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?