there was a preceding cause of debt prior to the date of the bond; and which was not borrowed money; for it bears no such thing, but allenarly that it was resting owing. Now, it is a known principle that usury takes properly place *in mutuo*, which this is not; for, though law reprobates the exorbitant profits of money, which, of its own nature, is barren, and has confined and reduced it to a certain moderation and quantity, yet this is only in money borrowed and lent; for, in the matter of goods and commerce, the *fœnus nauticum et pecunia trajectitia* may very justly exceed these rules, because of the apparent risk and hazard they run; as in policies of insurance, contracts of bottomry and the like. And the ground of this bond has certainly been a bargain of goods, and no lent money.

Replied,—Usurious oppression has appeared under many different shapes; and, as it broke out, it was nipped by sundry Acts of Parliament; such as, Act 52d 1687, Act 222d 1594, Act 247th 1597, and Act 28th 1621; and has been often discouraged by the Lords; as, *30th July* 1673, *Stevenson* against *Wilkison; 2d January* 1677, *Hepburn* against *Nisbet; and 1st December* 1680, *Johnston*. It is true, the canon law discharged annualrents as usury; yet this was but a mere pretence; for they allowed me to buy an annuity on my neighbour's land, which was every whit as grievous, and the same thing except only the name, and was the rise of our infeftments of annualrents. By the old Roman law, and an article of the twelve tables, all then exacted was *usura unciaria*; but, in process of time, it grew to six or eight, and sometimes to ten *per cent.* And the English allow it aye till it equal the principal sum, and then it stops; and Justinian did the like.

The Lords found there was no usury in this case; and it occurred to some, that, though it had, the same was fully taken off by the act of indemnity. Others said, though that took off the penal part, yet it did not dispense with the private party's damage. But there was no necessity of recurring to this defence, seeing the clause was not found usurious. *Vol. II. Page* 608.

1711. *November* 10. John Buchanan *against* Lawrence Crawfurd of Jordanhill.

John Buchanan being a creditor to Keiry *alias* Craigengelt of Gogar, he arrests some rents belonging to him, in the hands of Sir George Mackenzie of Coull, and pursues a forthcoming. In which Lawrence Crawfurd of Jordanhill compears, and craves preference; because he had adjudged these lands, whereof the maills and duties were craved, long before Buchanan's arrestment.

Alleged,—No respect to your adjudication: 1*mo*, Because you are never yet infeft upon it to this hour. 2*do*, You have been *in morâ et culpâ;* in so far as though you be ten years prior to my arrestment in date, yet you have never done any diligence to affect the rents, nor have you raised a process for maills and duties; and therefore the Lords, in a parallel case, *14th February* 1623, *Saltcoats* against *Broun*, found a posterior arrestment preferable to a prior comprising; where they had been negligent for many years, and neither taken infeftment nor done diligence thereon.

Answered,—That the apprising was a legal assignation, and so needed not intimation, but carried the maills and duties without any more. And though,

in Durie's time, arresters were preferred, yet the Lords had since, on better grounds, found the contrary, and preferred the appriser, though neither infeft nor *in cursu diligentiæ;* as was decided *23d February* 1671, *Renton* against *Fairholm.*

REPLIED,—It is true, that, after an apprising or adjudication, or even the citation in either, the debtor can do no voluntary deed to prejudge that creditor; but his diligence has the effect of an inhibition. But legal diligence by arrestment is more favourable than voluntary dispositions; and therefore used to be preferred, where the appriser or adjudger is *in morâ.* It is acknowledged, where the distance is not great betwixt the adjudication and arrestment, that *mora* is not regarded; but, if he be supinely negligent, as here, by the space of ten years, never to interpel the debtor, (though creditors shun a partial possession for fear of being made countable for the whole,) he can never compete with the arrester.

Then Jordanhill ALLEGED,—He had not been silent nor negligent; for he had obtained a sequestration of the rents, and a factor named, a month or two before his arrestment; and, if creditors were allowed to distress tenants after that, then factories invented to save them should be of no use.

ANSWERED,—The sequestration bears an express salvo and reservation of Buchanan's right; and so cannot be obtruded against him.

The Lords, in regard of the adjudger's being so long *in mora,* preferred the arrester in this special case. Some questioned the justice of this decision; because, if the debtor had assigned thir rents to a lawful creditor, and the same had been duly intimated before another creditor's laying on an arrestment on these rents, the prior intimated assignation would have undoubtedly been preferred to the subsequent arrestment, which can touch and affect nothing but what stood in the debtor's person the time it was laid on. And, if he was denuded *ab ante,* then the arrestment touches nothing that was the debtor's, but is wholly elusory and ineffectual. Now, an adjudication is a legal assignation, which, like the *jus mariti,* fully conveys the right, and needs no other intimation to its completion than what the law gives it. And it is on this same ground that a donatar to an escheat, competing with an arrestment laid on after the denunciation and the gift, but before executing the summons of general declarator, the arrestment will be preferred, if the ground of the debt be prior to the horning; because the gift is but of the nature of an assignation, and the declarator is in place of an intimation. So that an arrestment intervening betwixt the gift and the raising the declarator, it comes to be preferred; as was found, *24th February* 1687, *Pilmuir* against *Gaigy.* But the Lords, in this present case, preferred the arrester; because of the adjudger's long cessation and negligence.

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1711. *November* 17. JOHN MIDDLETON and ELISABETH CUNNINGHAM, Petitioners.

ELISABETH Cunningham, sister to Enterkin, being married to Captain John Middleton, and having 12,000 merks of tocher, it was judged convenient by friends to secure it for the behoof of his lady and bairns, by lending it to my Lord Roseberry, and taking the bond in thir terms,—To the said Elisabeth in