therefore, most justly, according to their practice, when there is no officer appointed to receive monies paid into Court, ordered the ascertained sum to be paid in the meantime. Something has been said here with regard to interest, which I did not understand. The matter of interest is clearly reserved by the interlocutor for further consideration.

"This appears so plain a case, tainted by the conduct of the appellants, and where they have been the cause of so much unnecessary delay, that though I am seldom inclined to give costs on appeals, I conceive this case fit to be so marked by your Lordships."

On his Lordship's motion, the case was then affirmed, with costs.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 of costs.

For Appellants, *Wm. Alexander, John Clerk, M. Nolan.*
For Respondents, *Edw. Law, Wm. Adam, Chas. Hay.*

NOTE.—Unreported in the Court of Session.

(M. App. I. Usury, No. 1.)

WILLIAM WALKER, Merchant in Berwick; Messrs. SURTEES, BURDON and EMBLETON, Bankers in Berwick; Messrs. CLUNIE and HOME, Merchants in Berwick; JAMES SHERIFF, Merchant in Edinburgh; JOHN JAMIESON and SON, Merchants in Leith, and Others, Creditors on the Estate of Messrs. SINCLAIR and WILLIAMSON, Merchants in Leith, . . } *Appellants;*

ROBERT ALLAN, Banker in Edinburgh, *Respondent.*

House of Lords, 2d March 1802.

USURY — ACT OF 12 QUEEN ANNE, c. 16. — ACT 31 ELIZABETH, c. 5.—(1.) A firm in Leith were in the habit of raising money by means of discounting bills with Mr. Allan, a banker. Mr. Allan charged a deduction for discount on these, ranging from ten to six per cent. And, in the several settled accounts for a period of several years, the balance, including commission, was always carried to a new account, and made to bear interest. On their bankruptcy, the creditors objected to Mr.

1802.

WALKER, &c. *v.* ALLAN.

Allan's claim, on the ground of usury, and raised action for the penalties, under the act of Queen Anne. The defence stated was, that the limitation of action to a year barred the present suit after that period. Held, by the Court of Session, that there was no ground for the charge of usury. In the House of Lords, the case was remitted for reconsideration, with strong expression of opinion that the judgment below was wrong. (2.) Question discussed, whether the English statute of limitation of action could be operative in Scotland, and doubts as to this indicated in the House of Lords.

The appellants were creditors of Messrs. Sinclair and Williamson, merchants in Leith; and, on their bankruptcy, had occasion to question the nature of the transactions which had been carried on in the discounting of bills with the respondent, Mr. Allan, banker, by which his claim on the estate was considerably enlarged. This was by taking more than the legal amount of interest for the bills discounted with him by the bankrupts. And the creditors (appellants) therefore raised the present action, praying the Court to decree, that the respondent had contravened the provisions of the statute of the 12th Queen Anne, cap. 16, against usury, and had subjected himself to the pains and penalties thereof; and concluding that it be decerned, That the debts due by the bills, or promissory notes, stated, were null and void, and could form no claim against the estate of Sinclair and Williamson, and that the respondent was not entitled to take credit for the same. That he had incurred the penalties of the statute, and that he ought to make payment to the plaintiffs of the sum of £36,373. 0s. 3d., being the treble value of the principal sums so lent or covenanted for, or such other sum as they should be found to amount to.

The respondent and the bankrupts began their dealings in Sept. 1793, and continued till the bankruptcy of the latter in April 1796. In that period their accounts were settled no less than eleven times, and at each settlement the balance, including interest and commission, was carried to a new account, which, consequently, was making a charge *of interest upon interest within the year.*

The mode in which these bill transactions were carried on was this, when Sinclair and Williamson had occasion for any considerable sum, the respondent brought some of these deposited bills to the credit of their account with him, by what he calls discounting them, but really by a short credit,

or stating less than the amount, apparently without any settled rule. The mode was thus stated :—

1795.							
Oct. 12.	Three bills per letter,	£96	9	4	£94	5	7
„ 16.	On Martin,	225	0	0	221	1	6
Nov. 24.	Graham & Co.,	1560	0	0	1467	3	6
Dec. 14.	Bills per letter,	1457	18	10	1431	5	3
1796.							
Jan. 11.	Three bills per letter,	1390	0	0	1364	13	3
„ 20.	Chapman's Promissory Note,	645	0	0	629	15	9
Feb. 23.	Chapman,	1040	0	0	1988	9	10
„	Atkinson,	1000	8	10			

Calculating interest on the bills thus credited, from the time of the credit given till they severally came due, it appears that the sum deducted amounts to more than at the rate of five per centum per annum. For instance, the interest, at that rate, on the first article, was £1. 0s. 7d., whereas the deduction is £2. 3s. 9d., that is, at the rate of 10½ per cent. per annum for the number of days to run. The other items vary from 6½ to 9 per cent.

The Lord Ordinary ordered informations to report to the Court. The respondent argued, that the action being founded entirely on the statute of Queen Anne, and brought by the appellants as common informers, for the statutory penalties, was barred in consequence of not having been commenced within a year after the alleged offence, in terms of the statute, 31 of Elizabeth, cap. 5. It was further maintained, that though the statute of Anne is silent as to the limitation, and though the statute of Elizabeth can have no force or operation in Scotland, yet, in construing the former, it must be held as containing the limitation, or as extending the statute of Elizabeth to the whole United Kingdom, since the legislature could not intend to make a distinction between the two countries, or to allow an action to be brought at any time in Scotland, while, by force of the statute of Elizabeth, it could not be commenced after a lapse of the year in England. *Separatim*, That the charges he made were not usurious, or an offence against the statute, and that they were sanctioned by practice. To this it was answered, that in point

1802.

WALKER, &c. *v.* ALLAN.

of fact, the objection had been taken so early as July 1796, (the bankruptcy being only in April preceding), when the trustee of the sequestrated estate of Sinclair and Williamson thought it his duty to object to the claim, upon the very grounds stated in this action. That objection, as then stated, would have then raised the question judicially, but the creditors having disagreed as to the mode, some being for entering into a submission, and others for legal prosecution, the Court was appealed to, under the authority of the bankrupt act; and it was not till February 1798 that they decided that the creditors might individually follow either course. The question, therefore, was raised *within* the year. But, in point of law, the appellants contended there was no limitation introduced by the act of Queen Anne, and no reference to any former statute; and that offences committed against the act in Scotland, may be prosecuted there at any time within which penalties in other cases might be sued for by the municipal laws of that country. To argue otherwise, is to say that an *English* statute has force in Scotland, though no British statute gives it that force, and that the judges of Scotland must, in this instance, construe the statute law of England.

May 15, 1800. The Court, of this date, found "it unnecessary, in this "cause, to give judgment upon the defence of prescription, "(*i.e.* limitation of the action), find there is no ground for the "charge of usury brought against the defender, and therefore sustain the defences upon the merits; assoilzie and "decern: Find the pursuers liable in expenses, and allow July 2, —— "an account thereof to be given into Court." Of this date, the Lords decerned for expenses.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. Money advanced upon the security of a bill of exchange not due, is, in the strictest sense, a loan, to the person who seeks to discount it; and who, by his indorsation, is obliged to repay or replace the sum advanced at the time when the bill becomes payable, in default of the acceptor; and to take more than the rate of five per cent. per annum for such accommodation, is therefore clearly against the statute, and necessarily subjects the taker to the forfeiture annexed to the offence. So far as the appellants know, or have ever heard, it is not the practice of any bank, banker, or merchant of reputation, to take more than the interest at the rate of

five per cent. for the time the bill has to run; and, if such a practice were permitted, the statute would virtually be repealed. Interest was taken here to an exorbitant extent beyond the legal; and, in order to excuse or disguise this, it is now attempted to be maintained that the overcharge was by way of commission; but this is a mere cover, and is just precisely one of those devices which the statute reprobates, and against which it was intended to provide. 2. The circumstances of the frequent settlements, where the interest was repeatedly converted into capital, bearing interest within the year, is left to your Lordships' consideration without argument. The respondent, in excuse for himself, has alleged that this was done by desire of Sinclair and Williamson; but that is impossible. They may have frequently desired to know the state of the account, but the striking of a balance, to be considered as a principal, must have been the respondent's own operation. And, at any rate, if it was against the statute, the concurrence of the debtor could afford no excuse.

Pleaded for the Respondent.—1. The appellants being private informers, did not bring the action within the time limited by the act 31 of Elizabeth, cap. 5, § 6, and therefore the present action is now barred. 2. But, in point of fact, the commission made by the respondent against Sinclair and Williamson is not usurious; but only a fair and moderate charge for trouble and expense upon money transactions with that house to a great amount, and is warranted by the universal practice in Edinburgh, the place where the respondent carries on business.

After hearing counsel,

Lord Thurlow said,—

"My Lords,

"(His Lordship began, by observing that the interlocutor appealed from, finds that "there is no ground for the charge of usury brought against the respondent," and that this was to be determined by a review of the persons who were parties to the appeal, and of the circumstances in which they appeared.)

"The appellants were creditors of Sinclair and Williamson, who had become bankrupts in Scotland. In a sequestration in that country, as under a commission of bankruptcy in England, it was necessary to consider who were creditors, and the amount of their several claims. The trustee or assignee, and each individual creditor, had an interest to cut off, or reduce demands upon the estate. Among others, the respondent was a creditor upon this estate. Some of the other creditors thought his account ill settled—that his deal-

1802.

WALKER, &c. v. ALLAN.

ings with the bankrupts were usurious—and that, therefore, their contracts were void. And as the money had been received, they claimed the penalty of usury. Others of the creditors thought that his account was fair, and that the disputed articles might be referred to arbitration. Those who contested the account, applied to the Court of Session for leave to sue the respondent, either in their own name, or in that of Mr. More as trustee. At first, I had some difficulty in not seeing Mr. More's name to the suit; but I now find that the suit was in his name.

"The conclusions of the summons are, that the debts due by the bills or promissory notes stated, were null and void, and could afford no claim against the estate of the bankrupts; that the respondent was not entitled to take credit for the same, that he had incurred the penalties of usury; and that he ought to make payment to the appellants of the sum of £36,373. 0s. 3d., being the treble value of the sums lent, or such other sum as the same should be found to amount to, one half to their use, and the other half for the public interest.

"The creditors had the forbearance not to state every particular instance of usury in the summons, but referred to certain acts stated in a condescendence.

"The defence set up by the respondent was prescription. The pursuers were private persons, and there was no public prosecutor. The defence of prescription rested on *this*, that the statute of Queen Anne must be affected in Scotland, as in England, by the statute of Elizabeth, which required that all penal actions, brought by common informers, should be *commenced within a year* after the offence is committed. It was said, besides, that the action was groundless, frivolous, and vexatious.

"As to the first ground, it was premature, on many views which might be taken of this matter. Even if the statute of Anne could be affected by an English statute of limitation, it would not have been an answer to the challenge, in regard to all the sums; but, if the other defence was true, the judgment was good, and the action properly dismissed with costs, which it was right to give, if the action was groundless, frivolous, and vexatious.

"Something has been said as to the moral character of the respondent. Upon this point, when civil rights come to be discussed in a court of justice, I have only to say, that it was right and proper that justice should be administered with as little severity to private character as possible.

"The dry question is, Whether the interlocutors are right? I think they are not right. I think them wrong; and that it will be proper to send the cause back to the Court below, with directions to the Court to review their interlocutors from the beginning.

"The Court ought to examine if there was usury here. As to the prescription of the statute of Anne by the operation of an English statute, it would be singular if it should turn out that an English

statute was to be operative in Scotland. But that point was not before the House. Another singular thing was, the different species of relief sought here from what could be sought in England. There was no idea of it being possible in England to devise a proceeding like this, which should reform the account, and at the same time charge for the usury. It has not been determined that these two prayers for relief can be conjoined, as the Court had found there was no ground for the charge of usury.

"If the statute of Anne is law in Scotland as well as in England, it ordains that not more than five per cent. shall be taken for the loan or advance of money, otherwise it shall be usury. As to a compensation for trouble, what has been held here in other cases must be held in Scotland. It is, that what is taken above five per cent. shall be a compensation for trouble, and a compensation only. The *onus probandi* lies on the taking of any sum above five per cent. They are bound to satisfy the Court, that what they have taken beyond five per cent. is nothing but a compensation for trouble.

"It appears a new doctrine to me, that if a person goes to a merchant to discount a bill, and if such merchant takes more than five per cent. that he had a right to do so.

"When cases of this sort first occurred in England, and a sum beyond five per cent. was allowed to be taken for trouble, it became matter of consideration to many grave and intelligent persons, whether it would not soon become absolutely necessary to regulate, by a general law, the extent of the sum to be taken for trouble, as it had been deemed necessary to regulate, by a general law, the extent of the sum to be taken for the forbearance upon the loan or advance of money. This matter is now left to the jury; but the question always is, "Is it merely for trouble?" or "Is it for the forbearance upon the loan or advance of money?"

"When this question is put, a person may say, I will have a certain commission upon my whole transactions. But if a mere compensation for trouble only is to be allowed, and if it lies upon the respondent to prove that a compensation for trouble only has been taken; and if he charges *commission upon a bill, when his only trouble is merely to receive payment;* and if the commission so charged upon a bill payable in Leith, or the commission and discount upon a bill payable in Leith, are more than a bill payable in Glasgow, the respondent will have this to grapple with.

"If six per cent. is sufficient for the bill payable in Glasgow, why charge seven per cent. for the bill payable in Leith? But there are different charges, also, for bills payable at the same place.

"If the question had been tried before a jury, I do not mean to say that Mr. Allan could not have sustained his defence. But the question here is, Can you sustain interlocutors which say, there is here no ground for the charges of usury, and which give expenses? The

1802.

WALKER, &c. v. ALLAN.

jury would have had to consider every item of the account. The Court of Session must do the same.

"The words of the statute are, that no person 'take *directly* or '*indirectly*, for loan of any monies,' &c., 'above the value of five 'pounds for the forbearance of £100,' &c. And as to the additional items, not specified in the condescendence, justice requires that the whole account should be examined, and a reformation of the account, at least, is due to the creditors. It has been said, you cannot go back upon accounts which have been settled. But the first item of the unsettled account is the balance of the settled account; and this balance is composed in part of the charges which are challenged. Interest must not be suffered to be made principal, and to bear interest, as is done in some instances here, eleven times in the year. You cannot go into the unsettled account without going into the settled account. The item which states the balance of the former account cannot be ascertained without going into that account. And if the penalties of usury cannot be made to attach, surely a reformation of the account is necessary; and, for this purpose, the Court must look from the beginning to the end of the account.

"There is one point more, and that is, What is the *taking* beyond five per cent., which will charge the respondent? If the money received beyond five per cent. is not carried to the credit of the account it will be difficult to say that it has not been taken.

"On these grounds, I think that this case ought to be remitted to the Court of Session to examine the account, item by item, and whether all or any of the items are usurious; and then this question will come before them, Can the penalties be recovered in this action?"

The cause was remitted accordingly.

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of generally.

For Appellants, *J. Mitford, Robert Blair, Wm. Adam, John Clerk.*

For Respondent, *Chas. Hope, Wm. Alexander.*

NOTE.—The Court of Session, in reviewing the question generally under this remit, (Mor. App. Usury, No. 1.), found (30th June 1807) that as the act of Queen Anne introduced into Scotland certain penalties for the crime of usury, these were introduced with such qualities and limitations as already existed in England, the same law being intended in this case for both parts of the island; and, therefore, that the act of Queen Elizabeth, c. 5, limiting the action to one year, must apply. They found, "that all actions for treble

" values brought in this country, under the authority of the statute " of Queen Anne against usury, are subject to the limitation appli- " cable to such penal actions in England, and that the concurrence " of his Majesty's Advocate is not necessary in the present action."

JOHN SCOTT, Writer to the Signet, Proprietor of the Farm of Ormiston, . } *Appellant.*

ALEXANDER BRODIE of Carey Street, London, Tacksman of the Farm of Ormiston, and WILLIAM BRODIE, residing there, } *Respondents.*

House of Lords, 10th March 1802.

LEASE—WAY-GOING CROP—STRAW AND DUNG—CUSTOM OF THE COUNTRY.—This was a question, as to whether the tenant had a right to a way-going crop, under a lease, which bore an entry at Whitsunday, and declared that his removal, on the expiry of the lease, should be at Whitsunday, from the lands, &c., and which bound him to consume the whole straw and dung upon the lands during the currency of the lease, and to carry none of the dung from the farm during the last year. The tenant began to plough, and to lay down a crop to be reaped after the expiry of his lease at Whitsunday, contending, that by the custom of the country, he was entitled to a way-growing crop. The Court of Session altered an interlocutor of the Lord Ordinary, which interdicted the ploughing and laying down of crop. On appeal to the House of Lords, the Lord Chancellor pronounced a judgment, declaring that the tenant, in this case, was not entitled to a way-going crop, and remitted the case for reconsideration.

The lands of Ormiston lately belonged to the Earl of Traquair, from whom they were purchased by the appellant.

They were let on lease, (15th March 1783), by the Earl of Traquair, to William Murray, " for the space " of nineteen years, from and after the term of Whitsunday " (then) next, 1783, which is thereby declared to be " the term of the said William Murray's *entry* to the posses- " sion of the said lands and others, by virtue of these pre- " sents, by which the said William Murray binds and ob- " liges himself and his foresaids, at the expiration of this " tack, which will be at the term of Whitsunday 1802, to " flit and remove from the lands and others thereby set,