

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-

unto the sasine was relative were produced *in initio litæ*, notwithstanding, the LORDS sustained process, the party used of the said sasine producing the said contract *cum processu*, before his contestation, not that the party's declaration was taken, that they had not the said contract in their hand, but behoved to seek it by action.

No 14.

*Fal. Dic. v. 2. p. 302. Auchinleck, MS. p. 209.*

1609. December 22.

COSSINDAE against ASLOUN.

THE Laird of Cossindae pursued the Laird of Asloun for contravention, by casting and transporting 300 or 400 loads of peats furth of his lands of Endbut and Polflug. It was *excepted*, That the pursuer could have no action for any deed done upon the ground of Polflug; because his goodsire, to whom he was heir, was denuded of the property thereof, by heritable infestment thereof, given to this Polflug's father, *in anno* 1557, by virtue whereof, they were in continual possession thereof; which allegiance the LORDS found relevant; because, they thought Polflug had action against Asloun for any wrong was done within his bounds, whereof he could not be relieved, neither by absolvitor or condemnator, to be given in this contravention. It was thereafter *replied* by the pursuer, That he offered him to prove, that this fact was committed in the Greenrisk, which was proper common betwixt his lands of Endovy and Polflug, and so he had good action of contravention, notwithstanding the feu given to Polflug, from whom the defender had no right. In respect of the which reply, the LORDS repelled the exception. ~~It was~~ thereafter *excepted*, That Asloun had done no wrong; because he was heritably infest in his lands, lying in Renfrew, with Endovy and Polflug; and the part libelled, when the said peats were casten, was proper part and pertinents of his proper lands, whereof he had had peaceable possession, past memory of man, as a part of the barony of Cluny, held by him of the Earls of Huntly. It was *replied*, That the exception was irrelevant, as contrary to his libel; because, that the bounds controverted were part and pertinent of the pursuer's lands, possessed by him and his predecessors, past memory of man, by casting and winning peats, and debarring others; likeas, by perambulation, his lands being bounded against this same Asloun, the lands controverted were decerned to lie within the meiths and marches of the pursuer's lands. It was *duplicated*, That the perambulation was only *declaratoria juris*, and altered not the possession: Likeas, a man possessing lands by tilling, sowing, &c. albeit, by decret of perambulation, part of the lands were found not to pertain to the possessor, yet he could not be *brevi manu* dispossessed from these lands, without decret of removing were obtained against him; and, therefore, the defender's lands, marching with the pursuer's lands, and the defender being in possession of lands controverted, no fact done therein by him, before the decret of perambulation, could infer contravention, and the pains

No 15.

Contravention being pursued for casting peats within a man's lands, wherein he alleges himself to be infest, he need not produce his infestment to instruct his summons; but it will be sufficient to produce it *cum processu*.

Effect of a decret of perambulation, as a title.