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that it was the constant custom since 1649 to allow only six *per cent.* for annual; and albeit that Parliament be rescinded, yet seeing it was submitted to by the whole kingdom, as a law for the time, those who took more annual than six *per cent.* are no less culpable than those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 feu-duties, 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; *2do*, 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-

testants and other nations, and the quantity of it is only restricted by our peculiar statute, so that a greater annual is declared usury by the same, which otherwise would not be so; but the proclamation not being a discharge of one of these, which are called penal statutes, but of all pecunial and arbitrary penalties, yet the Lords sustained it to reach to usury. It was further alleged, That the statute could only take away the King's interest, but not the half, which the statute makes to belong to the party injured, or informer.

No. 18.

The Lords found, that the taking of the annual-rent before hand, imported usury, but that the discharge proving it, being before the proclamation, anterior acts of usury were thereby discharged, and that any information given after the act, gave no share to the informer.

Stair, v. 2. *p.* 809.

1681. *July.* SPARROW *against* MONCRIEF.

No. 19.

Samuel Moncrief having taken a bond of borrowed money, bearing annual-rent, from Captain Sparrow, for a sum far exceeding what was truly lent; and the bond being questioned as exorbitant, the Lords restricted it to the sum truly lent, and interest at 6 *per cent.*; although it was here pleaded, that the money being lent in order to merchandise, and so employed, Moncrief might have made much more profit than the interest at 6 *per cent.* and the borrower did actually make more profit by the same.

Harcarse, No. 1002. *p.* 283.

1682. *December* 13. WILLIAM BROWN *against* PATRICK DICKSON, Miller.

No. 20.

It being alleged, that the taking full annual-rent *in anno* 1673, without allowing retention, was usury.

It was answered: That the creditor being an illiterate man, and the debtor one about the Exchequer knowing the law, who sent the discharge into the country, filled up the full annual-rent, to deceive the ignorant creditor, the creditor could only be liable in repetition of the retention-money; 2*do*, The act of Parliament did not restrict annual-rents for that year to 5 *per cent.* but only allowed the creditor to retain one of six; so that he was not obliged to retain it, though he might, towards the release of the assessment imposed on the lands.

The Lords, in this circumstantiate case, assoilzied from the usury, and allowed retention of the 1 *per cent.* out of any subsequent annual-rents.

Harcarse, No. 1003. *p.* 283.