

1624. June 15. FINLAYSON'S Wife *against* WOOD.

IN an action of double pointing betwixt Walter Finlayson's wife and John Wood, who, for a debt owing to him by the said Walter, had comprised an annualrent, wherein the said Walter's wife was infest out of the lands pertaining to the Lord Sanquhar; and which comprising being deduced at the instance of the said John Wood, against the said Walter; for the said annualrent, in so far as it pertained to him *jure mariti*, it was quarrelled, because the wife, who was principal party, having right to the annualrent, and in whose person the same was principally inherent, (for it belonged only to the husband *pro interesse*) was not cited to the deducing of the comprising, whose right could not be taken from her, except she had been expressly called thereto; this allegeance was repelled, and the comprising was sustained; for the LORDS found no necessity to cite her, seeing there was no right comprised from her, but only the right which the husband had thereto *jure mariti*, during their marriage. Sicklike, this comprising being quarrelled, because it was deduced by John Wood, who, the time of the deducing thereof, was paid of the debt, for the which he comprised; this also was repelled, because the payment was made by the cautioner in the bond granted to him, to whose use, and for whose relief, albeit in his name, the said comprising was deduced.

Act. Aiton.

Alt. Nicolson, jun.

Clerk, Gibson.

Fol. Dic. v. 1. p. 141. Durie, p. 128.

No 108.

A comprising was sustained although a wife infest was not called thereto; as there was no right comprised from her, but only what right her husband had *jure mariti*.

1637. March 17. STUART *against* STUART and INGLIS.

CAPTAIN STUART having obtained sentence against Lieutenant-Colonel Stuart, decerning him to pay him some moneys, for payment whereof having arrested in John Inglis merchant, burges of Edinburgh, his hands, some moneys pertaining to the Colonel, he pursues the Colonel and the said John Inglis for making of the said moneys furthcoming; and having cited the Colonel to this pursuit, at the day of compearance he refers the verity of the debt owing by John Inglis to the Lieutenant-Colonel, to the said John Inglis's oath, and summoned the said John Inglis to a day for that effect, to which day the debtor to the pursuer, viz. the Lieutenant-Colonel, was not summoned; and it being *alleged*, that no process could be granted therefor in this cause, because the said Lieutenant-Colonel was not summoned to that diet of the process, without which had been done, the process could not be sustained; and the pursuer contending in the contrary, that there was no necessity to summon him over again to this diet of the process, seeing he was summoned by the first summons in this cause; and there was no necessity to summon him to this term, seeing

No 109.

An arrester pursuing forthcoming, and referring the verity of the debt arrested, to the oath of the party in whose hand the arrestment is laid, and summoning him to a day to depone, must also summon the original debtor to the same day; or, if that is neglected, the oath may be taken to lie *in retentis* but

No 109.
no decret
can go out
till the prin-
cipal debtor
be summon-
ed, and the
days of the
summons run.

the debt was referred to John Inglis's oath, whom he could not hinder to depone upon his conscience what he pleased ;—THE LORDS found no process, because the principal debtor was not summoned to this diet, as he ought to be to all the diets of the process, (he not compearing therein) ; but the LORDS ordained, in the mean time, John Inglis his oath to be taken, seeing the pursuer had no other probation of the debt, owing by John Inglis to the Lieutenant-Colonel, but his oath ; and if the said John Inglis die before the Lieutenant-Colonel, who is not within this realm, could be summoned, it were inquiry that the pursuer should be prejudged in his probation ; therefore ordained his oath to be taken, as said is, and to be retained and kept, to be extant while the event of the process.

Act. Johnston.

Alt. Gilmore.

Clerk, Hay.

Fol. Dic. v. 1. p. 141. Durie, p. 839.

1665. January 31.

The LORD BORTHWICK against ANDREW and MR MARK KERRS.

No 110.

In a reduction *ex capite inhibitionis*, there was found no process till the person inhibited were called, the defender's author, and who was bound to him in warrandice.
See No 107.

THE Lord Borthwick pursues a reduction *ex capite inhibitionis* against Andrew and Mark Kerrs of a disposition made by Sir Mark Kerr of Mauldslic, upon this reason, that Sir Mark was inhibited at the Lady Borthwick her instance, before the granting of the said disposition, whereunto and grounds thereof, the Lord Borthwick was made assignee. THE LORDS found no process, because the representatives of Sir Mark, viz. the Countess of Lothian and her sister, were not called, as they ought to have been, in this process ; and albeit, they were called in a summons of transferring of the same process, yet that was not found sufficient, not being called in this.

Fol. Dic. v. 1. p. 141. Newbyth, MS. p. 24.

* * Stair reports the same case :

THE Lord Bothwick pursues a reduction, *ex capite inhibitionis*, of all rights made by Sir Mark Kerr, to Andrew or Mr Mark Kerr of Moristoun, of certain lands. The defenders *alleged* no process, because none to represent Sir Mark Kerr were called, who being bound in warrandice to the defenders, ought to be called ; whereas, of old, processes sisted till warrants were first discussed ; so now the warrant ought at least to be called. The pursuer *answered*, That he was not craving reduction of Sir Mark's own right, but of Moristoun's right, granted by Sir Mark, who was common author to both. And as to the warrandice, the defender might intimate the plea if he pleased.

THE LORDS found no process till the warrant were called.

Fol. Dic. v. 1. p. 141. Stair, v. 1. p. 259.