overcharge, his rival had in fact had his goods carried at a lower rate, and the railway company could exact no more from the latter under the contract of carriage into which they had entered. The only way therefore of redressing the inequality was to refund the overcharge. Here, on the other hand, all the traders are still liable to be sued for the rates properly leviable on goods which they have shipped; and the Commissioners, in the person of their representative Mr John Anderson, have expressed their willingness to adopt this course and indeed consider themselves in duty bound to do so. In these circumstances I am unable to give any effect to the defender's fifth plea-in-law, and I am for affirming in its entirety the interlocutor reclaimed against.

I would only add that I do not think that the Commissioners will be bound to exact dues on ships' provisions shipped in small quantities if they think that the expense of doing so would exceed the amount of the revenue derived. In matters of this kind the Commissioners must have a certain discretion, which it may be assumed they will exercise in the interests of the harbour which they administer.

LORD GUTHRIE—I am of the same opinion.

The Court adhered.

Counsel for the Reclaimer (Defender)—Macmillan, K.C.—Watson, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—Horne, K.C.—A. M. Mackay. Agents—Alex. Morison & Company, W.S.

Friday, December 3.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

SCHULZE *v.* INLAND REVENUE.

Revenue—Income Tax—Interest—The Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec*, 100, *Schedule D, Third Case—The Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D—Assessment of the Interest in a Decree for a Sum with Interest from a certain Date.*

In November 1911, A, a trustee on the estate of the late B, raised an action against the representatives of the late C, to recover from them an asset of B's trust estate, which owing to the negligence of C had not been ingathered. Decree was given for payment with interest at 3½ per cent. since the date at which the sum should have been ingathered. *Held* that the interest was assessable for income tax when paid to A.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) enacts, section 100—"The duties hereby granted, contained in the Schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment. *Schedule D*—The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A), (B), or (C), and to every description of employment of profit not contained in Schedule (E), and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons . . . receiving or entitled to the same." . . . *Third Case*—"The duty to be charged in respect of profits of an uncertain annual value not charged in Schedule (A). First—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profit or gains arising therefrom within the preceding year, . . . to be paid on the actual amount of such profits or gains, without any deduction. Second—The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Schedule (C)), and on all discounts, and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case."

The Income Tax Act 1853 (16 and 17 Vict. cap. 34) enacts, section 2—"For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively (A), (B), (C), (D), and (E), and to be charged under such respective schedules—that is to say . . . Schedule (D)—For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever . . . and to be charged for every twenty shillings of the annual amount of such profits and gains. . . . And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof."

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the county of Selkirk, held at Selkirk on the 13th day of May 1914, and at an adjourned meeting of the said Commissioners also held at Selkirk on 16th September 1914, Charles William Schulze, Brunswickhill, Galashiels, *appellant*, appealed against an assessment made on him by the Additional Commissioners of Income Tax, as a trustee on the estate of the late Hugh Lees, Galashiels, under Schedule (D), for the year ending 5th April 1914, on the sum of £462 in respect

of untaxed interest received by him. S. W. Bensted, surveyor of taxes, Galashiels, appeared in the interest of the Inland Revenue, *respondents*.

The Commissioners confirmed the assessment, and at the request of Schulze stated a Case for appeal.

The Case stated—"The following *facts* were admitted or proved—(1) In 1911 the appellant and his wife, as assumed trustees of the late Hugh Lees, raised an action in the Court of Session against John Sanderson Dun and others, the beneficiaries of the late John Dun, for payment by the defenders of the sum of £1040, with compound interest from 31st May 1870, being the alleged loss sustained by the trust estate through the negligence or breach of trust of the said John Dun while trustee thereon in respect of the sale of a dwelling-house in Abbotsford Road, Galashiels, and of the price thereof—amounting to £1040—not having been paid by the purchaser. (2) On 4th November 1911 decree was given by the Court of Session against the defenders jointly and severally—but that only to the extent to which each was *lucratus* from the estate of the late Mr Dun—for payment to the pursuers of the sum of £1040, with interest at 3½ per cent. per annum from 27th April 1902. (3) The said sum of £462 was made up as follows, viz.:—

"Interest at 3½ per cent. per annum on £1040, from 27th April 1902 to 1st November 1913, in respect of price of house in Galashiels, as decerned for by Court of Session	£419 2 11
"Interest at 5 per cent. on taxed expenses, also decerned for, and amounting to £460, 3s. 11d., from 22nd November 1911 to 1st November 1913 .	42 16 0
	£461 18 11

(4) The said sum of £461, 18s. 11d. was paid to the appellant as trustee foresaid. No income tax was deducted on payment to him of said sum. (5) For the year ending 5th April 1914 an assessment was made on the appellant as trustee foresaid on the sum of £462."

The appellant argued—(1) The sum dealt with was not interest to be assessed under the charging section. The purpose of the action in *Lees' Trustees* v. *Dun*, 1912 S.C. 50, 49 S.L.R. 50, *aff.* 1913 S.C. (H.L.) 12, 50 S.L.R. 520, was to recover the sum lost to the trust estate. The award was of the nature of damages—*in re National Bank of Wales, Limited*, [1899] 2 Ch. 629. To call it interest did not bring it within the charging sections—*Goslings & Sharpe* v. *Blake*, 1889, 23 Q.B.D. 324. In fixing interest at 3½ per cent. the Court had made all necessary deductions. (2) If the sum was interest, it was an accumulation of several years' interest, and there was no statutory authority for assessing it all under one year—*Scottish Provident Institution* v. *Inland Revenue*, 1912 S.C. 452, *per* Lord President (Dunedin) at p. 457, 49 S.L.R. 435 at p. 437. To do so would lead to an overcharge, as during the years of accumulation the rate of tax had varied from 11d. to 1s. 2d., and in the year in which the assessment was made had risen to 1s. 3d. (2) If the sum recovered was interest, the defaulting trustee must be presumed to have received it for the principal sum while invested and in his hands, and the tax on such income was recoverable from his representatives only—*Lord Advocate* v. *Edinburgh Life Assurance Company*, 1910, S.C. (H.L.) 13, *per* Lord Gorell at p. 21, 47 S.L.R. 94, at p. 97; *London County Council* v. *Attorney General*, [1901] A.C. 26.

The respondents argued—The sum of interest under the decree when it came into the hands of the appellant was income. The sum fixed was what the principal sum would have earned on the average. All income was assessable when it came into the hands of the party entitled to it. Income which was assessable included other profits and gains than interest, so the sum here could not escape. Interest, not merely yearly interest, was to be charged—*Leeds Benefit Building Society* v. *Mallandaine*, [1897] 2 Q.B. 402. The tax had not been paid, and was therefore exigible—*Lord Advocate* v. *Corporation of Edinburgh*, 1903, 6 F. 1, *per* Lord Stormonth Darling, at p. 3, and Lord Adam at p. 7, 41 S.L.R. 1, and 1905, 7 F. 972, 42 S.L.R. 691; *Glamorgan Quarter Sessions* v. *Wilson*, [1910] 1 K.B. 725. The tax was not due by Dun's representatives—*Gateshead Corporation* v. *Lumsden*, [1914] 2 K.B. 883. It was to be paid by Schulze—*Dunn* v. *Chambers*, 1898, 25 R. 688, 35 S.L.R. 537.

At advising—

LORD PRESIDENT—In November 1913 the appellant received the sum of £416 in name of interest. If the sum so received was interest in reality as well as in name, then, no income-tax having been paid thereon, income-tax is now due and payable.

I am of opinion that the sum so paid was interest both in name and in reality.

It appears that in November 1911 the appellant, a trustee on the estate of the late Mr Hugh Lees, raised an action in the Court of Session against the representatives of a person named Dun. The object of the action was to recover from Dun's representatives an asset of the trust estate, which, owing to the negligence of Dun, who was then a trustee of Hugh Lees, had not been ingathered. The Second Division of the Court of Session granted decree for the payment of that asset which had not been ingathered by Dun (*Lee's Trustees* v. *Dun*, 1912 S.C. 50, *aff.* 1913 S.C. (H.L.) 12). The appellant claimed in his summons compound interest on the asset, and stoutly maintained that he was entitled to have compound interest as damages because Dun had wrongfully withheld this trust money. The Court regarded that claim as barely stateable. The appellant then lowered his demand and asked for penal interest at five per cent. That claim likewise was rejected by the Second Division, who ultimately awarded three and a half per cent. upon the £1040, the successful argument being, as appears from the report, this—"Penal interest at the rate of five per cent. was only exacted when there was proof that

trustees had committed fraud or had appropriated trust money to their own use. Otherwise, and in circumstances such as the present, the rule was that the trustee was only bound to pay what the money would have earned had it been invested at the legal rate of interest, which between the years 1902 and 1911 averaged three and a-half per cent."

Plainly, therefore, the Court regarded the three and a-half per cent. as interest in the proper sense of that word and not as liquidate damages for breach of trust. There is a very good working definition of interest to be found in Bell's Dictionary. It runs as follows:—"Interest of money may be defined to be the creditor's share of a profit which the borrower or the debtor is presumed to make from the use of the money." Otherwise stated, it is just recompense to the creditor for being deprived of the use of his money. The three and a-half per cent. interest on the £1040 seems to me to fall within that definition. For the trustees on Hugh Lee's estate were deprived of the use of this sum of £1040. If they had had it, presumably they would have invested it; and if they had invested it presumably it would have yielded to them three and a-half per cent. Therefore as recompense for being deprived of the use of this trust money they had awarded to them the sum which it would have earned in their hands if placed in a proper trust investment. That appears to me to make it quite plain that this was interest in the proper sense of the word and not liquidate damages.

We were urged, however, to hold that it was damages and not interest solely, I think upon the authority of a judgment pronounced by Mr Justice Wright in the case of the *National Bank of Wales, Limited* ([1899] 2 Ch. 629). There the learned Judge held that the director of a limited liability company was liable in interest at five per cent. upon a sum which he (the Judge) held that director had fraudulently misappropriated, and the claim to have income-tax deducted, under the 40th section of the Statute of 1853, 16 and 17 Vict. cap. 34, was rejected. The ground upon which Mr Justice Wright refused to allow the deduction to be made is very clearly brought out in the report (page 650), where he says—"I shall not allow the deduction unless there is some authority which binds me to do so. I consider this interest is in the nature of damages for a fraudulent breach of trust . . . I do not see my way to allowing Mr Cory to deduct the amount of income-tax from the penal interest of five per cent. It is not a question of contract at all so far as I can see. The matter must be regarded for this purpose as if the respondent had fraudulently given away £37,000 of the capital of the company. I ordered him, rightly or wrongly, to repay that sum, and I make an order the effect of which is to find that the company has by its capital being withheld all these years suffered damages equal to five per cent. per annum. If the company has suffered those damages I can see no reason why it should not get the whole of the damages back. It is called 'interest' but it is really damages for withholding its capital from the company."

Now I offer no opinion upon the question whether that judgment is in accordance with the law of Scotland or not. All I say is that that case is not the case before us, because in the case before us an attempt was made to make Dun's representatives liable in damages on the ground that Dun had wrongfully withheld the trust money. That view was deliberately rejected by the Court, who found the representatives of Dun liable in interest and in interest only.

If that be so, then this duty must plainly be paid, for the claim falls within the precise terms of the charging statute—section 2, Schedule D, of the Statute of 1853, 16 and 17 Vict. cap. 34, which runs thus—"And for and in respect of all interest of money . . . not charged by virtue of any of the other schedules contained in this Act." The duty must be paid by the person receiving the interest chargeable to duty, and it appears to me to have been quite properly charged according to the Second Rule, Third Case, section 100, of the Statute of 1842, 5 and 6 Vict. cap. 35.

I am therefore for affirming the decision of the Commissioners.

LORD JOHNSTON—The question is whether a sum paid under decree *eo nomine* as interest on a principal sum recovered by the pursuers in an action was interest in their hands which fell to be assessed to income tax.

Where a pursuer recovers damages with interest from the date of decree I do not think that that interest is chargeable. It is part of the damages. But where a sum is due on a definite date with interest from the date of advance and decree goes out the case is different. The interest ought to have been in the creditor's hands on the stipulated date, and is none the less interest when it is recovered along with the principal under the decree. Between these two cases there may be many, some partaking more of the characteristics of the one, some more of those of the other.

The present case appears to me to fall under the latter category. [*His Lordship referred to the circumstances of the case of Lees' Trustees* v. *Dun*, 1912 S.C. 50, *and continued*]—The result of this action was that decree was pronounced in November 1911 against the defenders jointly and severally, but only to the extent to which each was *lucratus* from the estate of the late John Dun, with interest thereon at the rate of 3½ per cent. per annum from 27th May 1902, the date of old Mrs Lees' death. There were reasons, which it is not necessary to explain, why interest was not found due during the survivance of Mrs Lees. But these reasons were of such a nature that I think it may be fairly stated that the decree must be regarded for the purposes of the present question in the same light as if it had been pronounced for the principal sum with interest at 3½ per cent. per annum from 31st May 1870.

In these circumstances there was restored

to the trust a principal sum which ought throughout to have been in the trustees' hands and bearing interest, and there was also restored to the trust a sum representing that interest at the rate of 3½ per cent. But this latter sum was so restored as at November 1911 in one sum, without reference to its accrual termly between 1902 and 1911 at a modified rate assumed to be the average return on the trust investments and without compound interest. When it reached the hands of the trustees it was a surrogatum for that which ought termly to have reached the hands of the trustees and have been applied by them as income, in which case it would have been subject to income tax, and when it did reach their hands I think they were equally bound to apply it in accounting with the beneficiaries as income, and I am unable to see any sound reason for holding that it did not become liable to income tax in the hands of the trustees when received.

The question depends upon certain sections of the Income Tax Acts. But in considering these and their bearing on the question one must discriminate between their charging provisions and their collecting provisions. I take the charging provisions first. The case is one falling under Schedule D of the Income Tax Act 1842 as amended by the Act of 1853. But the Act of 1853 commences with a charging provision (section 1) which charges the duty, *inter alia*, "for and in respect of all interest of money, annuities, and dividends and shares of annuities payable to any person or persons" at the rates specified. It is true that this section had fallen under the guillotine of the Statute Revision Act as expired in point of time. But it is of use in interpreting the new Schedule D contained in the next section of the Act (section 2). By it, for the purpose of classifying profits and gains in respect of which the duties were by the Act of 1853 granted, new schedules to replace those of the Act of 1842 were provided to be read into that Act. The new Schedule D included "all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act." Had the schedule stood by itself there might have been a question whether "interest of money" read in connection with the following words "annual profits and gains" did not mean "annual interest of money," though the contention would, I think, hardly have prevailed. But when the new schedule of 1853 is read in connection with the 1st or charging section of that Act there can be no doubt that all interest, whether annual or not, is brought into charge under the Act of 1853—*Leeds Benefit Building Society*, [1897] 2 Q.B. 402. I think that the same result would have followed from section 102 when taken in connection with section 100, Schedule D, Third Case, and rules 1 and 2 of the Act of 1842. The enactment is confused, and the charging provisions and collecting provisions are mixed up in section 102. But one thing is made perfectly clear, viz., that the Legislature had in view even in 1842 the charging, not only of annual interest, but of interest which was not annual. And turning now to the collecting provisions, their development is explained in the case of *London County Council*, [1901] A.C. 26, by Lord Macnaghten in some detail. The convenience of taxing or collection at the source, as it had been called, was early seen, and it was applied by the Act of 1842, sec. 102, but as regards interest only to yearly interest. The debtor in the annual interest was to be charged on his income in full, and to obtain his relief by deducting from the payment to his creditor. But the interest which was not annual interest was by sections 102 and 100 to be charged in the hands of the creditor on the interest in full according to the actual amount received.

The distinction between annual interest and interest which was not annual was maintained by the Act of 1853, sec. 40, which only simplified the mode of relief by deduction of the tax on payment by the debtor, who was to be assessed himself in full on his income as provided by the Act of 1842. It was assumed that such annual interest was a natural charge on income, and it is against the principle of the scheme of taxation that there should be double taxation, as there would be if the debtor's income were taxed in full and the creditor also assessed direct on the interest.

A further step was taken by the Customs and Inland Revenue Act 1888, sec. 24 (3). It was recognised that interest might not be paid in certain cases, or might not be wholly paid out of profits and gains brought into charge, in which event, if the right to deduct the tax in full from the creditors remained unqualified, the creditors would be mulcted yet the tax or part thereof remain in the hands of the debtors and not reach the coffers of the State. Accordingly the debtor, though directed to deduct from his creditor, was required to account to the Revenue for the duty, or that part of it which was not paid out of profits and gains brought into charge.

That covers exactly the situation which we have here. The interest in question was in no sense a charge on the income of Dun's representatives. It was not interest for which they were called on to provide or could have provided annually, and obtain relief annually without injury to the Revenue. It had no relation to their income, but was a sudden call on them to be met out of general funds, just as was the call for the principal sum of £1040. It was none the less interest to the persons to whom they were decerned to pay it. Dun's representatives ought to have deducted the tax, rendered an account to the Revenue authorities under the Act of 1888, and have paid it over to them. They not having done so there is no reason why, to avoid circuity, the recipient should not now be assessed direct by the Inland Revenue. Where the debtors ought to have deducted it nothing has been deducted. But that does not affect the liability of the recipient. I therefore concur with your Lordship in holding that the determination of the Commissioners was sound.

LORD MACKENZIE—I concur.

LORD SKERRINGTON, who had been absent at the hearing but was present at the advising, gave no opinion.

The Court affirmed the determination of the Commissioners.

Counsel for Appellant—Christie, K.C.—A. M. Mackay. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Respondent—Blackburn, K.C.—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Saturday, December 4.

FIRST DIVISION.

[Sheriff Court at Hamilton.

MIKUTA *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule ii* (7)—*Expenses—Tender.*

In an arbitration under the Workmen's Compensation Act 1906, after proof was ordered the employers lodged a minute admitting liability in respect of the accident, and tendering £14, 10s. as compensation in respect of the incapacity, which they stated ceased on 10th July 1915, but not mentioning expenses. A proof was proceeded with, and the arbitrator awarded compensation at £1 per week for twelve weeks and 12s. 6d. per week for three weeks down to 10th July 1915 (£13, 17s. 6d. in all), and ended the compensation as from that date. He found the employers entitled to their expenses since the lodging of the minute. *Held* (*diss.* Lord Skerrington) that the arbitrator was entitled to make the award of expenses referred to.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as applied to Scotland, enacts, Schedule ii (7)—"The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . Sheriff."

Joseph Mikuta, miner, 46 Baird's Rows, Stonefield, Blantyre, *appellant*, having claimed compensation under the Workmen's Compensation Act 1906 in the Sheriff Court at Hamilton against William Baird & Company, Limited, coalmasters, 168 West George Street, Glasgow, *respondents*, the Sheriff-Substitute (SHENNAN) on 29th July 1915 awarded compensation, found the employers entitled to the expenses incurred since the lodging of a minute by them, and at the request of the workman stated a Case for appeal.

The Case stated—"1. The appellant was a miner, and on 29th March 1915, and for some time previously, he worked in the respondents' employment at their Craighead Colliery. 2. On said 29th March 1915 the appellant, in the course of his work in said colliery, received injuries to his right leg by a fall of debris from the roof. 3. In consequence of said injuries the appellant was totally incapacitated down to 19th June 1815, and thereafter partially incapacitated till 10th July 1915, at which date his incapacity ceased. 4. On 20th July 1915 the respondents lodged a minute in the following terms—'Craig, for the defenders, intimated that they admitted liability in respect of pursuer's said accident, and tendered payment of the sum of £14, 10s., being the compensation due to pursuer in respect of his incapacity following thereon, the period of which did not extend beyond 10th July 1915.' 5. The appellant's average weekly earnings prior to the accident were 45s. 4d.

"On 29th July 1915 I issued my award, finding the appellant entitled to £1 per week from and after 29th March 1915 to 19th June 1915, and thereafter to 12s. 6d. per week to 10th July 1915, at which date I declared the compensation ended. I found the appellant entitled to expenses down to the lodging of respondents' minute on 20th July 1915, and I found the respondents entitled to expenses thereafter—in both cases on the lower scale. The amount tendered as compensation exceeded the amount actually awarded, and the expense of proof was caused by the appellant's refusal of the tender."

The *question of law* for the opinion of the Court was—"On the foregoing facts was I entitled to award expenses to the respondents subsequent to the date of lodging their minute of tender?"

The Sheriff-Substitute added a *note* in the following terms—"The only question of law raised was as to the effect of the defenders' minute of 20th July 1915, admitting liability down to 10th July 1915, and tendering £14, 10s. of compensation. Strictly speaking, I agree that the tender ought to have been of so many weeks' compensation at a certain rate. But in fact the sum of £14, 10s. is rather more than I have awarded. No difficulty arises because of the minute making no reference to expenses. The tender is not one of a lump sum to cover all liability. The £14, 10s. is explicitly described as compensation. If the workman had accepted it he would of necessity have been allowed expenses down to the date of tender, just in the same way as if the tender of compensation had been stated in the defences. Indeed, the minute may be regarded as an amendment of the defences. Accordingly, as the expense of the proof was caused by the workman refusing to accept the employers' offer, the proper course is to allow him expenses to the date of tender, and to award expenses thereafter to the employers."

Argued for the appellant — Expenses were in the discretion of the arbitrator—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule ii (7). He must exercise a judicial discretion with regard to expenses, and, if not, his finding might be reversed—*Evans* v. *Gwauncaegurwen Colliery Company, Limited*, 1912, 5 B.W.C.C. 441; Workmen's Compensation Act 1906, Elliot (7th ed.), at pp. 433-435 and p. 588.