

(NATURE and EFFECT.)

No 16.

A compriser may chuse, whether to retain possession, or use personal diligence; but cannot take advantage of both.
See No 14.

1631. *January 22.* L. CLOVERHILL *against* MOODIE.

CLOVERHILL having comprised Moodie's lands for debt, and, nevertheless, charging Moodie, by horning, to pay; and, upon that horning, having letters of caption; Moodie suspended, that the comprising ought to stay personal execution, or else, that the creditor should renounce the same. THE LORDS found, That, if the suspender would enter the charger to the possession of the lands comprised, to be bruiked by him, conform to the comprising, he ought to accept of the same, *quo casu*, no personal execution of caption ought to be granted against the debtor; albeit that the debtor's wife was infest in the lands, and that she would not renounce her right, in favour of the compriser, which the LORDS found the debtor could not be compelled to obtain; but, without her consent, found the comprising and possession sufficient; and, if the compriser would not accept of possession, that he ought, *eo casu*, to renounce his comprising; for they found, That he ought not to keep both, *viz.* both to use caption, and to retain the possession and comprising; but that he had his choice of any one of them.

Act. —.

Alt. *Gibson.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 15. Durie, p. 537.*1631. *December 7.* SCARLET *against* PATERSON.

No 17.

An appriser, who did not renounce, but whose possession had not yet produced full payment, found entitled to poind, but not to execute caption.

HELEN SCARLET having comprised from John Paterfon, a tenement, the legal whereof was expired; before which comprising, the lands were burdened with an annualrent, which exhausted almost the yearly profit of the land, and mails thereof: She, after decease of her debtor, and expiry of the legal, pursues the son of her debtor, as behaving himself as heir to him, to make payment to her of the sum, for which she had comprised; and he *alleging*, That by the foresaid comprising, she must be reputed satisfied, and cannot return to seek personal execution for that debt, whereof she was satisfied by the comprising, the legal whereof was expired; and so she was become heretrix of the land, unless she would renounce, and resign her comprising and infestment *habili modo*: And the pursuer *replying*, That the comprising cannot hinder the creditor to seek payment, and to use all competent means to obtain payment, besides the comprising, seeing the same is unprofitable for her, through the burdening of the said anterior infestment of annualrent; and she needs not renounce the comprising, but being paid she shall renounce the same: And the defender *duplicing*, That albeit the annualrent should exhaust the whole mails of the lands, (which was not granted,) yet the heritable right thereof subsisting in the compriser's person, was more worth than the whole debt of the comprising.—THE LORDS found the

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comprising, although expired, hindered not the compriser to pursue the heir of her debtor for that same debt; and notwithstanding thereof, she might obtain, and seek action and sentence against him therefor, to the effect she might comprise the heir's lands, and pound his goods for her satisfaction; but found, That so long as the said comprising stood unrenounced by the pursuer, whatever sentence she should recover against the heir, she should not be heard to use any personal execution thereupon, either of caption, warding, or horning, but only pouding of his goods, or apprising of his lands, as said is.

No 17.

Act. *Cunninghame & Scot.*Alt. *Stuart & Primrose.*Clerk, *Scot.**Fol. Dic. v. 1. p. 15. Durie, p. 605.*

1740. July 25.

MABENS *against* ORMISTON.

A DOUBT being stirred, by the writer to the signet, when he presented a bill of horning to the Ordinary on the bills, whether horning should be granted upon certain grounds of debt, whereupon adjudication had lately proceeded, and in virtue whereof the adjudger was in possession; which the Lord Ordinary stated in general to the Lords, they ordered memorials.

No 18.

The law of the above cases, relative to personal execution, altered.

But no appearance having been made against passing the bill, the Ordinary, upon resuming the report, laid before the Court, the old decisions, 23d June 1627, Sinclair against Bruce, (*No 13. b. t.*); 29th January 1628, Meldrum against Cluny, (*No 14. b. t.*); 22d January 1631, Cloverhill against Moodie, (*No 16. b. t.*); 7th December 1631, Scarlet against Paterfon and others, (*No 17. b. t.*) From which it appeared that an appriser, who had attained possession, could not use personal diligence, even during the legal, unless he renounced his apprising; and that if the appriser continued to possess after the legal, he could not be allowed, even upon renouncing his apprising, to attach the debtor, or any other subject belonging to him; because then his debt was understood in law to be paid. And the question was, Why should not the case be the same in general adjudications, as it was in apprisings?

As to which it was *observed*, That, originally, apprisings were like poudings direct, and irredeemable conveyances; and while they remained of their original nature, there might be some reason, that while the creditor retained his apprising, he should have no access to other diligence.

But after apprisings came to be only rights in security redeemable, the decisions referred to, were said to carry the matter too far; that an apprising, though only a right in security, over, perhaps, a small estate, noways sufficient for the debt, should, within the legal, bar the creditor from affecting a separate subject, or even the person of his debtor, who might have concealed effects.