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him personally apprehended, which was a more assured way of knowledge than if it had been done at the kirk. This allegeance was also repelled, in respect of the personal premonition; neither was it respected, that the defender alleged, that reversions are *stricti juris*, and that conditions agreed upon betwixt parties ought not to be changed; and 3*dly*, It being *alleged*, That the order could not be sustained, because it was not used by a procurator, having power of the party to use the order, as is ever observed in all the like cases; but it is only used by a messenger, by virtue of the Lords' letters, passing upon a bill given in to the Lords, at the instance of the party who comprised, whereby he craved warrant to the messenger, to make the said premonition, and use the said order; which being sought by the party, and granted by the Lords, is against all form and practice, and ought not to be sustained, but must be done *periculo impetrantis*;——THE LORDS also repelled this allegeance, in respect the party ratified and approved the order, and allowed the same: And the LORDS found, That they would not cast nor avert the order for this alleged defect, nor for any other of the alleged defects in the foresaid allegeances; but this is not in use to be done in redemptions, and I remember not of any other used in this manner. *See* REDEMPTION.—DEATH.

Act. *Nicolson* & *Sibbald.* Alt. *Rollock.* Clerk, *Gibson.*
Fol. Dic. v. 1. *p.* 130. *Durie, p.* 866.

1667. *January* 2. OLIPHANT *against* HAMILTON of Kilpoty.

No 6.
A poinding of the ground is competent against an apparent heir, without a charge to enter.

WILLIAM OLIPHANT having obtained a decreet for poinding of the ground against Hamiton, he suspends on this reason, That he was neither decerned as heir, nor possessor, but as apparent heir to the heritor, and was never charged to enter heir.

THE LORDS repelled the reason, and found this action, being real, was competent against the apparent heir without a charge.

Fol. Dic. v. 1. *p.* 130. *Stair, v.* 1. *p.* 422.

1667. *June* 26. MR DAVID DEWAR *against* PATERSON.

No 7.
Reductions, declarators, and other real actions, which have no personal conclusion against the heir, require no general charge to enter heir

MR DAVID DEWAR pursues a transference of a count and reckoning which formerly was depending betwixt him and umquhile Henry Paterson, and craves it may be transferred against Henry the heir, and proceed where it left.—It was *alleged* for the defender, absolvitor, because the citation was given before year and day, after the defunct's death, contrary to the defender's privilege of his *annus deliberandi*, by which he hath *inducias legales*, and cannot be forced to own or repudiate the heritage.—The pursuer *answered*, *first*, That *annus deliberandi* is only competent, where the apparent heir is charged to enter heir,

No 7.

and so must either enter or renounce, and so has no place in reductions or actions declaratory, or real actions, which may proceed against the apparent heir without a charge.—The defender *answered*, That albeit the *annus deliberandi* be most ordinary in such cases, yet it is not limited thereto, but must take place also in all cases where the reason of the law holds, viz. where the defender must be either absent, and suffer sentence, or if he compear, must found himself upon the defunct's right, and so behave himself as heir, as in this case the defender cannot allege articles of deduction or discharge, but upon the defunct's right; for finding out of which right, the law giveth him a year to enquire and use exhibitions, *ad deliberandum ne incidat in damnosam hæreditatem;* and therefore during that year he cannot be prest *contestare litem.*

THE LORDS sustained the defence.

It was further *alleged* by the pursuer, that now the *annus deliberandi* was past.—It was *duplied* for the defender, That albeit it was now past, the citation was used within the year, so that that citation cannot be sustained.

THE LORDS refused to sustain the citation, and found no process till a new citation; but here the day of compearance filled in the summons was also within the year; which, if it had been after the year, it is likely the summons would have been sustained, especially seeing the decision of this case extending the year of deliberation to declaratory actions, in custom had not occurred, nor been decided. *See* INDUCIÆ LEGALES.

Fol. Dic. v. 1. *p.* 130. *Stair, v.* 1. *p.* 464.

1672. *December* 12. BRODIE of Lethem *against* DOUGLAS of Muldarg.

No 8.
Probation of a tenor, being a declaratory action, was sustained upon calling the apparent heir, without charging him to enter.

BRODIE of Lethem pursues improbation of a tenor of a bond, granted to him by Douglas of Muldarg, for the price of some victual; which bond was granted by the defender's father, whom he represents; the summons contains also a conclusion of payment. The defender denied the passive titles, and desired that the pursuer might condescend thereon. The pursuer declared that he insisted *primo loco* for making up the tenor of the bond, which being declaratory, the calling of an apparent heir was sufficient; and *alleged*, That seeing the *casus omissionis*, being the burning of the pursuer's house, was most notour, and the adminicles produced were so pregnant, that they were not only sufficient to sustain, but to instruct the tenor; for he produces letters of horning upon the bond relating to the whole tenor of it; *item*, An instrument of requisition of the victual conform thereto; *item*, A suspension founded thereon; and seeing the defender refused to represent, he had no interest to propone any allegeance in the contrary. The defender *alleged*, That being called but as apparent heir, he might propone any defence against the relevancy of probation, albeit he might not propone a defence upon any positive right, as payment or compensation; and therefore *alleged*, That albeit the ad-