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 intented 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 compear 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 adjudication.

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 2*do*, 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 compeared 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

the comprising being led by her and her second husband did accresce to the heir of the first marriage mentioned in the bond, and therefore sustained the comprising against my Lord Pitsligo, albeit a singular successor likeways in the said lands. No 248.

P. Falconer, No 82. *p.* 56.

*** Harcarse reports the same case:

February. 1682.—A WIFE having, after her husband's decease, comprised in favours of herself and her second husband, for his interest, and their heirs, lands belonging to the debtor, in a bond provided to her and her first husband in conjunct fee, and to the heirs of the marriage, which failing, to his heirs; the said apprising was quarrelled by posterior apprisers, in respect the wife, as having but a right of liferent of the money, could not comprise for the fee, nor alter the destination thereof from the heirs of the first, to those of the second marriage.

THE LORDS sustained the apprising as formal, and that it did expire, if not redeemed *debito tempore*, in respect the relict and fiar concurred; and a wife's conjunct fee is only considered as a liferent in a competition with the fiar; but found, that the heirs, who were minors, and so craved to redeem the legal of a prior comprising expired, against their mother, had no interest as apprisers to do it, the apprising being led in the mother's name, and not in their's; just as the minority of persons, for whom a major doth apprise in trust, would not prorogate the legal.

February. 1684.—THE cause *supra*, being again debated *in præsentia*, it was *inforced* by my Lord Pitsligo, That though the debtor in the bond had no interest to quarrel the informality of the apprising of the fee by the wife, whose right resolved in a liferent; yet my Lord Pitsligo, another compriser of the same lands, had good interest to quarrel the informality of another's diligence.

Answered; Though a wife's conjunct fee, even without the restrictive word *liferent*, doth in law import but a liferent in a competition with the heir; yet, by the conception of the bond, she seems to be formally fiar of the money, so as she might comprise for the fee on it; and the destination in favours of the husband and children of the second marriage is to be understood thus, viz. That the fee should go to her heirs, and the bygone annualrents subsequent to the first marriage, to his heirs and executors, as having right thereto *jure mariti*; suppose, again, she had altered the primitive destination of the fee, co-creditors apprisers had no interest to quarrel the same, as being a thing that only concerned the heirs, and would be regulated by the right course of succession.

THE LORDS sustained the apprising, and adhered to their former interlocutor.

No 248. Thereafter it was *alleged*, That the time of leading the apprising, the heir of the first marriage was served heir thereof; and so the fee subsisted in his person, and not in the person of his mother who apprised; but yet the Lords adhered to their former interlocutor.

IN the process *supra*, between my Lord Pitsligo and Harcarse, an apprising being *alleged* to have been satisfied by intromissions; it was *answered*, That, as to any intromissions during the debtor's minority, after expiring of the legal, the rents of the whole lands belonged to the appriser for his annualrent, though far exceeding the same, by the act 1621 concerning apprisings.

Answered; By the act 10. Sess. 3. Parl. 1. Charles II. aprisers intromitting with the whole rents, during the debtor's minority, after the legal, the superplus more than the annualrent is to be imputed *in sortem*. 2. 'Tis not only competent to the minor-debtor himself, but also to any posterior appriser, to crave the benefit of the declaratory act; for otherwise the posterior appriser's whole debt would stand out against the heir or debtor, and so the benefit of minority would be evacuated.

THE LORDS sustained both the members of the answer.

It was further *alleged* for my Lord Pitsligo, That his first apprising must be looked upon as expired, though led since the year 1652, and the legal prorogated many years by minority; in respect that, by the act 22. Sess. 3. Parl. 1. Charles II. it is declared, That, where a second appriser had redeemed the first before the year 1661, the clause of the act debtor and creditor bringing in apprisings within year and day *pari passu*, should not prejudge him, but that he should have the benefit of a first apprising, as before the year 1661.

Answered; All that is intended by the said act 22. is, That the sum with which the first apprising is redeemed, should be paid *ex capite*, and not come in contribution with the rest, which by the act debtor, &c. were appointed to come in *pari passu pro rata*; and the conclusion of the act 22. appoints posterior aprisers to come in *pari passu* with the second, which were inconsistent and impracticable, did the posterior apprising expire.

THE LORDS sustained the answer.

It was again *alleged*, That the first apprising, which the second appriser had now acquired, must be considered as satisfied in a great measure; in respect the first appriser had recovered a decreet of mails and duties against the tenants, and raised horning and caption thereon, which was as much as if he had entered into possession, and so he ought and should have continued; therefore, although he suffered the common debtor to intromit thereafter, the rent must be imputed to extinguish his apprising, for making room to posterior aprisers; as was found in the case of John Muir writer, *contra* Grimmet, January 1681. No 13. p. 301. No 8. p. 3477. and No 10. p. 3479.

No 248.

Answered; The recovering of a decreet, without recovering payment, was not relevant to make the first appriser possessor; especially considering that the said decreet was but a declarator for years to come, and was obtained several years before leading of the second or posterior apprisings; and the debtor, notwithstanding the decreet, continued always to possess; so that these other apprisers had no reason to ly by, upon pretence that the first appriser either did, or intended to intromit; and they not being debarred from possession by the first appriser's competing with them, they cannot seek the mails and duties of years subsequent to his decreet to be imputed in satisfaction of his apprising,

THE LORDS advised the parties to agree.

Harcarse (COMPRISINGS), *No* 271. *p.* 64. *No* 303. *p.* 73. & *No* 305. *p.* 74.

*** This case is also reported by Fountainhall.

January 18. 1684.—IN a case between Forbes Lord Pitsligo and Robert and Alexander Milns, the LORDS *in præsentia* find in the case of an apprising led by Mary Hillstains, my Lord Harcarse's mother, on a bond wherein she was only conjunct fiar of the sum, and her daughter Mary Hog was by the bond *per expressum* fiar, but led by the liferentrix for the principal sum as if she had been fiar, that the said apprising was effectual and accresced to the fiar, as if it had been also led and deduced at her instance for her interest and right of fee; though her name was not in the comprising, but that the mother's security became her's, seeing she was conjunct fiar, and had power to uplift upon caution:—*Nota*, The Milns being paid of their debt, the benefit of this cause was for the behoof of Keith of Ludquhairn.

By this interlocutor, another comprising of the same lands led 20 years ago was found not expired, because of the interruption by the fiar Mary Hog's minority; which was a great extension, to cause her minority, at whose instance it was not led, keep the legal from expiring in prejudice of Lord Pitsligo, a singular successor *bona fide* acquiring it. It was thought a great inversion and stretch of principles and form; for if Mary the fiar had been to transmit and convey this apprising, what could be her title? They answered, a general service to her mother; but this is not enough if infeftment had followed on the comprising; this is a new form of *negotiorum gestio* and acting for another.

February 15. 1684.—PITSLIGO's cause with Robert, &c. Milns, mentioned 18th January 1684, is again debated and advised; and the LORDS adhered to their former interlocutor of that date; though it was *urged*, that albeit she had *jus exigendi*, yet it was only for her liferent use; and they ordain him to count and reckon, though his legal was many years ago expired; so that he will be found by his possession and intromission more than paid. And the minority of

co-creditors was found to stop the expiry of a legal, in Hamilton of Wishaw's case with Andrew Lundy decided 30th November 1677.* And if in that case, why not here?

No 248.

March 5. 1684.—Pitsligo and Milne's cause, mentioned 15th February 1684, being advised as to other points; the Lords found that his author's possession by virtue of the comprising, after the legal was expired, behoved to be counted for, to absorb and extinguish his comprising *pro tanto*, notwithstanding it was prior to the 10th act 1663, by which it is first found that the superplus rents of minors lands more than pay the annualrents of the sums apprised for, must be ascribed *in sortem*, though the legal be run, and only stopped by the minority; because they find that act only decloratory, or exegetical and explicatory of the 6th act 1621; though it be *in terminis* contrary *quoad corticem verborum* to it.

There was also another point decided on the 22d act Parl. 1663, anent posterior comprisers redeeming the first, to secure themselves against the expiration of its legal, that other comprisers shall not come in *pari passu* as to that; and yet the 10th act 1663, is only in favours of minors against whom apprisings of their lands are led, and so ought not to be extended *ultra casum in lege expressum* to a co-creditor appriser who is minor, (which was Wishaw's case,) and it is too dangerous, metaphysical, and arbitrary, to obtrude the meaning and sense of the act against the rubrick and express words of it; for where the *rubrum* contains a sentence, Everhardus in his *Loci Legales* tells us, *a rubro ad nigrum licet argumentari.* The 3*d* point debated and ordained to be farther heard in presence was, If the Lord Pitsligo should be liable for the whole rent, seeing his author took a decreet for mails and duties against the tenants, and so must count conform, and cited Muir's case with Shaw, No 13. p. 301. No 8. p. 3477. and No 10. p. 3479. *Answered*, This holds only where the decreet of mails and duties proceeds on a competition among creditors, and a preference ranking them; for then he is bound to intromit, at least he must count for diligence, because he debars others; but where there is no opposition, but the decreet for mails and duties is in absence, so that none are excluded, so that they either have or might have pursued and obtained decreet for mails and duties as well as he, such a decreet cannot make him liable to count farther than he actually intromitted with. 2*do*, He did not enter to the lands by virtue of that comprising whereon the decreet for mails and duties was obtained, but by other rights and comprisings to which she now ascribes his possession.

Fountainhall, v. 1. *p.* 262. 271. & 277.

* Examine General List of Names.