1672. *February* 17. DOUGLAS *against* VERNOR.

No. 14.
A proper wadset was conceived with a clause warranting the wadsetter against all taxations or other impositions. The wadsetter was found obliged to account in terms of act 1661, cap. 62.

Douglas of Morton having wadset certain lands to ——— *in anno* 1656, pursues count and reckoning for the superplus of the rent, more then the annual-rent, upon the clause of the act of Parliament, 1661, bearing, that the wadsets contain exhorbitant clauses, whereby the wadsetters bears no hazard; but it is provided, that he be relieved of all burden, that he shall be countable for the *superplus* above his annual-rent; and in this wadset the clause of warrandice bears expressly, "to warrant the wadsetter against all maintenance, taxations, and other impositions;" which clause the Lords found to make the wadsetter countable, since the act of Parliament only, although before the citation the said wadset did also contain a clause, obliging to set a tack to begin after the redemption; against which it was alleged, that this was an usurary paction, giving the wadsetter more than his annual-rent, by an indirect contrivance, which is condemned, and declared null by the act of Parliament, 1449. Cap. 19. It was answered, that the foresaid act bears, that such tacks as are set for the half mail, or near thereby, shall be void after redemption. But it is offered to be proved, that the lands contained in this wadset were set for the same duty contained in the tack, or near thereby, before the wadset; and so as the heritor at that time would have set the land, not being grassumed to any body for the old rent, so he might to the wadsetter. It was answered, albeit the narrative of the act bears, where tacks are set to the half avail, or near thereby, yet the statutory part bears, that such tacks shall not be kept, but if the land be set for the very mail, or thereby; and that it is offered to be proved, that these lands were much more worth the time of the redemption, than the duty contained in the tack; and it imports not what they were set for before the wadset, but what they were worth, and might be set for the time of the redemption.

The Lords found the tack was valid, unless the duty were far under what the lands paid the time of the wadset, and that regard was not to be had to the worth of the land at the time of redemption; for if the wadsetter, upon consideration of the tack, had improved the land before redemption, he ought not to be excluded therefrom.

Stair, v. 2. p. 70.

*** Found, contrary to the above, in a case, January, 1728, Creditors of Elliot against Maxwell, that the wadsetter was not accountable.—See APPENDIX.

1673. *July* 30. STEVENSON *against* WILKISON.

No. 15.
Retention not allowed.

In a supension betwixt Martin Stevenson and Wilkison, the debtor having alleged for a reason of suspension, that the creditor had not allowed the last term's retention, conform to the act of Parliament, but had taken full annual-rent according to the six *per cent.* and thereby had committed usury, and so lost the benefit of the sum; it was answered, That usury being a crime, is never inferred but

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