No 44. against the feuars of the lands, without calling the superior.

and the L. Wemyss being permitted to mend his precept, and to turn it to a declarator for finding the property of the lands, and others libelled, to pertain to him, as his own property; which action being pursued at his instance and his son's, who was fiar, and himself liferenter, the LORDS found process, and sustained the action at the father's instance, who was liferenter, albeit the fiar was debarred by the defender by horning; seeing the father liferenter might seek this declarator upon the property, that the fee given to his son might be profitable and effectual to him; and this action was not sustained as merely petitory, but as mixed with the possessory, for maintaining of the pursuer's possession, as he libelled within his property, albeit the defender alleged, and claimed contrary property and possession; and also this action was sustained, albeit the defender alleged his property could not be disputed, except that his superior, of whom the defender held the lands wherein he was infeft, and whose vassal he was, were expressly called to this pursuit; who not being called, his right could not be questioned, nor he prejudged of his right, by calling of his vassal only, and not calling of himself, who was only the just party who should, and might maintain his own right; which was repelled, and this process and action against the vassal, who was heritor, was sustained. *See* PROCESS.—LIFERENTER.

Act. *Stuart.* Alt. *M'Gill.* Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 135. *Durie, p.* 697.

1677. *November* 8.

EARL OF MORAY *against* The FEUARS of the Salmon-fishing of Ness.

No 45. In a declarator that the Sheriff of Inverness had right to fish three days in the water of Ness, no necessity was found to call the town, or any but the possessors.

THIS is a declarator that the Earl, by his gift-right sheriffship of Inverness *ad vitam* has right to fish three days in the time called the summer-moon, conform to his possession. *Alleged*, The Sheriff and Town of Inverness are not called. *Answered*, He needs call none but the possessors, let them intimate the distress. THE LORDS repelled the allegeance.

Fol. Dic. v. 1. *p.* 135. *Fountainhall, MS.*

Huntley, as Constable of Inverness, claimed right also.

SECT. XII.

Citation in Declarator of Marches.

1623. *February* 28. IRVING *against* FORBES.

No 46. In an action against a wadsetter,

IN an action pursued by Irving, who was heritable proprietor and co-portioner of a land, which had a moss belonging to the whole land, against one Forbes,

who was infeft by a base infeftment in another part of the same land, with liberty of the said moss, to be holden of the annalzier, and under reversion; to hear it found, that his liberty of the moss should be restricted to the proportion of the land wherein he was infeft, and that he had no liberty in the said moss, but effeiring to the land, as it answered in proportion, as a part compared with the whole land; THE LORDS sustained this process against this wadsetter, albeit the heritor who was standing infeft holden of the superior, and who granted the wadset under reversion only, was not called to the pursuit, to which they found no necessity to call him; but the LORDS found and declared, That what should be done betwixt these parties in this process, should not prejudge him.

Act. ——. Alt. *Baird.* Clerk, *Scot.*

Durie, p. 53.

No 46.
of a part of lands that had a moss in common, for restricting the wadsetter's interest in the commonty, process was sustained against the wadsetter, although the reverser was not called. But the reverser's interest could not be prejudiced.

*** Haddington reports the same case:

IRVING pursued Mr James Forbes to hear and see him decerned not to take any more of the peats of the barony whereof they were portioners, nor effeired to his portion for the use of the inhabitants of his part of the barony. Mr James Forbes *alleged*, That he was only infeft under reversion, and so Blaikburne, his author, should have been called; without whom, no restriction could be imposed upon his land. It was *answered*, That the pursuer knew Forbes to be infeft, and to have done him wrong, but he could not prove whether he was infeft redeemable or irredeemable, and so could pursue none but him who was infeft, and wronged him; not his author.

THE LORDS found relevant; and declared that nothing done betwixt these parties should prejudge Blaikburne or his superiors, otherwise nor accorded of the law.

Fol. Dic. v. 1. *p.* 135. *Haddington, MS. No* 2796.

1662. *February* 8. LORD TORPHICHAN *against* ——.

No 47.
A cognition of marches betwixt vassals, was found valid, though the superior was not called.

THE LORD TORPHICHAN, and certain of his feuars, pursue a reduction of a decreet of the Sheriff, whereby he set down marches betwixt their lands and others, upon this ground, That he did not proceed by an inquest, conform to the act of Parliament, but by witnesses: *2dly*, That he as superior was not called: *3dly*, That the Sheriff had unwarrantably sustained the setting down of marches formerly by arbiters, to be proven by witnesses.—The defenders *answered*, The *first* reason was not objected, and the defenders compearance, it was competent, and omitted: To the *second*, The superior could have no detriment: To the *third*, That the setting down of march-stones being a palpable fact, might be proven by witnesses, whether done by the parties themselves, or by friends