

he had ceded the possession being warned, and gave warrant to the defender to enter, and therefore, he being *dominus bonorum*, his wife and bairns had no interest to pursue, and though they had, his oath was sufficient to instruct the lawfulness of the defender's possession, and that the wife's oath *in litem* could not be taken, to esteem her husband's goods. It was answered, that it was notourly known, that the husband had been two years out of the country, and having gone sea, was commonly reputed dead, and therefore the wife being in natural possession, might lawfully pursue this action; neither was it relevant that the husband promised to quit the possession, which being but an obligation, could not warrant the defender, *brevi manu*, to cast them out, unless he had been present, or consented to the entry, or had given a renunciation of his possession, with a warrant to enter *brevi manu*.

No 246.

THE LORDS, in respect both parties acknowledged, that the husband had been a great while absent, found the action competent to the wife; and found that the husband's ceding the possession, as was alleged, was not relevant, and ordained the wife's oath, as to the quantity and value of the goods spulzied, to be taken, and granted diligenece to the defender to cite the husband, if they could find him, to the same diet to give his oath, reserving to the Lords what the wife's oath could work, as to the estimation of the goods, without the husband's oath.

Stair, v. 1. p. 485.

1673. July 8.

HACKET against GORDON.

CHRISTIAN HACKET as one of the heirs portioners of her father, pursues reduction of a disposition of lands made by her father to Gordon of Chapletoun as being on death-bed. The defender *alleged* no process, because the pursuer being a wife, was not authorised by her husband's concurrence, without whom she can pursue no action, unless she were particularly authorised by the Lords, as in actions against the husband. It was answered, That the summons was raised at the instance of the husband for his interest, and if the defender produce any warrant to disclaim, which they must instantly verify, and which he pretends to be a ratification by the husband, in that case the Lords ought in justice to authorise the wife to insist, this being an heritable right, wherein the husband could have no more interest but by his *jus mariti*, and the courtesy, and the wife declares, that the reduction shall proceed with reservation of any right flowing from the husband.

THE LORDS found that the husband behaved to be *in processu*, but if he refused concurrence, the Lords would authorise the wife to insist to reduce the right, in so far as the husband had no interest further than his *jus mariti*, and the courtesy.

No 247.

An action was not sustained at the instance of a wife, though the summons was raised in her name and her husband for his interest, she not being authorised by her husband's consent, but the Lords declared they would authorise her to insist by herself, if her husband referred to concur.

Fol. Dic. v. 1. p. 405. Stair, v. 2. p. 206.

Gosford reports the same case:

No 247.

1673. July 9.—In a pursuit of reduction, at the said Christian's interest, of a disposition of land made by the father *ex capite lecti*, against the two sisters, in whose favours the same was granted, they being all apparent heirs portioners, it was *alleged* for the defenders, That the pursuer being married, and not authorised by her husband, who had disclaimed this same, could not be sustained at her instance. It was *answered*, That the pursuer insisting only for clearing of her own interest as heir portioner, and not for any thing that belonged to her husband *jure mariti*, and against a third party, she may pursue *proprio nomine*, and needs not to be authorised but where the action is intended against her own husband, *quo casu* upon a petition the Lords are in use to give warrant to a procurator to concur with her in that pursuit.—THE LORDS did find, That where a wife hath just cause to pursue, if it be proved *instanter* that the husband disclaims the pursuit, that the Lords may give warrant to another to compare and concur with her; but if that he do not appear, she must call for a concurrence, and cite him as a defender.

Gosford, MS. No 614. p. 355.

1684. February 15. PITSLIGO and MILNE *against* HILSTONE and HOG.

No 248.

A wife being a conjunct fiar, found entitled, along with her second husband, to lead an adjucation.

IN the action of reduction, pursued at the instance of the Lord Pitsligo and Robert Milne his assignee, of a comprising deduced at the instance of Isobel Hilstone and Mr William Hog her husband for his interest, of the estate of Ludquhairn, upon this reason, that the comprising was null, being led upon bond granted by Ludquhairn to Patrick Hodge and the said Isobel Hilstone then his spouse, in conjunct fee, and the heirs to be procreate betwixt them; in the which bond the said Isobel Hilstone was only liferentrix, and so could not comprise for the fee of the sum; And *2do*, That albeit she and her second husband Mr William Hog could have comprised for the sum, yet she behoved to comprise in the terms of the bond, viz. in favours of the heirs of the marriage betwixt her and Patrick Hodge, but could not comprise for herself and her second husband. It was *answered*, That she was conjunct fiar by the bond, and so had power to suit execution, and had *jus exigendi*; and albeit the comprising was not in the terms of the bond, yet the bond did regulate the comprising, and the apprising did accresce to the heirs of the first marriage, mentioned in the bond; likeas, the defender had right from Mary Hodge, heir of the first marriage, and also my Lord Harcarse was heir of the second marriage betwixt Isobel Hilston and Mr William Hog, who compared and concurred in this process.—THE LORDS found, That Isobel Hilstone being conjunct fiar, had *jus exigendi*, and therefore might warrantably lead the comprising, and