

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 disposed to her, and obliged herself to relieve the heir of all his predecessor's debts, found convenient 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

called till the heir of line be discussed, it is always relevant for the pursuer to say, that the heir of line hath succeeded to nothing, or hath nothing to succeed to, as such, which he could affect, Stair, b. 3. tit. 5. § 21. It is of no moment to *allege*, That the heirs may have some instructions of payment, or other defence; for the defender, as *emptor hereditatis*, is presumed to have got up all these, and if any be still in their hands, she is entitled to get them up. Again, by our law, any article in a contract betwixt two parties, conceived in favours of a third, affords action to that third party, Stair, b. 1. tit. 10. § 5. for *actiones non sunt multiplicandæ sine necessitate*.

THE LORDS found, That there was no necessity to call the heirs.

Fol. Dic. v. 1. p. 132. Forbes, p. 514.

* * Lord Fountainhall reports the same case :

July 4.—JEAN SCOUGAL, relict of James Hume, merchant in Edinburgh, transacts with her husband's heirs, mean obscure persons; and, for a gratuity, gets a full and ample disposition of his hail succession to a considerable value; but, to secure them, she gives a backbond, obliging her to free, relieve, and skaitless keep them of all debts he was owing, and of all damage and expence they could incur that way. James Hume owing a debt to Robert Walwood, merchant in Edinburgh, he pursues the said Jean, and Semple of Fulwood, now her husband, for payment, on this ground, that she having taken a right *per universitatem* to his whole estate, and obliged herself to free the heirs who disposed it, she has subjected herself *passive* to the debt, and become bound to pay her first husband's creditors; for *quem sequitur commodum idem debet etiam pati incommodum*. *Alleged*, However I may be liable to relieve the heirs if they were distressed, yet my backbond can never afford a direct action against me, the backbond not being conceived in the creditors their favours, but only in favours of my husband's heirs; and therefore they must be first called and discussed; and no process can be sustained against me till they be brought into the field; for they may have instructions of payment, or other defences, which cannot be known to me; the *negotium* being only with the heirs who have a *beneficium discussionis* among themselves, that an heir of tailzie and provision cannot be convened till the general heir of line be first discussed; and if this order hold among them, as Stair, tit. Heirs, shews, much more ought she to have the benefit of it, she not being the proper contradictor in this process, her bond of relief being no relevant *medium concludendi* against her till the heirs be discussed, who may renounce it; as the Lords found in Langton's case, No 11. p. 33. *Answered*, That the defender, by accepting a disposition *omnium bonorum* from the heirs, and obliging herself to relieve them of all the defunct's debts, has clearly subjected herself to the creditor's direct action, as effectually as if upon distress the heirs were pursuing her; and *actiones non sunt multiplicandæ sine necessitate*,

- No 3. especially the heirs being dead, and leaving none to represent them; and *quorum* should he call nominal heirs who have no manner of interest, but devolved all to her; and certainly she got up all the papers and instructions of payment, if there were any; and it is certain that she as *emprix hæreditatis* comes directly in the heirs place. It is true, by the Roman law, the seller was *primo loco* liable on that nice and stiff maxim, that *nemo alteri stipulari potest*; but the customs of all nations had now repudiated this, and laid down a more equitable principle, that articles in a contract in favour of a third party afford action to that third party, though no contractor, as Stair shews, tit. Conventional Obligations. It is true, there was an order among heirs; but if I subsume that the heir has nothing to succeed to, which is affectable or discussable, I will make the remoter heir liable, unless he condescend on a subject I can reach. Now the defender has so denuded Hume's heirs *per aversionem*, that there is not a denier left to them of his estate. THE LORDS sustained process against her, and found no necessity of calling the heirs of line.

Fountainhall, v. 2. p. 655.

S E C T. II.

Who must be Cited in a process against Minors, and who Certiorated in Extrajudicial Steps against them.

- No 4. 1573. March 6. CRIGHTON against LORD ROSSE.
 A DEGREE pronounced against a pupil was reduced, because his tutors and curators were not called for their interest, although it was notour he had none.
Fol. Dic. v. 1. p. 132. Maitland, MS.

* * See This case *voce* TUTOR and PUPIL.

- No 5. 1610. February 1. LORD ELPHINSTON against BRUCE.
 It is sufficient in an improbation to summon a minor personally, and his tutors generally, at the market cross.
Fol. Dic. v. 1. p. 132. Haddington, MS.

* * See This case *voce* MINOR.