where it is expressed; and this act of Parliament doth only allow the debtor that he may retain, but doth not retrench the annual-rent, even for that year, to five *per cent.* and that in the retentions in former acts of Parliament, sometimes it is appointed under the pain of usury, and sometimes not, which shows that usury should not be inferred but when it is expressed; and it would be a great inconvenience in such a dubious case to infer usury upon the not allowing of the retention, and that the most in justice that can be done, is to appoint repetition, if there were the least insinuation by the creditor of any inconvenience to the debtor, if he craved retention. It was replied, That usury is incurred when more annual-rent is taken than the law allows, whether there be mention in that law of usury, or not; for if the terms of this act had been to retrench the annual-rent to five for a year, or to discharge one, there can be no question of usury, though the act bore no certification of usury; so that the mind of the law-giver being clear, that in consideration of the burden of lands with a great assessment, the debtor should have retention of one of six, it were to enervate the intent and reason of the law, *et fraudem facere legi*, to suffer the creditor to take six upon the pretence of the debtors willingness, it being beyond doubt that debtors would not throw away their money to their creditor, if it were not upon apprehension that he would be rigorous to them, and would charge them for the principal sum; and though he should make no such insinuation, *inest in re ipsa*, and by this means the poorest debtors who durst least withstand the creditor, and for whom it was most intended, should have no benefit of it. No. 15.

The Lords found that seeing creditors might doubt whether the not allowing of retention inferred usury, that whosoever had taken the full annnal, if they allowed or repaid the same within the year of retention, that it should not infer usury, otherwise that it should infer the same; for they found that if the certification were only repetition, it would not be effectual, and the debtor might certainly renounce the same.

Stair, v. 2. p. 226.

1675. *July.* GEDDES *against* BUDGE.

No. 16.
Usury upon the usurper's acts.

Geddes, as having right to the gift of usury granted to the Earl of Glencairn, having obtained decreet against William Budge of usury upon two bonds, containing more annual-rent than six *per cent.*; *in anno* 1656 he suspends on these reasons, 1*mo*, That usury being a crime, behoved to be founded upon an express law as to any criminal effect, which cannot be in this case; for it cannot be founded upon the act of Parliament 1649, reducing annuals to six *per cent.* because that Parliament is rescinded as null *ab initio*, without authority and without any *salvo*, and the act of Parliament 1661, restricting annuals to six *per cent.* doth not bear as in other cases to take effect from the act of Parliament 1649, 2*do*, That albeit these bonds bear an obligation to pay more annual-rent, they cannot instruct usury, unless it were proved that more annual-rent was actually taken. It was answered

No. 16. to the first, That crimes may be founded not only upon statute, but upon custom, and it is in contraverse that it was the constant custom since 1649 to allow only six *per cent.* for annual; and albeit that Parliament be rescinded, yet seeing it was submitted to by the whole kingdom, as a law for the time, those who took more annual than six *per cent.* are no less culpable than those who take it now, and the rescissory act doth not annul that Parliament and all its acts *ab initio*. To the second, the old act of Parliament 1594, Cap. 222. against usury, bears expressly, "That the party payer, or obliged for unlawful profit, is liable."

The Lords repelled both the defences, and found that usury inferring but a pecunial pain, might be sustained, notwithstanding of the rescissory act, and that the obligation to pay the same was sufficient by the old act.

Stair, v 2. *p.* 359.

No. 17. 1677. *January* 24. HOME of FORD *against* STEUART.

A wadset being granted in these terms, That the wadsetter should possess the lands; and that the granter should free the wadsetter of levies of horse, and feuduties, and Minister's stipends; it was found that the wadsetter is not liable to count and reckon for the duties and superplus of the same, exceeding the annual-rent; in respect, the wadset was a proper wadset; and the wadsetter was not free of all hazards of the fruits, tenants, war and vastation.

Reporter, *Redford.* Clerk, *Mr. Thomas Hay.*

Dirleton, p. 214.

1680. *December* 1. JOHNSTOUN *against* The LAIRD of HAINING.

No. 18. Usury found incurred by taking annual-rent before it was due.

Mary Johnstoun having obtained a decreet against the Laird of Haining, he suspends upon this reason, that he hath right to the sum himself, as donatar to the usury committed by the pursuer's husband, by taking annual-rent before hand, proved by a discharge produced. It was answered, That the King by his act of grace and proclamation in March 1674, had discharged all arbitrary and pecunial pains incurred by law anterior to that time, and this discharge is of an anterior date to that time; 2*do*, The taking of annual-rent before hand is lawful, being no more than what would have been given to a broker for finding out the money. It was replied, That the proclamation could not extend to usury, which is a crime by the law inferring infamy, which is equivalent to death, and is not introduced by any pecunial statute in this kingdom, but is a general crime every where prohibited by divine law; whereupon the King's advocate for the King's interest had a second hearing. It was duplied, That taking of annual-rent is no crime, though it was prohibited among the Israelites by the judicial law, and is yet prohibited by the cannon law, but is allowed by all Pro-