

1704. December 20. JOHN ANDERSON against Sir JAMES SMOLLET.

No 13.

The heirs of certain members of a committee of management, who had not been originally cited, were allowed to be cited *cum processu*.

JOHN ANDERSON of Dowhill, Provost of Glasgow, and John Bowman, Treasurer there, against Sir James Smollet, and others.—The tack of the customs and foreign excise being set to the Royal Burghs, and the administration being so diffused, they committed the management to a few, in name of the whole : And now the Town of Glasgow pursues Sir James Smollet, and the other managers, for count, reckoning, and payment of their share of the profits resulting from that tack, and to exhibit their books, &c.—*Alleged*, No process ; because sundry of the committee of managers being dead, their heirs and representatives are not called, such as Bailie Haliburton, Patrick Houston, and others. *Answered*, They never officiated, and the trust being personal, it accresced to the survivors, and yet they are content to call them *cum processu*. *Replied*, That offer is not sufficient ; but the omitting to cite them originally in the process is sufficient to cast the summons, and force them to begin of new ; for though parties called *pro interesse* only, or as authors, may be allowed to be cited *incidenter*, yet that ought not to take place where principal defenders are forgot to be called *ab initio* ; for if they should now be cited, they may then compear, and allege they are not bound to answer on such a citation, which deprives them of their *induciae legales* ; and suppose one should cite two heirs-portioners, where there are three, the offering to cite the third *cum processu* would not be sustained, but would cast the whole process, seeing the third might have a defence, that could liberate and assoilzie them all. THE LORDS, on Lauderdale's report, repelled the dilator, and allowed the heirs of the managers who were dead to be yet cited *cum processu* ; but sisted any farther procedure in the cause till the same were done.

*Fol. Dic. v. 2. p. 302. Fountainball, v. 2. p. 249.*

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S E C T. III.

Production of Titles *cum Processu*.

A. against B.

No 14.

A SASINE given *propriis manibus*, relative to a contract of marriage, was alleged could not be a title to pursue mails and duties, except the contract where-