1740. *January* 22. AUCHINDRYNE *against* INVERCAULD.

[Elch., No. 5, *Property*; Kilk., *ibid.* No. 1.]

The question here was, Whether an heritor upon one side of a river, can, in order to protect his lands, raise a bulwark upon the top of the bank, and so throw the water upon the lands of the heritor on the other side? The Lords did not determine the question, but remitted to the Ordinary to inquire about some facts. But they determined the point of form, *viz.* that a summary application, by way of petition and complaint, without the formality of a declarator, was competent in this case; though the work was finished, so that there could be no room for a suspension or *interdictum prohibitorium;* which was in effect introducing into our law an *interdictum restitutorium*, since the intent of the action was to have the work demolished and things restored to their former state.

1740. *January* 22. DALSWINTON *against* BARNCLEUGH.

[Elch., No. 2, *Papist.*]

IN this affair there were several questions, all turning upon the meaning of the Act of Parliament 1700, intitled, An Act to prevent the Growth of Popery.

1*mo*, The first question was, Whether the Protestant heir can take advantage of that Act, and serve himself heir without declarator of the irritancy incurred by the Popish heir?

The Lords found there was no occasion for a declarator; because there was no mention of a declarator, as there ordinarily is where it is required, as in the Act concerning tailyies; and because it is said, that, immediately after the irritancy incurred by the Popish heir, the right of succession in his person shall become null and void, and devolve to the next Protestant heir; and the prescription by which the nearest Protestant heir loses his right of succession, which is carried to the next, runs not from the declarator, as it certainly would do were there any necessary, but from the irritancy incurred.

2*do*, Whether the Popish successor, not qualified in terms of the Act of Parliament, can be charged to enter heir?

The Lords found that he could not; because it was absurd to charge him to enter heir who could not; and so it was decided before, and the decision confirmed by the decree of the House of Peers.

N.B.—This is thought a bad decision.

3*tio*, Whether the Protestant heir can be charged to enter heir;—that is, whether a charge to enter heir in special, will vest the estate in his person, in the same manner as in the person of any other heir, so that adjudication or other diligence may validly follow upon it?

The *ratio dubitandi* was, That the Protestant heir was required, by the words of the statute, to make up his titles by service.

To which it was answered, That, in another clause of the Act, there was mention made of the Protestant heir's prosecuting his right by service, or other legal means; and that it would be hard to deny this heir the privileges that other heirs had of making up their titles, by granting a bond to a trustee who charges them to enter heir, and thereupon adjudges the estate; which was the way that the Protestant heir, in this case, had made up his titles. Which the Lords sustained.

1740. *January 22.* TARRAS *against* INNES.

[Elch., No. 21, *Bill of Exchange;* C. Home, No. 141.]

THE question here was, When an accepted bill, payable three days after sight, began to bear interest; whether, from three days after date, or three days after a demand made, which in this case was the citation in the process, since no demand earlier could be instructed?

The Lords found, That the sight began when it was accepted, and that, as the bill bore for cash instantly received, and that as the acceptor was the person who received the cash, the presumption was that it was accepted at the time of the date; and therefore found that it was the same thing as if the bill had been payable three days after date, from which time they found interest due.

The President was against the decision, and declared it his opinion, that, if the point were yet entire, no bill should bear interest that is not negotiated; and that even an accepted bill, payable on a certain day, should not bear interest from that day, unless it was protested for not payment, as it is the law in England, and as it was once found to be the law in Scotland; for it is exceeding hard upon the debtor to be obliged to have his money ready at the day, and not know whom to pay it to, since the bill may go through twenty different hands.

1740. *January 22.* TARRAS *against* INNES.

IT was debated, in this case, whether the lowest kind of thirlage, when neither the *invecta et illata* nor *omnia grana crescentia* are thirled, extends to the farm-meal, or only to the meal which the tenants have occasion for, for the use of their families.

The Lords found, That, in this case, it did not extend to the farm-meal; but the most of them founded their opinion upon the specialty of a *res judicata*, in