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-

boration would not, on the forfeiture of the granter, be reſtricted; ſo neither ought an adjudication to be reſtricted to the original capital and ſimple intereſt.

'THE LORDS ſuſtained the claim.' *

No 19.
Is intereſt on an accumulated ſum, being in ſo far intereſt upon intereſt, of the nature of a penalty?

Act. *Lockhart.* Alt. *The Crown Lawyers.* Clerk, *Juſtice.*

Fol. Dic. v. 3. p. 11. Fac. Col. No 107. p. 158.

Dalrymple.

1760. *December* 11. WADES, *againſt* The HEIR of MARSHAL WADE.

No 20.
Sums ſecured by adjudication, carried by a general clauſe of all debts and ſums of money.

MARSHAL WADE, upon the 5th of May 1747, executed at London a deed in the Scots form, by which he diſponed to George and John Wades, his natural ſons, 'all and whatſoever debts and ſums of money, real or perſonal, reſting or due to him 'by any perſon or perſons in Scotland, by bond, bill, account, or any other manner 'of way.' A particular clauſe was afterwards ſubjoined, by which he bound his heirs and ſucceſſors, to ſubſcribe and deliver to his ſaid ſons equally betwixt them, valid and ample diſpoſitions and aſſignations of the whole premiſſes, containing procuratories of reſignation, precept of ſaſine, and all other neceſſary clauſes.

The only ſubjects which belonged to Marſhal Wade in Scotland, at the time of his death, were certain tack-duties due by the York-buildings company, ſome of them ſecured by adjudications, in the following manner: Sir Alexander Murray of Stanhope, granted a leaſe of his mines in Tweeddale and Argyleſhire, to the Duke of Norfolk, Marſhal Wade, and others, for thirty years, commencing 25th March 1725. Theſe partners granted a ſub-tack to the York-buildings company, for payment of the tack-duty to Sir Alexander Murray, and an additional ſum of L. 3600 Sterling yearly. For ſecurity of this additional ſum, the company did infeft the Duke of Norfolk and his partners in their eſtates in Scotland, for payment of an annuity of L. 3600 Sterling, equivalent to the tack-duty.

The York-buildings company having failed in payment of theſe tack-duties, the partners uſed inhibition againſt them; and in the years 1732, 1736, 1738, and 1746, deduced different adjudications of the company's eſtates, for payment

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* This caſe was appealed, a circumſtance mentioned inaccurately in the Faculty Collections, and entirely omitted in the Folio Dictionary.—The Lord Dun, Ordinary, had rejected the claim, principally on account of alleged precedents. A petition, againſt this interlocutor, was refuſed. Mar. 7. 1753. July 10. 1753. A ſecond petition was preſented, arguing, that the precedent, chiefly inſiſted on, was not in point. THE LORDS altered the Lord Ordinary's interlocutor, and their own, and ſuſtained the claim.— Mar. 9. 1754. But the following was the judgment of the Houſe of Lords:

'It is ordered and adjudged, That the ſaid interlocutor of the 9th March 1754, complained 'of, in the ſaid appeal, be, and the ſame is hereby reverſed; and that the interlocutor of the 'Lord Ordinary, of the 7th March 1753, and the ſaid interlocutor of the Lords of Seſſion, of 'the 10th of July following, adhering thereto, be and the ſame are hereby affirmed.'

Journals of the Houſe of Lords, 25th March 1756.