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

lived she was *non valens agere, et actio ei non competebat nec nascebatur* till after his decease. See *3d Nov.* 1677, *Cuthbert.*

The Lords are most favourable to women's jointures. *Interest reipublicæ mulieres dotes salvas habere,—l.* 1 *et* 2 *D. de Jure Dot. and l.* 1. *D. Solut. Matrim.* See *8th Jan.* 1680, *Rie.* *Vol. I. Page* 65.

1679. *December* 9.—David Fergusson, as tutor to his grand-children, craving that Sarah Keir, his daughter-in-law, and their mother, may be decerned to deliver them up to be kept by him; as also, to modify an aliment to them of their mother's jointure. ANSWERED,—There was a civil process depending betwixt them before the Lords, for recovering her jointure. (*Vide* 14th Nov.)

The Lords referred it to the civil judge, to be summarily discussed; and superseded to determine an aliment, till the event of the said civil process did make it appear what means and estate the children had, unliferented by their mother or goodsire. *Vide infra*, 11th Feb. 1680. *Vol. I. Page* 68.

1680. *January* 20.—In the action between John Wemyss and David Fergusson, (19th Nov. 1679;) where an arrestment is laid on upon a decreet or registrate bond, which is suspended, the Lords do now commonly upon a bill loose the arrestment upon caution, as if it had been originally laid on upon a dependance, and this they never refuse now; as also, if the arrestment lie over six months without raising a pursuit on it, they will loose it upon caution. *Vol. I. Page* 76.

1680. *February* 11.—The case David Fergusson against Wemyss (9th Dec. 1679,) being reported; the Lords found the defence proponed by the mother against the aliment craved by her children from her, *viz.* that she liferented little more than her own tocher, not relevant, unless she offer to prove there is an estate sufficient to aliment the minor, over and above the estate liferented by her. But they allow the mother the custody of her son till he be of the age of seven years, as also the custody of the daughter till she be of that age. *Vide Aug.* 10, 1680, *Home; Ann. Robert. Rer. Judicat. lib.* 1, *c.* 8,—where the Parliament of Paris adjudges the education of the child to the mother, though she be married. *Vol. I. Page* 84.

1682. *November* 8.—David Ferguson, as tutor to his grand-children, pursuing Sarah Keir, their mother, and John Wemyss now her husband, for the moveable heirship intromitted with by her, (*vide* 14th Nov. 1679;) she craved absolvitor, because, by a clause in her contract matrimonial with David's son, she is assigned to all the moveables of the house, the time of her husband's decease, if she should survive him. ANSWERED,—This is to be understood *sano sensu*, and not of heirship, seeing it is not expressed.

Yet the Lords found moveables, in the general, comprehended heirship as well as other moveables; and therefore assoilyied her. *Vol. I. Page* 193.

1682. *November* 8. CATHARINE M'KAY, Petitioner.

CATHARINE Mackay being to be served heir to her father, in some lands in Argyleshire; because there was no Sheriff there to give her infeftment, the Lords, by their deliverance on a bill, ordained the Director of the Chancery to