

C I T A T I O N.

S E C T. I.

Who must be Cited in a Process on the Passive Titles.

1666. *June 23.* THE VISCOUNT OF ARBUTHNOT *against* ANNA KEITH.

IN a pursuit at the instance of the Viscount of Arbutnot, as donatar to the ward and marriage of Mary and Katharine Keiths, bairns and heirs portioners to umquhile John Keith, brother to the Earl of Marischal; the donatar insisting only at present against Anna Keith, and her husband for his interest, it was alleged no process, because all parties having interest were not called, viz. The Representatives of Katharine Keith, one of the heirs-portioners now deceased; and that the probation against the defender might prejudice Katharine Keith's Representatives in the avail of the marriage.—THE LORDS repelled the allegiance, and found process against one of the heirs-portioners, albeit the Representatives of the other heir-portioner were not called.

Fol. Dic. v. 1. p. 131. Newbyth, MS. p. 63.

No 1.
The Lords sustained process against one of more heirs-portioners, although the representatives of the other were not called.

1672. *January 18.*

The MASTER of SALTOUN *against* LORD SALTOUN and ARTHUR FORBES.

THE Master of Saltoun, as assignee to a debt due by the deceased Lord Saltoun, pursues this Lord Saltoun as heir of line to him, or as charged to enter heir, and he having renounced, he insists for adjudication. Campearance is made for Arthur Forbes, as having disposition from the deceased Lord Saltoun of his estate, who *alleged* that this adjudication was by collusion betwixt the father and the son, to burden the estate disposed to him, and therefore had interest to defend; and alleged that all parties having interest were not called, viz. the rest of the heirs-portioners of the deceased Lord Saltoun; for this Lord Saltoun being heir of line by a woman, the rest of her sisters and their representatives are also heirs-portioners, and must be called; who if they were called, they or some of

No 2.
Found, that process was not to be sustained upon any debt of a defunct, unless the whole heirs-portioners were called.

No 2. them may have writs, whereupon defences may be proponed. The pursuer *answered*, That he might well adjudge against the one heir-portioner *pro rata*, according to her proportion of the debt, and of the estate; and, though the rest were compearing, they could not hinder him, for he might discharge some of them, and pursue the rest; and the pretence that the other heirs-portioners might propone and instruct defences, has no more strength, than if one or more co-principals, or cautioners, being pursued, should allege the same, which has been often repelled. It was *replied*, That process cannot be sustained upon any debt of the defunct's, unless those representing him be called; *ita est*, the whole heirs portioners do represent him jointly in heritage, as well as executors in moveables, against whom there is no process till all be called; and, though formerly this defence was repelled as to one heir-portioner, who, though not called, compeared, concurred, and renounced to be heir, the defence is now proponed for the other heirs-portioners.

THE LORDS sustained the defence, and would not allow to continue the summons against the other heirs-portioners; but found that all of them behoved to have two citations, which could not be upon this summons.

Fol. Dic. v. 1. p. 131. Stair, v. 2. p. 49.

1711. July 3.

ROBERT WALWOOD, Merchant in Edinburgh, *against* JEAN SCOUGAL, and
ROBERT SEMPLE of Fulwood her Husband.

No 3.

A relict, who, by transaction with her husband's heir of line, got the whole right of succession disponed to her, and obliged herself to relieve the heir of all his predecessor's debts, found convenable for payment of one of these debts at a creditor's instance, without calling the heir.

JEAN SCOUGAL, relict of Mr James Hume, merchant in Edinburgh, having by transaction with her husband's heirs of line obliged herself to relieve them of all debts resting by Mr James Hume to any person or persons, upon their disposing to her all their right of succession; Robert Walwood pursued Jean Scougal and Semple of Fulwood her present husband, for payment of a debt contained in a bond granted by Mr James Hume to the pursuer.

Alleged for the defenders: The bond of relief bearing no obligation to pay to the creditors, but only to relieve the heirs of Mr Hume in case of distress, these heirs are the true contradictors, and should have been called; for they might have defences against the debt, and the instructions thereof. Yea, they may, at their pleasure, discharge the bond of relief which is conceived in their favours, and thereby cut off the pursuer's pretences. So, No 11. p. 33. in the competition of the Creditors of Langtoun, it was found, that a cautioner might renounce a public infestment of relief in prejudice of the creditor for whose debt it was granted, *Stair, lib. 2. tit. 2. page 210. (218.)*

Replied for the pursuer: No necessity to call heirs, who have no manner of interest, and are absolutely denuded of all right to the succession, in favours of the defender who is come actively and passively in their place. So when an heir of tailzie defends himself with the *beneficium discussionis*, that he cannot be