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

liferent, and to the heirs of the marriage in fee; whilk failing, to John Cunningham of Enterkin, her brother; with this quality and provision, that it should not be in the power of the said Elisabeth or her husband to alter, innovate, or prejudge the foresaid destination in favours of his wife, children, and substitute foresaid; and how oft the same should happen to be uplifted by the husband, it should be rëemployed by the advice, and at the sight of the Lords of Session, in session-time, and the three Lords on the bills in the time of vacance, in the precise terms and for the uses foresaid. The husband having bought a post in the army, and needing money, he and his wife gave in a bill to the Lords, representing that he is fiar of the sum, and has the power of uplifting; and that he has bought an advantageous place, to enable him the better *ad sustinenda onera matrimonii*, and needs this money to pay his debts contracted; and that he has lodged a bond in the clerk's hands in terms of the former bond, in favours of the bairns and substitutes, his wife consenting to the uplifting; therefore craves the Lords may interpose their authority, and allow him to raise the money on the security he has consigned.

The Lords found they were made overseers and administrators of this money by the conception of the bond, and so their trust obliged them to see it secured; and they thought his personal bond, who designed to live abroad, was too thin and slender a security for the bairns and substitutes to rely on; and that the least he could offer was to find caution for its reëmployment, in the terms of the present bond. Which not being offered by him, the Lords thought they could not consent to his uplifting of the money; and therefore refused the bill, without so much as giving it to see and answer. But if to his simple bond he offer caution, then they would consider it, when it should be so made.

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1711. *November* 29. RHYMER *against* BALFOUR.

ANDERSON, maltman in Couper, being heritor of six acres adjacent to that town, and dying without children; Rhymer, his sister's son, being next heir, Balfour (who was his nephew) applies to Rhymer, and tells him he hears that Anderson, his uncle, had made some right or conveyance of these acres to a third party; but if he would dispone the half of them to him, he, by his friendship and favour, would warrant him against any such deeds. And on this suggestion he induces Rhymer to enter into a contract with him, by which he obliged himself to serve heir, and then dispone three of these acres to him, and he became obliged to secure and relieve him of any prior rights his uncle had made. Rhymer, having made inquiry, finds there were no such disposition made by his uncle; and thinking himself circumvened, he raises a reduction, *ex capite fraudis*, and that *dolus dedit causam contractui;* in so far as he offered to prove, by Balfour's oath, that the true inductive cause of his entering into that minute, was Balfour's asserting to him that his uncle had disponed these acres, and he would defend him against that right; and he acknowledging that it was the procatartick cause, then Balfour must prove the being of such a disposition, otherwise it was a mere snare and contrivance to trick him out of his three acres.

ALLEGED,—*Nullo modo relevat* that my telling you such a report was the mo-