BARJARG. This private contract cannot have effect against the diligence of third parties. There was no antecedent obligation on the Virginia merchant.

PRESIDENT. It would be dangerous to alter this interlocutor: it would be opening too wide a door for frauds and undue preferences.

KENNET. The tobaccos were not the property of the Glasgow merchants, and would not have been their property, even if they had been delivered. The case of *M'Farlane* was different from this; for there he had previously wrote home to a trustee that he was to send the goods for payment of his creditors.

On the 29th November 1768, The Lords found that there was no sufficient evidence that Archibald Dunlop was divested of the ship and cargo, in favour of Hastie and Jamieson, and, consequently, that the same was liable to be affected by the diligence of his creditors; and, therefore, preferred Robert Arthur upon his arrestment, "adhering to Lord Pitfour's interlocutor."

Act. R. Cullen. *Alt.* A. Lockhart.

Non liquet, Monboddo.

Vide infra, 1*st March* 1770.

1768. *December* 1. CREDITORS of GEORGE PITCAIRNE *against* SAMUEL FOGGO.

USURY.

A commission of a half *per cent.* may be charged by Bankers.

[*Dictionary*, 16,433.]

MONBODDO. If Foggo's debt is good, so also is his diligence. A *pari passu* preference has an appearance of equity, but we have no power to create it.—My doubt is upon the statute against usury. I am glad that the pursuers have passed from penalties; but they insist that the debt itself be set aside, upon two grounds: 1. The charge of commission. 2. The charge for drawing and re-drawing. If a man, under pretence of commission, or other practice, takes more than five per cent. he is within the statute of usury. The merchants, in their report, have made a distinction which I cannot make, between bills and accounts. A banker's profit is great without commission; he lends at five per cent. while he borrows at four per cent. The charging Pitcairne with the expenses of drawing and re-drawing is also usurious.

AUCHINLECK. My brother is too Jewish in his notions of usury. Transactions among merchants are carried on in a different form from those of other men and the rest of the world. It is absolutely necessary, for carrying on transactions in trade, that there be something of the same nature as here. Many people have a great benefit by this method of dealing; business cannot be carried on without it. It enables men to borrow no more than they have occasion for, and to pay in sums, however small. The commission here, in the in-

tercourse of many years, is but £30. It would have cost Pitcairne more had the money been got from a money-broker. As to drawing and redrawing, that is already cut off by the Lord Ordinary. The case, as to that, was formerly tried between *Ochterlony*, and *Hunter of Polmood*, a cautioner, and unanimously found not usury. I could find this usury, when fraud appeared; but *here* no fraud.

PITFOUR. One detests a creditor who takes advantage of a debtor: one equally detests a debtor who takes advantage of a creditor. This point of commission is of great consequence. Upon it commerce, in its infant state, depends. To exact money for labour, is not usury. There may be an excess, but an excess may be corrected. Too high price for labour happens when there are few hands employed:—No danger of this in Edinburgh, as to bankers, whose number is so great. I see no reason for striking off the charge on account of drawing and redrawing, unless Foggo had given it up; for it was calculated for the benefit of Pitcairne.

KAIMES. Drawing and redrawing is wrong in its consequences; but can never cut down the debt or the account. As to commission, I tremble for the consequences to the trade of this country, were commission to be cut down. Some years ago, there was only one banker in Edinburgh, and he did not circulate above £50,000; now there are many, and one circulates £50,000 *per annum*. This is owing to cash accounts, on which commission is given. I have no idea of cutting down, as usurious, when a man does no more than what every man has done for 30 years.

ELLIOCK. I never understood that there was such a money-lending business any where but in Edinburgh; it is different from that of a banker or remitter of money. It is something like the trade of pawn-broking, which has been checked by many statutes. There has been a practice of taking commission established for 25 or 30 years. I would not cut down the debt, but would strike off the claim for commission.

PRESIDENT. It is impossible that drawing and redrawing can be usury, after the decision of *Ochterlony*. As to commission, neither is that usury; but, at the same time, I think that the account ought, in so far, to be corrected. I do not like this money-lending branch of business; it is merely a trade of dealing in money. Private bankers open cash accounts in imitation of the public banks; but they take commission which the banks do not: Thus, 20 or 30 *per cent.* may be gained in a year. I do not see that this trade prevails in any country but Scotland. I do not see that it benefits trade: it must exhaust the profits of all merchants and mechanics. We are not to look to consequences: we must determine by the law. There may be a benefit to trade from borrowing at the rate of 10 *per cent.*, on particular occasions; but this the law permits not.

PITFOUR. The borrower does not in effect pay 5 *per cent.*; for, according to this practice, he may draw interest for the smallest sums, whereas, in the common way, he must always keep his money dead from term to term.

GARDENSTON. If you find that commission is illegal, the bankers in Edin-

burgh must give it up, and have recourse to the English fashion, which will be less beneficial to infant trade.

On the 21st July 1767, the Lords found commission due, and assoilyied.

On the 29th November 1768, they adhered, in terms of Lord Kaimes's interlocutor.

Act. J. Pringle, Ilay Campbell. *Alt.* R. Blair, A. Lockhart.

Diss. Monboddo, Elliock, President.

Monboddo was for cutting down the debt *in totum.* President and Elliock for striking off the commission money.

1768. *December* 14. JAMES WIGHT *against* THOMAS RANNIE and JAMES PRINGLE.

THIRLAGE.

Thirlage of Victual, in general, does not comprehend Wheat, where the mill is not properly constructed for grinding it.

[*Faculty Collection, IV.* p. 146; *Dictionary,* 16,057.]

AUCHINLECK. Even in an astriction of *all grindable corns,* there must, from the nature of the thing, and in common sense, be certain restrictions, as of seed-corn and horse-corn; so also of wheat, if the mill is not fit for grinding wheat. We cannot force men to carry their wheat to mills where it will be mangled and made useless.

KAIMES. Although I am no friend to astriction, yet I must observe, that the common mills can grind wheat, though not so well as the mills constructed with marble mill-stones.

JUSTICE-CLERK. To alter this interlocutor, would be a great discouragement on agriculture: it signifies nothing whether the burr-stones were known or not at the period when the lease was granted.

PITFOUR. Here there is no extinction of the thirlage; there is only a suspension of it while the mill is not fit for grinding wheat.

On the 14th December 1768, the Lords assoilyied from the demand for the abstracted multures of wheat, adhering to Lord Coalston's interlocutor.

Act. A. Cockburn. *Alt.* R. Sinclair.

Diss. Barjarg, Monboddo. *Non liquet,* Kaimes.