that man; but, *nota, they call him Gordon.* See the contrary decided in Dury, 16*th December* 1629, *Home.* *Vol. I. Page* 182.

1682. *July 5.* The TOWN of PAISLEY *against* The SHERIFF of RENFREW.

PITMEDDEN, being this week on the Bills, reported the case of an advocation given in by the Town of Paisley against the Sheriff of Renfrew, craving a general advocation of all actions that should be pursued against any of their inhabitants before the Sheriff's Court; because they were expressly exemed by their charter in 1448, given them by King James IV. with all the privileges of the burghs and abbacies of Dumfermline, Newburgh, and Arbroath; and they had a declarator of their exemption depending before the Lords.

The Lords refused a general advocation, as unusual; but, when they should be pursued, ordained them to give in special advocations of each particular action, and the Lords would consider them.

Yet I see a general relaxation against all hornings *quoad* the effect of a service, granted to the Earl of Crawfurd, in Dury, 19*th June* 1630.

Vol. I. Page 187.

1682. *November* 7. ELIZABETH and —— BARCLAY and PHIN, their MOTHER, *against* PHIN and DUNCAN.

IN a declarator of the commission of a back-tack in a wadset, for not paying the back-tack duty, by the space of three or four terms run together; it was ALLEGED, The back-tack not being conceived under an irritancy in case of not payment, by suffering two terms to run in the third unpaid, the failyie could not be declared.

The Lords, upon Forret's report, found such back-tacks had, in their own nature, a legal irritancy, though there was none in the contract and paction; and therefore declared it was incurred; and admitted the creditor to the natural possession of the wadset-lands, unless the debtor would purge the failyie by payment of the bygones before extract, and would find caution to pay it in time coming.

Though some cried out on this as extraordinary, yet the same was decided before; whereof Stair, *tit.* Tacks, p. 338, gives instances.

Vol. I. Page 192.

1682. *November* 7. DOCTOR HARY BLYTH *against* LAWSON.

MR Hary Blyth, Doctor of Medicine, pursues a reduction of a comprising led by one Lawson, upon this ground, That the lands of Soultry, which are ap-

prised, at least a part of them, lie locally within the shire of East-Lothian, and yet they are denounced to be apprised at the market-cross of Edinburgh, whereas they ought to have been denounced at Haddington cross; and so, the execution being wrong and null, the comprising falls, *quoad* that part at least.

ANSWERED,—Though a part of the apprised lands are indeed locally situated in East-Lothian, yet they are but a part of the barony of Soultry, which lies, *in confinio*, betwixt the two shires, in the west limits of them; but the greatest part lies in Mid-Lothian, and therefore, by constant practice, all diligence in relation to that whole barony has been always hitherto done and executed at Edinburgh, the greater part drawing the lesser; and *error communis* being able *facere jus pro præterito*, at least to excuse and maintain a standing diligence.

The Lords demurred on this; and first annulled the apprising; but thereafter, in respect of the consuetude, sustained the denunciation and apprising, and found it no nullity. *Vol. I. Page* 192.

1679, 1680 *and* 1682. SARAH KEIR and JOHN WEMYSS, her Husband, *against* DAVID FERGUSSON.

1679. *November* 14.—IN the charge given by Sarah Keir and John Wemyss, her husband, against David Fergusson in Kirkaldie, for employing 13,000 merks for her liferent use, conform to her contract-matrimonial with his son:

It was ALLEGED, He was not personally bound in that clause of employing, but only *nomine tutorio* for his son; it only bearing that he took burden for his son, in respect of his then minority; which in law can import no more but that he was cautioner for his son that he should not revoke the provision made to his wife; and, he becoming major, and never having revoked it, the obligement as to his father is extinct, and he is now free.

The Lords found the father liable, (notwithstanding of those words, *In respect of his minority,*) as *expromissor et correus debendi*, since he, his heirs and executors, were bound.

This deserves consideration; for the clause neither bore that he and his son were bound conjunctly and severally, nor that they became obliged with one consent and assent. But it seems the Lords thought it unfavourable to evacuate the obligement for a woman's jointure of 13,000 merks, who brought 9,000 merks of it in tocher with her; and the Lords went upon the design and meaning of the parties. *Vol. I. Page* 64.

1679. *November* 19.—In the cause Keir and Wemyss against Fergusson, (*vide* 14th Nov. last,) the defender further ALLEGED he had satisfied the obligement, in so far as he had already employed the money for her liferent. ANSWERED,—It is not in responsal hands. REPLIED,—They were then responsal.

This being reported, the Lords found, that it was not enough that the parties in whose hands the money was lodged for her liferent use, at the time of the first employment by her husband, which was in 1670, were then responsal unless she had accepted, or consented, or homologated it since her husband's decease; or that they are still sufficient and able; seeing the time her husband