No. 43. been directly conveyed. The same exorbitant recompence for the use of the money might have been demanded, although the vessel had remained in harbour till the loan was at an end. The creditor too, after two months notice, might have withdrawn himself from the hazard of loss; and he was also entitled to the benefit of salvage, which a creditor by bottomry, or at *respondentia*, never is. Such an agreement seems to be quite anomalous, and indeed a mere cover for an usurious loan; Park on Insurances, p. 468, 475, 483, 499.

Answered: The agreement between the parties, though not precisely the same with those which generally go under the name of bottomry or *respondentia* contracts, is a fair and equitable one, the risk undertaken by the creditor being much greater than in ordinary cases. It is truly a peculiar species of bottomry, adapted to the circumstances of a coasting trade; and although in general a creditor at *respondentia*, or by bottomry, is not entitled to salvage, this may be otherwise regulated by special agreement. In the case of money lent on vessels or merchandise going to or from the East Indies, it has been provided by statute, that the lender shall have this benefit; 19th Geo. II. Cap. 37.

It appeared, that a claim had been entered in behalf of Mr. Glen for the whole premium paid by him to the underwriters, which was also founded on for showing the illegality of the bargain; but as it had arisen from the inaccuracy of the Procurator in the Admiralty-court, no regard was paid to it.

It was also stated, that the policy of insurance, as having been obtained without any specification of Mr. Glen's interest, was therefore ineffectual, agreeably to the decision Glover *versus* Black, reported by Burrow, Vol. 3. p. 1394. But as no objection was made by the underwriters, the information given to them by the broker having been sufficiently explicit, this circumstance was likewise disregarded.

The question being reported on informations,

The Lords preferred Mr. Glen to one half of the insured sum, and to the premium paid by him for insuring that part of the vessel which was at the risk of William Macalpine.

Reporter, *Lord Eskgrove.* Act. *Macormick.* Alt. *Wight.* Clerk, *Home.*

C. *Fac. Coll. No.* 143. *p.* 284.

1797. *June* 6.

ROBERT PLAYFAIR, *against* RICHARD HOTCHKIS, Trustee on the Sequestrated Estate of BERTRAM, GARDNER, and Company.

No. 44.
Private bankers may charge commission on sums advanced by them on a cash-

Alexander Simpson held a cash-credit in the books of Bertram, Gardner, and Company, bankers in Edinburgh; and in the year 1791 there was a balance of upwards of £.800 due by him.

In the year 1792, Simpson applied for a further advance of £.200, which being refused, unless security was found for that sum, and also for £.200 of the balance,

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credit, without being guilty of usury; but if such commission exceed one half *per cent.* the excess will be disallowed.

A banker is liable to repetition of the profit made from selling bills, payable at a more distant date than is warranted by the usual rate of exchange.

already owing, Robert Playfair joined with Simpson in two bills to Bertram, Gardner, and Company, for £.200 each; the one, payable at two, the other at four months date. These bills were immediately discounted by Bertram, Gardner, and Company, and their amount, deducting the discount, placed to Simpson's credit.

Both Simpson, and Bertram, Gardner, and Company, became bankrupt; and Mr. Hotchkis, the trustee for the creditors of the latter, having demanded payment from Playfair, he, in the year 1796, brought a reduction and declarator, founded on 12th Queen Anne, C. 16. for having them set aside on the head of usury, and himself found entitled to triple their amount.

His action was founded chiefly on the following allegations; 1*st*, That Bertram, Gardner, and Company, in their settlements with Simpson, had, besides the legal interest, charged commission on the sums advanced, which, particularly as it exceeded one half *per cent.* was usurious; 2*dly*, That in furnishing Simpson with bills on London, they had drawn at sixty and seventy days date, when the established par was only forty days.

The defender, besides denying that the commission charged by Bertram, Gardner, and Company, exeeded one half *per cent.*

Pleaded, 1*st*, The action being founded on a British statute, falls under the triennial prescription of penal actions, introduced by 31. Eliz. C. 5.; Ersk. B. 4. Tit. 4. § 110.; Bankton, B. 2. Tit. 12. § 22.; 13th January, 1747, Booksellers of London against Booksellers of Edinburgh and Glasgow, No. 341. p. p. 11143.

2*dly*, Mr. Playfair has no title to pursue. Even if the transactions of the Company with Simpson had been improper, nothing is demanded of Mr. Playfair but payment of his accepted bills, with the legal interest due upon them.

But, 3*dly*, There was no usury in these transactions. A banker, giving a cash-account, stands in a different situation from a mere money-lender. He must be at the expense of an office, books, and clerks;—he must have constantly by him a supply of money, yielding no interest, to answer the daily demands of his customers, and he must receive back the sums which he lends them, at whatever times, and in what proportions they chuse to pay it. It is reasonable, therefore, that he should charge commission, in order to indemnify himself; and he is not on that account guilty of usury; 1768, Pitcairn's Creditors against Foggo, No. 39. p. 16433.

And supposing it to be true, that Simpson took bills on London, at sixty, in place of forty days, the statute of Queen Anne will not apply. For, independently of there being no invariable rate of exchange, Mr. Simpson, in this way, only allowed his money to lie without interest, for a few days longer than he needed to have done, had he dealt with the established bankers. No London banker, indeed, allows interest for money deposited in his hands, although it should remain with him for years.

Answered, 1st, The statute of Elizabeth can no more regulate the duration of a penal action in Scotland than a Scots statute could have that effect in England.

No. 44.

2dly, The pursuer has a direct interest to pursue, as his plea goes to annul the very debt, in security of which his bills were granted. Besides, the action, on account of usury, is competent *cuilibet e populo.*

3dly, Every device, by which more than *5 per cent.* is obtained for the use of money, falls under the denomination of usury. A banker is sufficiently rewarded for his trouble in various ways, such as the profit in discounting bills, and lending money at a higher interest than what he pays, without charging commission; and accordingly no such charge is made by any respectable private banker.

The Lord Ordinary sustained the defences, and found the pursuer liable in expenses.

On advising a reclaiming petition, with answers, replies, and duplies, the Court, without entering into the preliminary defences, considered it as fixed by the decision in the case of Foggo, that Mr. Playfair's allegations, although made out, did not amount to usury. It was observed, however, that if Bertram, Gardner, and Company, had charged more than one half *per cent.* of commission, ascertained by a report of bankers in the case of Foggo, to be the customary charge; or in selling London bills, had drawn them at longer dates than the usual par; their conduct in both respects had been exceptionable; and that the balance due by Simpson, in so far as it had arisen from these practices, should be disallowed.

The Lords "adhered."

A similar judgment was pronounced in the case of Gilbert Grierson against Bertram, Gardner, and Company, 6th June, and 21st November, 1797.

Lord Ordinary, *Glenlee.* Act. *Abercromby.* Alt. *Fraser Tytler.* Clerk, *Sinclair.*

R. D. *Fac. Coll. No. 2. p. 3.*

1800. *May* 15. WILLIAM WALKER, and Others, *against* ROBERT ALLAN.

No. 45.
How far bankers are entitled to charge commission, besides interest, on bills discounted, and accounts-current?

Sinclair and Williamson, merchants in Leith, had been in the practice of transacting business with Robert Allan, banker in Edinburgh, from 1793 to 1796, when they became bankrupt. At this time there was a balance of above £.900 in his favour, for which he held a deposite of bills in security.

From the various accounts he had settled with the bankrupts, it appeared that he had been accustomed to charge commission on his accounts-current, as also on some of the bills discounted by him, and that on other occasions, instead of charging commission, he did not allow the usual exchange on bills. The rate of commission charged on bills, varied according to circumstances, from above 1 *per cent.* to a much less sum; and upon his whole transactions with the bankrupts, the *extra* charge, above interest, was under one-fourth *per cent.*