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-

minicles produced be pregnant enough to sustain the probation of the tenor, they cannot be instructions thereof; because horning, passing in course, without the special notice of the Lords, cannot instruct what a bond was in being of this tenor; much less can it show what qualifications might have been therein, which useth not to be repeated in the horning; and therefore the tenor of the writ must either be proven by the writ and witnesses insert there, or by other witnesses above exception, who saw, read, and remembered the tenor of the bond; and the *casus omissionis* is only of the loss of the extract out of the register, and nothing is shown to clear that the principal that was in the registe[r] is miscarried, except that the registers were carried away, which is too general a ground, and would serve to prove the tenor of all writs registrated.

No 8.

THE LORDS sustained the tenor, but found it not instructed by the writs produced, but that it might be instructed by witnesses. *See* TENOR.

Fol. Dic. v. 1. *p.* 130. *Stair, v.* 2. *p.* 132.

1737. *July* 10. MONRO *against* CREDITORS of EASTERFEARN.

No 9.
Nature and effect of general-special charge.

IN a competition respecting a right of reversion, betwixt a creditor who had adjudged the same, from the apparent heir of the reverser, and a posterior heir passing by the apparent heir, and connecting his title by a general service to the reverser, it was *objected* against the adjudication, That it was null, the apparent heir not having been charged in special to enter heir to the subject in question.—*Answered*, The apparent heir was charged in general to enter, which being suppletory of a general service, was a sufficient foundation of the adjudication, as to all rights that can be carried by a general service.—*Replied*, A general charge is intended to supply a passive title only; for such is the very stile of the charge; but does not supply either a general or special service. A special charge is necessary, to that end to enter heir to lands and others, where the debtor died infeft, which is a special charge properly so called, and which supplies the want of a special service; or to enter heir to heritable rights, where the debtor died not infeft, which is termed a general-special charge, and which last kind of charge, and that alone, supplies the want of a general service.——THE LORDS found the adjudication null.

Fol. Dic. v. 1. *p.* 131.

1738. *December* 1. CREDITORS of CATRINE *against* BAIRD of Cowdam.

No 10.

AN objection to an adjudication repelled, that the special charge upon which it proceeded was raised and executed before extracting of the decree of constitution, being after decerniture.

Fol. Dic. v. 1. *p.* 131. *Kilkerran*, (CHARGE TO ENTER HEIR.) *No* 1. *p.* 119.