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.

No. 20.

1682. *March.* Sir Patrick Home reports this case:

Patrick Dickson, in the old mill of Aiton, having pursued William Brown presenter of the signatures, for payment of the sum of 2,000 merks contained in his bond, and he having suspended upon a reason of multiple-poinding; there being compearance made for John Paterson, who craved to be preferred to the sum as having obtained a gift thereof from the King, upon the account the charger had committed usury, in so far as by the act of Parliament in the year 1672, there was retention allowed of a sixth part of the annual-rents; yet notwithstanding the charger had received payment of the hail annual-rents, as is clear by his discharge. Answered, That the act of Parliament allowing retention does not declare that the taking of the hail annual-rents shall import the crime of usury, and crimes cannot be inferred but from clear and express laws; so that all that is provided by the act, is only that the debtor might retain, but if he thought fit not to make use of the benefit of the law, it was no crime in the creditor to receive payment of the hail annual-rents, especially the charger being a poor illiterate man, and ignorant of the law, his *probabilis ignorantia* should excuse him; and albeit there were any crime, as there is not, it is discharged by the act of grace in the year 1674, which pardons all pecunial and arbitrary pains incurred before the said act, as was found in the case of Riddel of Hayning against ————; and albeit one of the discharges be after the act of grace, and the act anent retention being dubious, and the charger an ignorant man, it can import no more against him but to allow the retention in the fore-end of the sum, which he is content to do, and which was so decided 13th January, 1673, Wilkison against Martin Stevenson, No. 15. p. 16412. especially seeing the gift of escheat was procured by the means and moyen of the suspender, taken in Paterson's name to his own behoof. Replied, That usury being *accessio ultra sortem*, it is clear by our law, and by the common law, that the taking of more annual-rent than is allowed by the law, infers the crime of usury; and the act of Parliament of restricting of annual-rents at 6 *per cent.* does not declare the taking of more annual-rent to be usury; yet notwithstanding, if the creditor take more annual-rent than 6 *per cent.* he will be guilty of usury, so that albeit the act do not declare it to be usury to take more than 5 *per* hundred; yet it is the taking of that whereof the law allows retention that infers usury, and the charger's ignorance cannot excuse him *nam ignorantia juris neminem excusat;* and if that were sustained, it would be a common defence against all laws; and judges cannot dispense with general laws, which being once made and duly promulgated, must take full effect, and be interpreted according to the true meaning and intent, it being pars judicis judicare secundum leges et non de legibus; and whatever might be pretended in the case of ignorance of municipal laws, as to strangers who may be presumed to be ignorant of the positive laws of any kingdom, when they suddenly arrive in any place, (and even in that case they will incur the certifications and confiscations appointed by the law,) albeit they

might pretend to some mitigation of the punishment, in respect of the *probabilis ignorantia*; and it cannot be extended to subjects who either do, or are obliged to know the laws, Leg. 9. C. De Legibus, Leges sacratissimæ quæ non constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestius cognito, vel inhibita declinent, vel permissa sectentur; and the pretended dubiousness of the act cannot free the charger from cases much more dubious, as is in back tacks and wadsets, and invictual, and in the case of simulate contracts; in all which cases, if there be more annual-rent taken than is allowed by the law, much more in this case, which is so clear, the law allowing retention of a sixth part of the annual-rents, and by 107th act, Parl. 7, James the First, it is expressly provided, That no man should interpret the King's laws and statutes contrary to the true intent and meaning of the act; and it were to interpret this law otherwise than the intent of it should be interpreted, if in any sense the taking of annual-rent more than is allowed by this law, should not infer the crime of usury; and it is expressly decided in the case of Ludovick Grant against ———, which immediately fell out after the act, that the taking of annual-rent which is allowed to be retained by the debtor did infer the crime of usury, and albeit the gift had been taken to the suspender's behoof, as it was not, there was nothing to hinder him to take a gift thereof from the King as any other person.—The Lords found, that usury is not inferred, notwithstanding that by the discharges produced, the whole annual-rents are paid without retention to the debtor of the sixth part, in respect the act of Parliament doth not express the penalty of not giving retention to be usury, and of the rusticity of the party, and smallness of the sum not retained, and the ambiguity of the practice as to this point; and therefore finds the letters orderly proceeded, except as to the sum whereof by the act of Parliament the debtor should have had retention, and finds the donatar to the usury hath no interest therein. No. 20.

Sir P. Home MS. v. 1. No. 212.

1685. *December.* DOWIE *against* CUNINGHAM.

Found that a wadset (though it was very lucrative, and bore relief of all public burdens, and some of the hazards mentioned in the act of Parliament) was not to be restricted to the annual-rent from the date of the wadset, but from the offer of caution, as had been formerly decided in the case of Captain Hume of Ford against Jean Telfer in Dunbar, in respect the wadset did not secure against all the hazards mentioned in the act of Parliament, viz. fruits, tenants, or war. No. 21.

Harcarse, No. 1029. p. 293.