compriſing, although expired, hindered not the compriſer to purſue the heir of her debtor for that ſame debt; and notwitſtanding thereof, ſhe might obtain, and ſeek action and ſentence againſt him therefor, to the effect ſhe might compriſe the heir's lands, and poind 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 poinding 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.

No 18.
The law of the above caſes, relative to perſonal execution, altered.

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.

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. *h. t.*); 29th January 1628, Meldrum againſt Cluny, (*No* 14. *h. t.*); 22d January 1631, Cloverhill againſt Moodie, (*No* 16. *h. t.*); 7th December 1631, Scarlet againſt Paterſon and others, (*No* 17. *h. 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 poindings 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.

No 18.

But that, be in this what will, there was ſtill a different conſideration in adjudications; for, in appriſings there was a valuation of the ſubjects as in poindings; whereas, adjudications are led at random, without any regard to the value.

And without further argument it was found, 'That the creditors might, without renouncing their adjudication, or diſcontinuing their poſſeſſion, uſe perſonal diligence againſt the debtor.' And accordingly, the Ordinary was authoriſed 'to paſs the bill of horning.'

Nevertheleſs it muſt be owned, that as a deciſion, it is of the leſs authority, that it proceeded *ex parte*, and came in, it may be ſaid, by ſurpriſe before the Court.

Fol. Dic. v. 3. *p.* 12. *Kilkerran*, (ADJUDICATION and APPRISING.) *No* 8. *p.* 5.

1754. *March* 9.

Sir LEWIS M'KENZIE of Scatwell, *againſt* His Majeſty's ADVOCATE.

No 19.
Whether intereſt is due on the penalty in an adjudication.

IN the 1705, George Earl of Cromarty became bound to pay 2300 merks to Kenneth M'Kenzie of Scatwell. In the 1723, Scatwell obtained decreet, adjudging the eſtate of Cromarty, for payment of the principal and intereſt of the ſum foreſaid, accumulated from the date of the adjudication. The late Earl of Cromarty, heir of the original debtor, was attainted, and his eſtate veſted in the King. Sir Lewis M'Kenzie of Scatwell, having right to the adjudication aforeſaid, entered his claim for payment of the accumulated ſum and intereſt on it, from the date of the adjudication.

His Majeſty's Advocate *objected:* That, by the act 20 Geo. II. cap. 41. it is provided, 'That no decree in favour of any claimant, or debenture, or cetificate 'to be iſſued thereupon, ſhall be made for any ſum or ſums, on account of pe-'nalties, for failure of payment at the day it became due, or for any other pe-'nalties whatſoever.' And he *contended*, That the accumulating of capital and intereſt may not be ſtipulated in an original obligation; but is indeed a legal penalty inflicted for the non-payment of the capital and intereſt; and that therefore the claim, in ſo far as it is for ſuch penalty, ought to be diſmiſſed.

Anſwered for the claiment: He who fails to make payment of the intereſt of money borrowed, ought, by a bond of corroboration, to convert both capital and intereſt into one capital ſum bearing intereſt; this, on his neglect, the law effectuates by a decreet of adjudication. And neither can the former accumulation, which is by the deed of the party, nor the latter, which is from the operation of the law, be, in any propriety of ſpeech, termed *a penalty:* As a bond of corro-