circumstances of a person that stands upon the roll, documents may be laid before the meeting, of such alteration, and the party objected to, may very justly be struck off the roll. But where no alteration has happened in the party's circumstances, there, it is scarce possible to bring any other evidence of the objection but from the party's own writs, which he is not obliged to carry about with him to every Michaelmas meeting; so that here judgment is given without evidence against a party who is not called or warned, perhaps not present, and, if present, cannot be supposed to be prepared to answer and defend himself.

To this it was answered,—1*mo*, That the Michaelmas meetings were not to be considered as different diets or sederunts of the *same court*, but as *different courts*, one of which cannot be bound by what another does; so that they are not in the case of Sheriff Courts, or any other inferior courts; which, to be sure, cannot review their own proceedings. 2*do*, By the Act 1681, Michaelmas Courts are empowered to revise their rolls, which implies a power to make such alterations as they think proper; and as for the words, *such alterations as have occurred since their last meeting*, they are to be understood of alterations that have come to the knowledge of the barons since the last meeting, as well as of those that have happened in fact. 3*tio*, All the ill consequences to be feared from this doctrine may be remedied by the review competent to the Lords of Session; whereas, if the contrary doctrine prevail, the consequence will be, that, if a bad vote is once enrolled, it can never be taken off the roll but by the House of Commons. 4*to*, If the party objected to is not present, nor his papers in court, then there is a remedy pointed out in the act, which is, that the meeting should appoint a day for the parties controverting to attend the Lords. Which the Lords found. *Dissent.* Arniston.

The second question was, Whether lands formerly held of the forfeited persons, of which the superiorities had not been purchased in Exchequer, and with respect to which the benefit of the Clan Act had not been taken,—whether, I say, such lands gave a title to vote?

It was argued for the negative,—1*mo*, That these lands, properly speaking,

did not hold of the king, but of the *trustee of the public*; and that though the trustee happened to be the king in this case, yet that did not vary the matter, since he was not superior *qua* king, or *jure coronæ*, but by another title. While these estates were in the persons of the Commissioners of Enquiry, it is certain that the proprietors had no claim to a vote. Now the crown is come in place of the Commissioners of Enquiry, with neither more nor less power than they had; and so can give no more privileges to those vassals than they had before. *2do*, Any body may apply to the Barons of Exchequer and get these superiorities put up to sale; and if he is the highest bidder he will carry them off, as happened in the case of Gabriel Napier, and then the proprietors of those lands will hold of him; so that their holding of the Crown is too precarious and uncertain to entitle to a vote, since they may be deprived of their holding, and rendered vassals of subjects without any deed of theirs. *3tio*, When the king enters a vassal *supplendo vices* of the contumacious superior, though he is superior to all intents and purposes, during the life of the contumacious superior, yet the vassal has no title to a vote, (it was so decided in the late parliament,) because the king is only superior for a time, and not *jure coronæ*, but as come in place of another. Now our case is rather stronger; because in that case the king holds the superiority absolutely for his own behoof; whereas in our case he holds it in trust for the public, and is obliged to apply the profits and casualties of it to the use of the public.

It was argued for the affirmative,—*1mo*, That, by the Act 1681, all the vassals of the crown are entitled to vote. The proprietors of these lands are vassals of the crown, because they must hold of somebody, and can hold of nobody but the king; and though the profits of those superiorities be appropriated to the use of the public, yet that does not hinder the vassals to have all the privileges of the king's vassals. *2do*, As to the uncertainty of the holding, it is true, that, if these superiorities are bought in Exchequer, they will hold no longer of the king but of a subject; but the same uncertainty is in the case of superiorities falling to the king by forfeiture. In that case the king has a power of interposing a donatar betwixt him and the vassals; but, till he does that, it will not be denied that they are in every respect vassals of the crown.

The Lords found,—That these lands entitled to vote.

1741. *January* 28 *and* 29. BRECHIN ELECTION PROCESS.

[Elch., *Burgh Royal*, No. 15.]

IN this case there were several objections made to the execution of the summons, which the pursuers endeavoured to supply, by giving in what they called a suppletory or explanatory execution. The question was, Whether such explanatory execution could be received.

The Lords found, That it could not, *as containing several facts not mentioned*