in rebus bello captis, the former private owners and merchants of the said ship, so brought up and rescued, could lay any claim to the same. Wherein it was ALLEGED for the caper, that the said vessel having been in the custody and power of the enemy by the space of twenty-four hours before they recovered her out of their hands, the same was *jure gentium* absolutely and irrevocably become the victor's and enemy's: and the owners, (whose right was *in pendenti* during the said space,) had utterly fallen from their right; and they having supervened and retaken her, she was become fully theirs: and the old owners had no claim or interest in her, unless they could say she was retaken before she was twenty-four hours in the enemy's possession, and which is a kind of prescription.

ANSWERED,—That Grotius, *lib. 3, de Jure Belli et Pacis, cap. 6, No. 3, et cap. 9, No. 14*, who sees as far into these affairs as any, (and many other lawyers are of his opinion,) is positive that the enemy does not acquire the dominion and property of things taken, till the other has lost all probable hopes of recovering them; and which is not till they be brought within their castles, forts, harbours, and other stations for ships, or where their whole fleet is; *nisi intra præsidia navalia, portus, fines imperii, aut eum locum ubi tota classis se tenet, perductæ sint;* but so it is, this ship was not brought to their own country or *præsidia*, and therefore it still remained theirs, the recovery of it not being desperate till then.—*See Joannes Voet, de Jure militari, cap. 5, pag.* 286.

REPLIED,—The same Grotius, in the place cited, as also Loccenius, *de jure maritimo, lib. 2, cap. 4, de jure postliminii*, affirms, By the universal consent of nations, *spatium* 24 *horarum* is determined for the time after which they become irrecoverably the taker's, and so must appertain to them who have retaken them from them.

Advocates' MS. No. 418, *folio* 224.

1673. *July.*

ONE having charged upon a bond, there was a suspension thereof raised upon this reason, that the said charge was most malicious; and given only because the suspender debtor in the bond offered in the payment of the annualrent, to retain one of six, conform to the benefit introduced in his favours by the 4th act of Parliament, in 1672. Whereupon sundry of the Lords, especially the Chancellor, President, Strathuird, &c. greedily drew in the debate, Whether the exacting of the whole six during the retention, or the taking the said full annualrent, when offered by the debtor voluntarily, and refusing to use that privilege, be lawful, yea or no; or if it can in any construction of law be reputed usury, to the effect they might get the same decided to be unlawful.

It was ALLEGED,—That though the creditor could not seek it, yet where his debtor was content to give it, he might take it, because there could be no usury, and we had no such thing unless where a statute decided or declared it; but so it is, the said act, 1672, allenarly ordains, that every debtor, for the space of one year, have retention of a sixth part of their annualrents; and which act being conceived in their favours, they might renounce the same. That it was against the ingenuity of lawgivers, and the interest of the lieges, to forge and invent crimes, where there was none; or to make acts of Parliament snares and gins wherein to catch innocent

persons, or to stretch laws by cruel consequences beyond their words, upon the pretence it was the meaning of the legislator. *L.* 29, *C. de Pactis.*

ANSWERED,—The act of Parliament 1672 speaks not *verbis permissivis* (may retain), but *imperativis* (shall retain), *et legis est jubere; L.* 7*a*, *D. de Legibus et Senatus-consultis;* and therefore debtors cannot renounce the same, unless there had been an express salvo, empowering them so to do, as is in the act 62, between debtor and creditor, in 1661; *et pactis privatorum non potest derogari juri publico. L.* 38, *D. de Pactis.* That to adhere to the word is *adhærere cortici,* and that the strength of the law stood in the sense, design, and purpose of the law-makers. *Scire leges non hoc est verba earum tenere, sed vim et potestatem, l.* 17, *D. de Legibus;* and therefore, whatever frustrates and evacuates the intention of the law, though it keeps the words, it defrauds and circumvenes the law as much as that which directly contravenes the same. *In fraudem legis facit, qui, salvis verbis legis, sententiam ejus circumvenit; l.* 29, *et* 30, *D. eodem.* But if the taking of six off the hundred shall be allowed in any case whatever, then the said act appointing retention shall signify nothing; for creditors, though they will not directly threaten, yet they will use such insinuations to their debtors, of their dissatisfaction if they shall retain that off them, and that they shall make it out of their way, that there shall never a debtor retain what the law has permitted him to do. Likeas, all the acts that ever hitherto, in this kingdom, ordained a retention in annualrents, did ever declare that the receiving the whole annualrents, without the said allowance and deduction, should be usury, as will appear by the 17th act of Parliament in 1647; and therefore, this act 1672, being copied of these as the pattern, must be in the same manner understood.

REPLIED,—That all laws and statutes were *stricti juris,* and the drawing them *de casu ad casum* was not allowable; that it was confessed if a creditor should offer to infuse the least insinuation or inclination to have it, that then he should be punished as an usurer and one who oppressed the lieges, and craved to exact more interest from them than they were bound to pay; but where a debtor had so much regard to his honour as not to catch hold on so miserable and naughty advantages, there was no law could hinder the creditor from taking it. That the act 1647 was *funditus* rescinded with the authority that made it; that these times of rebellion were not to be made use of as patterns of our policy now; and yet that the argument drawn therefrom is retorted; for if, in that act 1647, it needed a special clause to declare the taking the full annualrent should be usury, then it can be none here, because, in the act 1672, that clause is omitted, and it must be presumed to have been done of purpose; and none doubts but if this question had been started in Parliament, when the said act passed, but they would have found it to have been no usury; and the truth is, none seemed to doubt it at that time, and the resolutions of all lawyers did run for the lawfulness of it. And if the lords should find, by the meaning of the said act, that it might not be taken by creditors, the most that can reach to is only future payments; seeing what has been already paid or received *bona fide,* and upon the faith of that law, (which at best is but dubious,) can never be now called in question or revoked.

The Lords FOUND, whatever creditor had taken his full annualrent before that time, it should infer no usury; only, it should bind them either to restitution, or to allow and discount it in the next annualrent that should be paid them; but if any hereafter should take their full interest, they declared they should be guilty of usury.

The President and some others wrought vehemently for this interlocutor, and but narrowly carried it. Sir George Lockhart was out of all patience at it, for he would lose about L.2000 by it. He pretended he cared not for his particular, but to see the arbitrariness and illegality of the decision. It was much pressed, that it should only be restored or allowed where the debtor required the same; and that being disobeyed, then to be usury; but they were inexorable, and would not alter one punctilio of it; alleging there was no way to secure the retention to debtors but this. But since they appealed to the act of Parliament 1647, they should have taken it complexly; for it is declared by that act, that no debtor shall have the benefit of this retention, save he who pays his annualrents within the space of an year after it is due; but there is no such salvo in favours of creditors in the act 1672. Yea, by the 34 act, in 1640, there is only six months allowed them; so that if they paid not their annualrents termly, they forfaulted the said privilege. But the said act 1672, is guilty of many other inequities: which see in the special reflections upon the said fourth act.

Advocates' MS. No. 419, *folio* 225.

WINTER SESSION.—Anni 1673.

November, 1673.

TITIUS charges or pursues upon a bond granted to him by Sempronius. Sempronius alleges the obligation is null, being suspended upon his own option; and where *contractus confertur in meram et liberam voluntatem unius contrahentium, nulla oritur obligatio nisi voluerit; l.* 3, *D. de Contrahenda Emptione; l.* 13, *C. eodem;* and that it depended on his arbitrament, he subsumed and proved, in so far as the bond contained an express clause, declaring the sum should be payable at the debtor's conveniency, and whereof he was absolute judge.

ANSWERED,—This condition not being annexed to the obligatory part of the writ, but merely to the execution or exaction, it did not impede *quin nata erat obligatio et verum suberat debitum.* See *Vinnius, ad parag.* 4*tum, Institutionum, de Emptione et Venditione. Vide supra,* 23*d February,* 1671, Viscount of Oxenfurd's daughter, (it is No. 148.) *In jure verba debent cum effectu accipi; in contractibus non præsumuntur otiose adjecta, et ea semper sumenda est interpretatio ut actus potius valeat quam pereat seu distrahatur.* See Hadington, 25*th February,* 1623, *Lyon* and *Scot;* and *l.* 12, *D. de Rebus Dubiis;* and the many other laws there quoted in the margin. And, therefore, albeit the sum in the bond was declared payable at his conveniency;* yet this clause is elusory, but must be reduced *ad arbitrium boni viri,* and be interpreted κατ' ἐπιεικειαν, *secundum bonum et æquum.* Which I think the Lords would follow either by examining the onerous cause of the obligement, and the other circumstances of the ability of the debtor

* This, Alisat, *ad legem* 125, *D. de verborum significatione,* expounds, *rationally, so soon as his other debt is all paid.*