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No. 1375—HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
7TH, 8TH, 9TH, 12TH AND 28TH MARCH, 1945

COURT OF APPEAL—29TH, 30TH AND 31ST MAY AND 22ND JUNE, 1945

HOUSE OF LORDS—23RD, 24TH, 27TH AND 28TH JANUARY AND 21ST MARCH, 1947

WESTMINSTER BANK, LTD. *v.* RICHES (1)

Income Tax, Schedule D—Interest—Action on contract—Interest awarded under Section 3 of Law Reform (Miscellaneous Provisions) Act, 1934—Whether “interest of money” within the meaning of the Income Tax Acts—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Schedule D, Paragraph 1(b); Rule 21 of the Rules applicable to Schedules A, B, C, D and E.

In a previous action heard in 1943 brought by R against the W Bank as judicial trustees of X's estate, R claimed to be entitled under an agreement made in 1936 to a half share of the profits realised by X on the purchase and resale of certain shares, and the Court awarded R the sum of £36,255 as representing the balance due to him. After judgment application was made on R's behalf to the Court to exercise its discretion under Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which empowers the Court, in any proceedings for the recovery of any debt or damages, to order “that there shall be included in the sum “for which judgment is given interest at such rate as it thinks fit on the whole or any “part of the debt or damages for the whole or any part of the period between the date “when the cause of action arose and the date of the judgment”. In exercise of this discretion the Court awarded R the further sum of £10,028, representing interest on the £36,255 at 4 per cent. from 14th June, 1936, to 14th May, 1943. The material part of the formal judgment was: “It is adjudged that the Plaintiff “recover from the Defendant £36,255 with £10,028 interest making together the “sum of £46,283.”

The present action was brought by the Bank for a declaration that the Bank had satisfied the judgment in the earlier action by paying R the amount adjudged to be due less £5,014, the latter sum representing Income Tax on the interest awarded. The interest in question was not payable wholly out of profits or gains brought into charge to Income Tax.

Held, that the £10,028 was “interest of money” within Schedule D and General Rule 21 of the Income Tax Act, 1918, and that Income Tax was accordingly deductible therefrom.

The case came before Evershed, J., in the Chancery Division on 7th, 8th, 9th and 12th March, 1945, when judgment was reserved. On 28th March, 1945, judgment was given in favour of the Bank, with costs.

(1) Reported (Ch.D.) 172 L.T. 337; (C.A.) 173 L.T. 148; (H.L.) 176 L.T. 405.

Mr. Terence Donovan appeared as Counsel for the Bank, and Mr. Frederick Grant, K.C., and Mr. N. E. Mustoe for Mr. Riches. The Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills represented the Crown as *amici curiæ*.

JUDGMENT

Evershed, J.—The short point raised in this action is whether a sum of money awarded for interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, and included, as provided by the same Section, in the total sum for which judgment was pronounced in favour of the Defendant against the Plaintiffs in another action between the same parties, is or is not "interest of money" within the meaning of Schedule D to the Income Tax Act, 1918, and subject, as such, to the impost of tax. Although the power for a Judge or a jury in an action for debt to award "interest" has existed under Section 3 of the 1934 Act, or under the somewhat similar provisions of Section 28 of the Civil Procedure Act, 1833, for over a hundred years, it does not appear that the point now raised has ever before come before the Courts.

The material facts may be shortly stated. In the spring of the year 1936 one Ernest Bramwell Ridsdel made a large profit on the purchase and resale of certain shares, and pursuant to a previous agreement between Mr. Ridsdel and Mr. Riches, the present Defendant, the former was liable to pay to the latter one-half of such profit. Certain sums were paid by Mr. Ridsdel to Mr. Riches, who accepted them in full satisfaction of his claim on the faith of Mr. Ridsdel's representation that such sums constituted in fact one-half of the profit made.

After Mr. Ridsdel's death, Mr. Riches brought an action in the King's Bench Division of this Court against the present Plaintiffs, the Westminster Bank, Ltd., as judicial trustees of Mr. Ridsdel's estate, for an account of his half share of the true profit made on the transaction and for consequential relief. The Bank, by way of defence, relied upon Mr. Riches' acceptance of the sums paid to him in full settlement of his claim; to which defence Mr. Riches pleaded in reply that his acceptance had been induced by the fraudulent representation of Mr. Ridsdel that the sums so paid in fact constituted one-half of the full amount of profit.

At the trial of the action before Oliver, J., the learned Judge found in favour of Mr. Riches on his plea in reply, thereby disposing of the defence of settled account. Mr. Riches became, accordingly, entitled to judgment for the sum of £36,255, which was at the trial admitted to be the difference between one-half of the profit in fact made by Mr. Ridsdel and the aggregate of the sums previously paid by him to Mr. Riches.

The learned Counsel for Mr. Riches then invited Oliver, J., in exercise of his power under Section 3 of the Act of 1943, to award to Mr. Riches interest on the sum for which he had been held entitled to judgment from the date on which such sum ought to have been paid over until the date of the judgment—a period of approximately seven years; and after hearing argument on both sides Oliver, J., exercised his discretion in Mr. Riches' favour by awarding to him an additional sum of £10,028, being the equivalent of interest at 4 per cent. per annum from 14th June, 1936, to 14th May, 1943. The material part of the judgment in the action, dated 17th May, 1943, is in the following terms: "It is . . . adjudged that the Plaintiff recover "from the Defendant £36,255 with £10,028 interest making together the "sum of £46,283." I have seen the transcript of the shorthand note taken of

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the argument on Mr. Riches' application under the Act of 1934, and it is clear that Oliver, J., was mainly influenced to exercise his discretion in Mr. Riches' favour by the circumstances that, as he had found, Mr. Riches had for seven years been deprived of his due share of the profit made by Mr. Ridsdel by the latter's fraud. "This gentleman", said the learned Judge of the Defendant, "has been cheated"; and later, "The view I have taken is that this very large sum of money has been kept away from Mr. Riches, to whom it ought to have been paid."

The Bank has paid over to Mr. Riches the amount due under the judgment, with the important exception that, as regards the amount of £10,028 included for "interest", the Bank has paid to Mr. Riches £5,014, or one-half only, claiming that such sum of £10,028 is "interest of money" within the meaning of Paragraph 1(b) of Schedule D to the Income Tax Act, 1918, and that in the circumstances they were bound under Rule 21 of the All Schedules Rules to deduct Income Tax therefrom at the rate of 10s. in the £ and account therefor to the Crown.

Mr. Riches having by Oliver, J.'s Order been given leave to levy execution in default of payment and having threatened so to do unless the full sum of £10,028 (which he claimed and claims not to be liable to any deduction for Income Tax) were paid to him, the Bank have instituted the present action for the purpose of having determined by the Court the question whether or no the item of £10,028 included in Oliver, J.'s judgment is liable to Income Tax.

The Crown, being interested in the question raised, was invited to attend the hearing, and I have had the advantage of hearing argument on behalf of the Crown by the Attorney-General and Mr. Hills as *amici curiæ*.

One other matter of fact must be stated. In respect of the year 1943-44 (which, upon the footing that the sum of £10,028 is liable to the charge of Income Tax, is the material year) the profits or gains of the Bank, as judicial trustees of Mr. Ridsdel's estate, brought into charge amounted to approximately £10,000. In respect of the same year the annual payments of the Bank in the same capacity were over £21,000, inclusive of the amount of £10,028 here in question. It is therefore conceded that, if the sum of £10,028 is subject at all to the charge of Income Tax, the proper Rule applicable to its collection is Rule 21 of the All Schedules Rules. Rule 19 is, on the facts I have stated, excluded.

The Law Reform (Miscellaneous Provisions) Act, 1934, is by the material part of its title described as "An Act . . . as to the awarding of interest in civil proceedings." Section 3 is in the following terms: "(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". Then there follow provisos, the first prohibiting the "giving of interest upon interest", and the second excluding the application of the Section to any debt on which "interest is payable as of right whether by virtue of any agreement or otherwise". Sub-section (2) repeals Sections 28 and 29 of the Civil Procedure Act, 1833.

If the matter rested merely upon the language of Section 3 of the Act of 1934 I confess I should feel no difficulty in concluding that the language used meant what it said, that "interest" meant interest and that the sum

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awarded, being interest on the principal sum of £36,255 at 4 per cent. per annum from June, 1936, to May, 1943, was interest of money within the meaning of Paragraph 1(b) of Schedule D of the Income Tax Act and Rule 21 of the All Schedules Rules.

But it has been argued, and argued forcibly by Mr. Grant and Mr. Mustoe, that the matter is not so simple as at first appears, and that the sum awarded, being upon a proper analysis damages or in the nature of damages, is not interest of money so as to be subject to the charge of Income Tax. It therefore becomes necessary for me to examine this argument, each stage of which, it is contended, is sustained by authorities binding upon me.

The first stage of the Defendant's argument consists of the proposition that awards of "interest" on money claims under the 28th Section of the Civil Procedure Act, 1833 (which was repealed and replaced by Section 3 of the 1934 Act), have been held, in spite of the use of the word "interest" in the Section, to be in truth and substance awards of damages, or at the least in the nature of damages, for the detention of the debt after the date when it should have been paid.

In the second stage of the argument, Mr. Grant and Mr. Mustoe claim that, notwithstanding the difference of language, the true purpose and effect of Section 3 of the Act of 1934 was considerably to enlarge the scope of the relevant Section of the 1833 Act, but not to affect or alter the quality of the awards contemplated, which remain awards of damages or in the nature of damages equally under the 1934 Act as under the Act of 1833.

Thirdly, it is contended that sums awarded in the exercise of the discretion conferred by the material Sections of the two Acts, being damages or in the nature of damages, are not taxable as interest of money, or at least are not so taxable where the exercise of the discretion has depended upon the finding of an "element of wrongdoing" in the detention of the money successfully claimed by the party to whom "interest" (that is damages) has been awarded.

There is a fourth contention on the part of the Defendant substantially independent of the arguments I have already mentioned, and referred to by Mr. Grant as subsidiary thereto, which is to the effect that the sum awarded under the 1934 Act is in any event not interest of money within the Income Tax Act as not having the quality of recurrence or liability to recur or of any history or existence antecedent to the date of the award.

Before proceeding to a consideration of the authorities relied upon in support of the first stage of the Defendant's argument, it will be convenient—particularly in view of the second stage of the argument—to refer to the language of the material sections of the Civil Procedure Act, 1833.

It will have been observed that Section 3 (1) of the 1934 Act comprises awards of "interest" in respect both of claims for debt and of claims for damages, that is in respect of claims both in contract and in tort, in terms making no distinction between the two. In the Civil Procedure Act, 1833, the two classes of case were distinctly treated in separate Sections, 28 and 29, differing materially in language. The present case is one of a money claim to which, under the Defendant's argument, only Section 28 of the Act of 1833 is directly relevant. As appears later in this judgment, it is possible that, as regards liability for Income Tax, a different answer might have been given, and may still be given, in the case of an award of "interest" in respect

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of a sum of damages for tort from that appropriate to an award of "interest" on a money claim. In this action I am only concerned with an instance of the latter category, to which, under the law from 1833 to 1934, Section 28 of the Civil Procedure Act and not Section 29 would have been applicable. By Section 28 of the Act of 1833 a jury was empowered "to allow interest upon debts." This language is in marked distinction to that of Section 29, which says "the jury . . . may . . . give damages in the nature of interest". The wording of the Sections is as follows: "28. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law. 29. And be it further enacted, that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act."

It will be observed that Section 28 was subject to certain limitations in scope which are inapplicable to Section 3 of the Act of 1934—for example, in the case of debts not payable at a time certain, it was necessary that there should have been a demand in writing giving notice that interest under the Section would be claimed.

I now turn to the authorities relied upon in support of the first stage of the Defendant's argument, and particularly to the cases of *Cook v. Fowler* (1874), L.R., 7 H.L. 27, and *Webster v. British Empire Mutual Life Assurance Company* (1880), 15 Ch.D. 169.

In the first case the appellant Cook claimed as a creditor of one Bevan, whose estate was in process of administration by the Chancery Court. Bevan had, as security for moneys advanced, given to Cook a warrant of attorney, the defeasance clause of which provided for payment of the sums advanced, with interest thereon at the rate of 5 per cent. per month, on 2nd June, 1864, judgment to be entered forthwith but not to be executed unless default was made in payment of the principal and interest mentioned. Judgment had never been entered in fact, and Cook did not produce his warrant of attorney for some time after Bevan's death. Accounts having been taken, the matter came, on a summons to vary the Chief Clerk's certificate, before Vice-Chancellor Stuart, who fixed the rate of interest after 2nd June, 1864, at 4 per cent. per annum.

The appeal to the House of Lords was from this Order of Vice-Chancellor Stuart, and the only question before the House was whether the proper rate of interest after 2nd June, 1864, was that mentioned in the warrant, namely, 5 per cent. per month, or the rate fixed by the Vice-Chancellor, namely, 4 per cent. per annum. In deciding as they did against the appellant's claim to the larger rate specified in the warrant, their Lordships considered the basis on which interest is awarded, and its rate fixed, in the case of a

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simple contract to pay a sum of money on a fixed day with interest at a fixed rate up to that day, the contract being silent as to any rate of interest or otherwise in the event of default of payment on the due date. Each of the noble Lords observed that the award of interest in such a case, and the determination of its rate, was to be justified as constituting damages or compensation to the claimant for non-payment of his debt.

One citation, from the speech of Lord Cairns, L.C., will suffice, at page 32: "According to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson v. Redshaw* (1 Wm. Saund., at page 201 n), any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages."

One other point arises on the case of *Cook v. Fowler*⁽¹⁾ which is, in my judgment, important. In their argument for the respondents, learned Counsel are reported as referring to Section 28 of the Act of 1833, and Mr. Grant argued that the case was an authority directly upon that Section. I am, however, far from clear that Vice-Chancellor Stuart had purported to exercise jurisdiction under the 1833 Act. The Act is not mentioned in any of the speeches in the House of Lords. On the contrary, Lord Hatherley intimates, at page 37, that the Vice-Chancellor had applied "the ordinary rule of the Court of Chancery".

In my judgment the noble Lords in *Cook v. Fowler* were stating a general principle in regard to interest not limited to the application of the Civil Procedure Act. This seems to me to be clear from the Lord Chancellor's reference to the note to the case of *Mounson v. Redshaw*, reported in 1 Wm. Saund. 201, before the date of the Civil Procedure Act, in which it is pointed out that, in the case of a deed of covenant which is silent as to interest after default in payment on the due date, interest after that date must be claimed not as part of the debt but as damages for its detention. And the same rule appears to have applied (apart from the Act of 1833) equally in the case of a mortgage which makes no provision for the payment of interest after the redemption date—see, for example, *Price v. Great Western Railway Company* (1847), 16 M. & W. 244, and *In re Roberts* (1880), 14 Ch.D. 49. At least, if the right of the mortgagee to recover interest after the redemption date rested upon implied contract, the principle was applied in fixing the rate, as it was likewise applied in the case of commercial contracts—see *Cameron v. Smith* (1819), 2 B. & Ald. 305.

The emergence of the principle to which I have referred owes its origin to the rule of English law that, *prima facie*, money claims do not carry interest. To this rule there were exceptions, of which claims under contracts providing for interest by express terms or necessary inference, including the necessary inference of mercantile usage, were illustrations. And the Courts of Equity provided their own exceptions, based, for example, upon the relation between the parties affected. An analysis of the exceptions may be found in

(1) (1874) L.R., 7 H.L. 27.

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Halsbury's Laws of England, 2nd ed., vol. 23, page 174 and following; Mayne on Damages, 10th ed., page 151 and following; and Seton on Judgments and Orders, 7th ed., page 1344 and following. The existence of the general rule is, however, clearly established. It was authoritatively stated by the Court of King's Bench in the case of *Page v. Newman* (1829), 9 B. & C. 378, where, I observe, it is pointed out that its application is not affected by the circumstance that the withholding of the claimant's money was unjustifiable or wrongful.

Although I have not been able to find any satisfactory statement of the origin of the rule, there seems little doubt that it was closely connected with the ancient disapproval of usury. According to Blackstone, "When money " is lent on a contract to receive not only the principal sum again, but also " an increase by way of compensation for the use; which generally is called " interest by those who think it lawful, and usury by those who do not so. " For the enemies to interest in general make no distinction between that " and usury, holding any increase of money to be indefensibly usurious. " And this they ground as well on the prohibition of it by the law of Moses " among the Jews, as also upon what is said to be laid down by Aristotle, " that money is naturally barren, and to make it breed money is preposterous, " and a perversion of the end of its institution ". The reference given is Commentaries, book II, ch. XXX, page 454. It is indeed significant that the word " interest ", derived from the mediaeval Latin "*interesse*" and "*id quod interest*", signified the notion of loss or damage suffered by the claimant as opposed to the usurious conception of reward for money lent—cf., the definitions of " interest " in the Encyclopaedia Britannica and the Oxford Dictionary, and the French phrase "*dommages et intérêts*".

From these considerations I conclude that, save in cases where the payment of interest was provided for by the terms of the contract expressly or by implication and thereby incorporated in the debt, the justification for its award was founded upon the conception of providing compensation or " damages " to the claimant; and even in cases where, by trade usage or otherwise, it was to be inferred that the parties intended that interest should be paid, its rate was fixed upon the like conception.

In my judgment, therefore, the proposition that interest is awarded as damages, or by way of damages, as in the case of *Cook v. Fowler*⁽¹⁾, imports the justification for the award or for the rate awarded, but does not affect the quality of interest as such or distinguish, so far as relevant to the present enquiry, the interest so awarded, as, for example, in the case of a mortgage silent as to interest after the redemption date, from the interest in terms stipulated in the contract, for example, stipulated interest up to the redemption date in a mortgage.

I further conclude that, as a matter of general principle, the element of " wrongdoing " in the debtor is, *prima facie*, irrelevant to the question of the quality of the sum awarded for interest, though it may well be relevant to the question whether, in justice, the claimant is entitled to any " interest " or compensation at all.

Finally, I think that Section 28 of the Civil Procedure Act of 1833 introduced no new principle affecting the quality of any " interest " awarded in respect of money claims, though I think it clearly enlarged the class of cases in which it was competent for a Court or jury to award any interest at all; and to that extent I venture respectfully to doubt the correctness of the suggestion made by Thesiger, L.J., in *Webster's case*⁽²⁾ (the second of the

⁽¹⁾ (1874) L.R., 7 H.L. 27.

⁽²⁾ 15 Ch.D. 169.

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cases relied upon by Mr. Grant) in argument and in the course of his judgment, that the Section was merely declaratory of existing practice—a suggestion which appears to have been adopted in the 10th edition of Mayne on Damages, at page 154.

The material facts in this second case, *Webster v. British Empire Mutual Life Assurance Company*⁽¹⁾, were that a life policy issued to A had been charged by him in favour of B, but no notice of the charge had been given to the insurers, nor had there been any assignment of the policy. After A's death the chargee claimed payment of the policy moneys, but neither he nor any other person had taken out legal representation to the estate of the assured. In these circumstances the insurers—who had put the policy money in a separate account—claimed that they were unable to pay over the money in the absence of any hand able to give an effective receipt. The chargee sued the company for the policy moneys, asking at the same time that legal representation be dispensed with; and at the trial the Master of the Rolls made the Order dispensing with legal representation, and further ordered payment by the insurers to the plaintiff of the policy moneys, together with interest (by virtue of his discretion under the 1833 Act) from the date when A's death had in fact been proved. The appeal of the insurers was limited to the award of interest, and the decision of the Court of Appeal upon that matter was that, since the withholding of payment by the company was attributable to the absence of any properly constituted representative of the assured—an absence for which responsibility lay rather with the plaintiff than the defendants—no damage had been suffered by the plaintiff for which the defendants were responsible, and accordingly, no interest or compensation ought to be awarded in the plaintiff's favour.

In my judgment the observations of the members of the Court of Appeal in *Webster's* case, having regard to the facts of the case as I have stated them, are wholly consistent with the view I have already expressed. I refer particularly to the language of Cotton, L.J., who, after referring to the fact that the contract contained no stipulation whatever that the company should pay interest, proceeds⁽²⁾: "Interest, therefore, is no part of the debt. . . . If it can be recovered, it must be in the nature of damages. . . . In the case of a policy of assurance subsequently to the Act, as much as in a case before the Act as regards other instruments, where no stipulation appears for payment of interest but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages." After referring to the decision in *Cameron v. Smith*⁽³⁾, which I have already mentioned, the learned Lord Justice proceeds: ". . . the only damages, as a rule, given for the improper detention or refusal to pay money, are interest; loss of interest being the damage which the law supposes a man suffers, except under special circumstances, for non-payment of money to him."

In my opinion, therefore, the explanation of an award of interest, whether under the Act of 1833 or otherwise, in cases where payment of interest is not part of the contract, as being by way of or in the nature of damages, amounts to no more than a statement of the meaning of the word "interest" as defined, for example, in the passage in Halsbury's Laws of England (*supra*), or by Farwell, J., in *Bond v. Barrow Haematite Steel Company*, [1902] 1 Ch. 353, at page 363.

There is, no doubt, a valid distinction between interest on a debt, which is part of the debt, and interest awarded in respect of a debt which is not

⁽¹⁾ 15 Ch.D. 169.⁽²⁾ *Ibid.*, at p. 175.⁽³⁾ 2 B. & Ald. 305.

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part of the debt; and the distinction may (though not necessarily must) correspond with the distinction between the conception of interest as a reward for the use of money and the conception of interest as compensation for the deprivation of money. But the distinction, if valid, appears to me to have no relevance to the question of the quality (particularly the quality for tax purposes) of interest as interest or interest of money. In reference to this question it is, in my judgment, impossible to say that interest is interest when it is part of the debt, but is damages and therefore not interest when not so part. Equally it seems to me impossible to find any logical or sensible ground for classifying, save by reference to the special facts of the cases, some awards of interest by way of compensation as being in truth interest, and others as being in truth something else; and for saying, for example, that interest allowed after the redemption date in a mortgage, or interest allowed by the Court of Chancery on unpaid legacies, or awarded against a trustee, is interest properly so-called, and that interest awarded under Section 28 of the Civil Procedure Act or under Section 3 of the Act of 1934 on a money claim is not interest at all but damages.

The other two cases cited by the Defendant's Counsel in support of this part of their argument were *Sheba Gold Mining Co., Ltd. v. Trubshawe*, [1892] 1 Q.B. 674, and *Wilks v. Wood*, [1892] 1 Q.B. 684. In both the point decided was the same, namely, that the addition on a specially endorsed writ to a money claim of a claim for interest claimable only under Section 28 of the 1833 Act was outside the terms of Order III, Rule 6, in its then form, and invalidated the special endorsement. The ground of the decisions was that interest could not in the circumstances be regarded as part of the debt but was claimable as unliquidated damages. The reasoning is wholly in accord with and necessarily follows from the principles I have attempted to state above, but in my judgment nothing in either of the cases expands or affects those principles in any way.

In reference to the second stage of their argument, Mr. Grant and Mr. Mustoe cited the case of *London, Chatham and Dover Railway Company v. South Eastern Railway Company*, [1893] A.C. 429. The question in that case was whether the appellant company could recover interest under Section 28 of the 1833 Act on the balance owing by the respondents on the taking of certain accounts under a joint traffic agreement. It was held by the House of Lords that the claim for interest could not succeed under the Act, because the appellants could not on the facts satisfy the limiting conditions of Section 28, apart from the Act, because of the long established rule of the common law to which I have earlier referred. It is true that Lord Herschell, L.C., expressed the opinion that the conditions of Section 28 of the Act of 1833 confined its operation within too narrow limits, and it is also true that Section 3 of the Act of 1934, not being so limited, may be said to have remedied the grievance expressed by Lord Herschell. But the later enactment is not a codifying enactment, and in language is so widely different from the two Sections of the Civil Procedure Act which it repealed that it would be difficult to justify a strained construction of the wording of the 1934 Act merely by reference to the terms of the earlier statute. I am, however, content to assume (and it must, I think, be assumed) that the principles which I have already stated continue to apply to awards on debts under the Act of 1934; that is, that the basis and justification for such awards lies in giving to a claimant compensation for the non-payment of his debt. To that extent it remains true that such awards of interest are by way of or in the nature of damages.

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I come now to the third stage of the Defendant's argument, founded on a number of decisions in tax cases, though in none of them, as I stated at the beginning of this judgment, has the question of liability to tax arisen directly in reference to an award under the material Sections of the Acts of 1833 and 1934. A reference to these cases must still be made, notwithstanding the interpretation I put upon the authorities cited in support of the first stage of the Defendant's argument, in order to see whether I am bound by any of these decisions to hold that interest, if awarded by way of compensation, is not taxable, or that the answer is affected by the presence or absence of what has been called an element of wrongdoing in the conduct of the party ordered to pay interest. But I venture to observe first that, if it be right that interest awarded by way of compensation is free from liability to tax, then awards of interest at the current rate of 4 per cent. or 5 per cent. per annum during the period of detention would appear to be excessive as assuming that the claimant, had he had the use of his money at the proper time, would not have had to pay Income Tax upon its earnings. Secondly, I observe that the dependence of the claimant's Income Tax obligations in respect of awards of "interest" on the existence or degree of moral turpitude on the part of the person ordered to pay interest would appear to me neither rational nor logical. Thirdly, I point out that, generally speaking, in the tax cases the real points decided were matters of fact depending upon the particular circumstances of the particular cases.

It is not necessary for me to travel *seriatim* and in detail through all the cases cited, which were very fully debated in the course of the arguments. My third observation above is well illustrated by *Commissioners of Inland Revenue v. Ballantine*, 8 T.C. 595, and *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 427, the decisions in both of which turned, in my judgment, upon the finding of fact that the sums in each described as "interest" were in truth damages or compensation properly so-called, the element of "interest" being introduced merely as a convenient and appropriate method of fixing the sum awarded. Thus in the *Glenboig* case the question related to the compensation awarded to the Glenboig Company by a railway company for the sterilisation of a bed of fireclay, and the amount awarded was arrived at by reckoning two and a half years' profits of working. Such an award was held not in truth and fact to be profits, though calculated on that basis. It may, indeed, fairly be said to have been no more profits in quality than is the price paid for a reversion or any other kind of property calculated upon so many years' purchase; that is by taking the sum of the estimated profits or returns for that number of years. In *Ballantine's* case the sum of money concerned was an amount described as "interest" included in an arbitral award upon a claim by a contractor for "additional costs, loss and damage". The interest appears to have been taken from a purely arbitrary date, namely, the date of an amendment of the claimant's claim. The Court of Session in Scotland affirmed the findings of the Special Commissioners, that the sum in question was in fact an integral part of the total of costs and damages awarded, the Lord President (Clyde) observing that the result would have been otherwise if the award had taken the form of a lump sum of £X with interest thereon from the date of the award until the date of payment (8 T.C., at page 612).

The same reasoning applies, in my judgment, to *Simpson v. Kay's Executor*, 14 T.C. 580, and to the case of *Southport Corporation v. Lancashire County Council*, [1937] 2 K.B. 589, in each of which the conclusion of fact (that is, that the sum called "interest" had not in truth that quality) was

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strongly supported, if not compelled, by the circumstance that the tribunal making the award (in the former case the Mixed Arbitral Tribunal established under the Versailles Treaty, and in the latter an arbitrator acting under the powers of the Local Government Act, 1929) had no power to award interest and could not, therefore, have purported or intended so to do.

On the other side of the line are the cases of *Schulze v. Bensted*, 7 T.C. 30, and *Sweet v. Macdiarmid*, 7 T.C. 640, both Scottish cases, and the English case of *Commissioners of Inland Revenue v. Barnato*, 20 T.C. 455.

The *Schulze* case arose out of the circumstance that, in other proceedings in Scotland, the representatives of one Dun, a deceased trustee, had been made liable to make good to the continuing trustees a principal sum together with interest thereon at $3\frac{1}{2}$ per cent. per annum from a past date; and the question was whether this sum of interest was interest of money within the Income Tax Act. This question the Court of Session answered in the affirmative. The Lord President (Strathclyde), at the beginning of his judgment, emphasised that, although in the other proceedings the claimants had sought to charge Dun with fraud, this charge had been negatived. As a consequence the claimants had failed in their demand to recover either compound interest or simple interest at a "penal" rate. "Plainly, therefore", proceeds the Lord President, 7 T.C., at page 32, "the Court regarded the $3\frac{1}{2}$ per cent. "as interest in the proper sense of that word and not as liquidated damages "for breach of trust." The Lord President then cited (at page 33) the definition of "interest" in Bell's Dictionary, the second part of which definition is: "Otherwise stated, it is just recompense to the creditor for "being deprived of the use of his money"; and went on to observe that the $3\frac{1}{2}$ per cent. interest must be taken as having been awarded for the purpose of giving just recompense to the trust, the rate fixed being presumably that which the principal money would have earned had it been in the trustees' possession and properly invested by them.

In *Sweet's* case the decision was that interest ordered to be paid in respect of a successful claim by a widow for her *jus relictæ* was liable to tax; and it was pointed out by Lord Mackenzie, 7 T.C., at page 644, that the interest on the *jus relictæ* "is not of the nature of damages, for the element of "wrongful withholding is absent."

It is, as I understand it, largely on the observation of the Judges in the two Scottish cases of *Schulze* and *Sweet*, together with the observations of Wright, J., in the English case (presently mentioned) of *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, that is founded the proposition that, *prima facie* at any rate, interest awarded on a money claim under the Act of 1934 is only what has been called "interest proper" and as such liable to Income Tax where the element of wrongful withholding is absent; or conversely that, where such an element of wrongdoing is present, then *prima facie* the interest awarded is in reality not interest but damages.

As I have already indicated, I find considerable difficulty in appreciating this proposition, or in giving to it a precise significance. In some sense there must always be an element of wrongful withholding by a defendant who is ordered to pay over a sum of money. Otherwise, presumably, the claim against him would be dismissed. I can also understand that, if a man is charged with fraud or with other acts giving rise to a claim in damages, an award may be made against him which, though calculated in terms of or by reference to interest, is in truth an award of damages for fraud or breach

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of contract; and in such a case a Court may find as a fact, and having regard to all the circumstances of the case (including the terms of any statute under the powers of which the award is made), that the sum awarded, however it is described, is not "interest of money" so as to be chargeable with Income Tax. I cannot, however, speaking for myself, follow how the presence of an element of wrongdoing in the sense of opprobrious conduct, whether or not forming or capable of forming the basis of any claim sounding in damages, can of itself be the determining factor, though it may well be a consideration relevant to the exercise by a Judge of a discretion vested in him. To take an example, suppose that a defendant, against whom action had been brought for payment of a debt, had succeeded in postponing the evil day by persisting in unsubstantial interlocutory applications or other delaying tactics. The Judge at the trial might well express his strong disapproval of the defendant's conduct in the action and found upon such conduct the exercise of his discretion to award "interest" under the Act of 1934. Would it be said that there had in the case supposed been an element of wrongdoing on the defendant's part and that the sum awarded was therefore not taxable?

Nor is the matter advanced merely by stating that in any particular case the interest awarded is "in the nature of or *by way of* damages"; for, as already shown, that is true of every case where interest is not part of the debt, and the statement may amount to no more than a definition. Thus I observe that in *Schulze's* case the Lord President, after stating that the $3\frac{1}{2}$ per cent. interest awarded was interest proper and not liquidated damages, proceeds immediately afterwards to describe the interest as "recompense" to the trust (7 T.C., at page 33), which appears to me the same thing as saying that the interest, though having the quality of interest, was nevertheless awarded by way of damages.

I refer hereafter to the *National Bank of Wales* case⁽¹⁾. As regards the two Scottish cases of *Schulze*⁽²⁾ and *Sweet*⁽³⁾, there is nothing, in my judgment, in the decisions themselves, or in the language of the Scottish Judges, which binds or persuades me to accept the proposition that liability to tax depends on the absence of an element of wrongful withholding, whether or not such wrongful conduct could form the basis of an action for damages at law.

This conclusion is, in my view, supported by the language of the judgments of the Court of Appeal in the *Barnato* case, 20 T.C. 455, particularly the judgment of Lord Wright, M.R. So far as concerns the question actually decided in the case, I do not think the matter is carried further than it was carried by the earlier cases. The facts as recited in the report are extremely complex. It is sufficient for me to state that Capt. Barnato had brought proceedings against two persons, claiming that they were accountable to him for very large sums, both as trustees and as partners in a business. Upon the matter coming on for trial a consent Order was made, which opens with the recital that the plaintiff and defendants by their Counsel admitted a number of propositions, including the proposition that the defendants were chargeable with compound interest at the rate and from the date specified on all sums found due to the plaintiff, who accepted such compound interest in lieu of his share of profits of the business. The Order then directed the taking of various accounts, and the question at issue between Capt. Barnato and the Crown was whether the sum found due in respect of the item of compound interest was or was not taxable.

⁽¹⁾ [1899] 2 Ch. 629.

⁽²⁾ 7 T.C. 30.

⁽³⁾ 7 T.C. 640.

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As I follow the facts, the item of interest was, for tax purposes, on all fours with a claim for interest under a contract. Alternatively, the interest was something which the plaintiff elected to take in substitution for a share of profits which would, beyond question, have been taxable. Certainly the interest did not arise out of or form part of an award of damages. Strictly, therefore, the conduct of the defendants and the degree of their wrongdoing was irrelevant; but in the course of his judgment, at page 512, Lord Wright said this, after referring to the *Schulze* case⁽¹⁾: "It was owing, not to any fraud, as the case has proceeded on the part of the Defendants, but owing to their negligence and improper accounting, that he (Capt. Barnato) was deprived of that money for all that time, and he was entitled, according to the ordinary law, either to the profits or to interest, and I see no reason at all why the appropriate sums payable under the admissions embodied in the consent Order of Romer, J., should not be treated as interest here in the ordinary sense." I take that passage as supporting the view that the presence of a degree of wrongdoing—negligence and improper accounting—cannot of itself convert the quality of interest into something else, namely, damages for that wrongdoing.

I cite also and adopt the language of Slessor, L.J., who states, 20 T.C., at page 520, the effect of the two Scottish cases, *Schulze* and *Sweet*⁽²⁾ as follows: "Where, on the consideration of the realities of the case, it emerges that the money is paid as interest and not paid merely as a means of measuring damages, there it can properly be said that it satisfies the requirements of Case III, Rule 1, of Schedule D". Neither the *Schulze* case nor the *Sweet* case was in any way concerned with Section 28 of the Civil Procedure Act.

I have left till last, on this part of the case, the *National Bank of Wales* case, though it is the earliest in point of time, being reported in [1899] 2 Ch. 629. In that case Wright, J., had found a director of the bank guilty of a misfeasance, holding, further, that his conduct amounted to fraud. "The result is", said the learned Judge, at page 645, "that . . . the respondent must be held liable to repay . . . £37,000 in all, besides interest, as in cases of fraud, at 5 per cent. from the dates when the dividends were paid, which I suppose will make the total sum about £50,000."

After this judgment had been delivered, the respondent director raised by his Counsel the question whether, as regards the amount of interest, he was entitled or bound to deduct Income Tax. There was some argument (the Crown not being a party or otherwise represented in the action), at the end of which Wright, J., said, at pages 650/1: "I do not see my way to allowing Mr. Cory to deduct the amount of income tax from the penal interest of 5 per cent. It is not a question of contract. . . . 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 . . . 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 5 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 is really damages . . ."

Now if the decision of Wright, J., means this and no more than this, that in his view the bank had been damaged by the fraudulent acts of Mr.

⁽¹⁾ 7 T.C. 30.⁽²⁾ 7 T.C. 640.

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Cory and that part of the damages awarded was to be calculated by reference to interest at a certain rate from certain dates, then the decision may be said to be in accord with the other authorities; and this view appears to be supported by the passage I have quoted at page 645, where the learned Judge refers to what he supposes will be "the total sum of about £50,000." Furthermore, the emphasis on the penal nature of the interest may import the idea of punishing the respondent rather than that of compensating the company. But it seems open to doubt whether either of these lines of reasoning is consistent with Wright, J.'s later language, where he bases himself on the view that the company should be compensated for the loss it suffered (that is, the interest it was prevented from earning) by reason of the sum of £37,000 of capital having been withheld from it.

In *Kay's* case, 14 T.C. 580, at page 606, Lawrence, L.J., cited the *National Bank of Wales* case⁽¹⁾ with approval, but only as authority for the proposition that the mere fact of part of the compensation awarded being called interest does not make it taxable if in truth it is not interest but damages.

In the *Barnato* case, 20 T.C., at page 509, the decision is discussed at length by the Master of the Rolls, who stated that he desired to express no concluded opinion whether it was rightly decided or not. In so far, however, as the decision cannot be justified on the special facts of the case, and seeks to lay down a general proposition that interest awarded as proper compensation to the injured party for the detention of his money against a delinquent guilty of fraud or other wrongdoing is for that reason or on those facts alone not taxable, it would, in my judgment, have been inconsistent with the reasoning of the Master of the Rolls in *Barnato's* case, and would have been disapproved by him; and, with all respect to the learned Judge in the *National Bank of Wales* case, I am not prepared to follow it.

The result, therefore, of all the tax cases is, in my judgment, that there is no rule or principle referable to the circumstance that interest awarded under the 1934 Act is by way of compensation to the injured party, or to the circumstance that the other party has been guilty of fraud or other wrongdoing, which compels me to hold that the interest awarded is not in reality interest, or otherwise qualifies the right of the Court to construe the language of Section 3 of the 1934 Act according to its ordinary and proper meaning.

There remains what Mr. Grant has called his subsidiary point, namely, that, since the "interest" here awarded had no existence until the award and did not therefore possess the quality of recurrence or liability to recur, it could not satisfy the terms of Paragraph 1 of Schedule D of the Income Tax Act. Mr. Grant relies for this proposition upon the dictum of Lord Maugham in *Moss' Empires, Ltd. v. Commissioners of Inland Revenue*, [1937] A.C. 785, at page 795; 21 T.C. 264, at page 299.

On the facts of the present case, as explained at the beginning of this judgment, I am not concerned with the special effect, if any, of the word "yearly" which occurs before "interest of money" in Rule 19 but not in Rule 21 of the All Schedules Rules. Mr. Grant's point is, however, independent of the word "yearly".

The answer to the point is, in my judgment, this. Assuming that Lord Maugham intended to define interest of money by reference to an essential

(1) [1899] 2 Ch. 629.

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characteristic, then an award of interest under the Act of 1934, at some specified rate and in respect of some specified period, must be taken to bring into existence the same quality of recurrence or liability to recur as if interest had in fact been accruing throughout the whole of the specified period at the specified rate. The contrary conclusion would necessarily mean that no interest awarded under the Act of 1934 could satisfy the terms of Paragraph 1 of Schedule D of the Income Tax Act—in other words that the Legislature, in using the word “interest” in the Act of 1934, meant and intended something essentially different from “interest” as used in the Income Tax Act. I cannot accept such a result.

I should add that, in my judgment, the phrase, “there shall be *included*” in the sum for which judgment is given”, in Section 3 of the 1934 Act, cannot have the effect of so merging the subject-matter of the award under the Section with the debt that the former loses its individuality and quality. The point was not pressed, and I need not, therefore, enlarge upon it.

My conclusion, therefore, is that the words of Section 3 of the Act of 1934 ought to be construed according to their plain and ordinary significance, and that an award of “interest” on a debt under the Section is no less interest properly so-called and “interest of money” within the terms of the Income Tax Act because it is awarded as compensation to the injured party and may, therefore, be described and justified as being interest “by way of or in the nature of damages.”

In my judgment the meaning of the Section, if judged according to the ordinary usages of language and freed from the embarrassment of the arguments of which I have attempted to dispose, is reasonably plain. It speaks of “interest . . . on . . . the debt”. I have referred to the title of the Act. I add that, if the Defendant’s argument is correct, the strange result must follow that in the body of the first Sub-section and in its first two provisos the word “interest”, in spite of the absence of any context to justify such a view, must be taken to be used in varying senses.

In any case I hold that (if it is permissible to travel outside the wording of the Section) there is nothing in the facts of the present case which compels me, notwithstanding the terms of the Section, to the conclusion that the sum awarded was damages by way of interest instead of interest by way of damages. The fact of Mr. Ridsdel’s fraud may, no doubt, have determined the exercise of Oliver, J.’s discretion. It was a discretion—exercised because of the fraud—to award “interest”, not an adjudication on a claim of damages for fraud. There was no such claim in the action.

At the beginning of this judgment I observed that the present was a case arising on a money claim, and I have confined myself, so far as I have been able, to the general problem as it affects interest awarded in respect of claims of this class. It will have been noted that in the Act of 1833 awards of interest in respect of damages, as distinct from awards of interest on debts, form the subject-matter of Section 29, the language of which differs in material respects from the language of Section 28. The difference in language between “damages in the nature of interest” in Section 29 and “interest upon debts” in Section 28 may well have indicated an intentional distinction of substance; and in the case, for example, of a claim for damages for fraud or negligence it is plainly easier to conceive of an award calculated in terms of interest being in reality an integral part of a single award of damages as such—see, for example, per Lord Johnston in *Schulze v. Bensted*, 7 T.C., at the top of page 34. Moreover, in a claim for damages of this character

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the conception of loss through the withholding by the delinquent of the claimant's money is very frequently absent.

However that may be, the compendious form of Section 3 of the 1934 Acts omits, and I must assume deliberately omits, any distinction between the two classes of case. Lord Johnston's point may, therefore, be no longer open or valid. The terms of the present Section may preclude, in the case of an award of interest upon damages, a conclusion based on the particular facts of the case. Upon that I express no view. As I have said, I am satisfied that no such problem arises in the present action.

Mr. Donovan, you have succeeded. The question is what form of Order you should take. You ask for "a declaration that a judgment obtained by the Defendant" against them as judicial trustees, and so on, "has been satisfied." I think that is a convenient way of taking it. There is no point on the taking of a declaration, is there, Mr. Grant?

Mr. Grant.—I believe not, my Lord. There is only this one point.

Mr. Donovan.—Then paragraph 2 asks for an injunction.

Evershed, J.—What about the injunction? You do not want an injunction in the circumstances, do you? After all, Mr. Riches is an officer of the Court.

Mr. Donovan.—That is so.

Evershed, J.—I will simply make a declaration in the form prayed in the first paragraph of the prayer and order that the Defendant should pay the Plaintiffs' costs of the action. I take it that neither of you offers to pay the costs of the appearance here of the Attorney-General and Mr. Hills. Is there any further point?

Mr. Grant.—I do not think so.

Evershed, J.—I am very much obliged to you all for your assistance in every way.

An appeal having been entered against the decision in the Chancery Division, the case came before the Court of Appeal (du Parcq and Morton, L.J.J., and Cohen, J.) on 29th, 30th and 31st May, 1945, when judgment was reserved. On 22nd June, 1945, judgment was given unanimously in favour of the Bank, with costs, confirming the decision of the Court below.

Mr. Frederick Grant, K.C., and Mr. N. E. Mustoe appeared as Counsel for Mr. Riches, and Mr. Terence Donovan (Mr. Harold Parrish with him) for the Bank.

JUDGMENT

du Parcq, L.J.—Rule 21 (1) of the General Rules to all Schedules under the Income Tax Act, 1918, provides that "Upon payment of any interest of money . . . charged with tax under Schedule D . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment." Under paragraph (2) of the Rule, provision is made for assessment to tax of the person who is bound to deduct tax under paragraph (1). Under Schedule D, tax is to be charged on "all interest of money . . . not specially exempted from tax". For the purposes of

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the present case, at any rate, there is nothing in the relevant legislation to qualify the generality of this provision.

In an action brought by Mr. Riches, the present Defendant, against the Westminster Bank, Ltd. (the present Plaintiffs) in their capacity of judicial trustees of the will of Mr. Ridsdel, deceased, Mr. Riches established a claim to a sum of £36,255. He had justly claimed to be entitled to a half share of the profits realised by Mr. Ridsdel in a certain transaction. Mr. Ridsdel had paid him a sum much less than that to which he was entitled, and £36,255 was the balance which remained due. A plea of accord and satisfaction failed because, as the Judge found, Mr. Riches' consent to take the smaller sum had been induced by the fraudulent misrepresentations of Mr. Ridsdel.

After giving judgment the learned Judge exercised in favour of Mr. Riches the discretion given to him by Section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which is as follows: "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". The learned Judge awarded interest at 4 per cent. per annum from 14th June, 1936, to 14th May, 1943. The formal judgment, as it was finally drawn up after some discussion at the Bar, expressed the decision of the Judge as follows: "It is . . . adjudged that the Plaintiff recover from the Defendant £36,255 with £10,028 interest making together the sum of £46,283." An appeal from that judgment to this Court was dismissed⁽¹⁾.

The action, in which the judgment now under appeal was given, was brought by the Bank for (1) a declaration that the Bank had satisfied the judgment in the earlier action by paying the amount adjudged to be due less £5,014, the latter sum representing the Income Tax on the interest awarded; (2) an injunction to restrain Mr. Riches from levying execution. Evershed, J., made the declaration, and the Bank did not insist on its prayer for an injunction. Two questions of importance now arise for our decision. First, is the sum of £10,028, which was awarded as interest, "interest" on which tax is chargeable under Schedule D? Secondly, if the answer to the first question is in the affirmative, was the Bank bound or entitled to deduct from that sum the tax due on it at the time of payment? It may be stated here that it was agreed that Rule 19 of the General Rules had no application to the present case, since the interest in question was not payable wholly out of profits or gains brought into charge to tax.

The question whether interest awarded under the Act of 1934 is subject to tax has never been judicially decided. There is, therefore, no authority which is precisely in point. On principle, and apart from authority, I see no reason why it should not fall within the words of Schedule D. When the Legislature authorises the Court to award interest, it is a reasonable assumption that it intends what it calls interest to be regarded as interest for the purposes of taxation. If, indeed, there were something in the context of the statutes to show that the word was used with one meaning in the 1934 Act, and with another in the taxing Acts, such an assumption would be negated.

⁽¹⁾ Reported (C.A.) [1943] 2 All E.R. 725.

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I can find nothing to suggest that in the Act of 1934 the word "interest" has so special a meaning that it falls outside the description "all interest of money". If the Act provided that damages might be awarded to the plaintiff and should be based on a calculation of interest, a different result might follow, but that is not the language of the Act. The provision that the interest awarded is to be "included in the sum for which judgment is given" seems to me to carry the matter no further. Nor can I attach importance to the fact that the interest awarded is in the nature of damages or compensation. Interest, payable as such under a statute, is none the less interest because it is awarded to compensate the plaintiff for what he has lost through the defendant's delay in paying a just debt. Finally, I am by no means persuaded that this interest is excluded from the wide words of the taxing Act because, as was said, it is non-recurrent. What the Judge does in a case like this is, first, to find that at a given date a certain sum was in fact due. It is then open to him to say, if he thinks fit, that, as the sum ought to have been paid at that date, it is right that it should bear interest as from that date. The Order is retrospective, but I see no reason to think that a right to receive interest, in the sense in which that word is used in Schedule D, may not come into being as the result of a retrospective Order. If we were dealing, not with a statute, but with a contract which resulted in an analogous position, I think that there could be little doubt about the matter. Suppose, for instance, that A lends £1,000 to B to be repaid at the end of three years with such interest, if any, as C (an impartial friend acting as arbitrator) may in his discretion think it fair and just, in all the circumstances, that B should pay. If A received interest under C's award, it could hardly be doubted, I think, that it would be interest subject to tax. So far as this particular point is concerned, I see no distinction in principle between that case and the one before us.

So far I have dealt with the matter apart from authority, but I believe that I have said nothing which conflicts with the many authorities cited to us in so far as they afford us guidance. Citations from cases referring to Sections 28 and 29 of the Civil Procedure Act, 1833, are, in my opinion, of doubtful assistance. Indeed, I am of opinion that when the Legislature has repealed a statute and has, not re-enacted it, but replaced it with a new enactment in different terms, it is in general a salutary rule that such case law as has accumulated round the repealed statute should be regarded as having expired with it. With regard to the other authorities cited, there is little that I wish to say. The two which seemed to me most helpful to Mr. Grant's argument were *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, and *Simpson v. Kay's Executor*, 14 T.C. 580. The latter case is, in my opinion, distinguishable from the present. The sum awarded by the Mixed Arbitral Tribunal had been reached by a calculation of interest, but, under the relevant Article of the Treaty, that Tribunal had no power to award interest as such. If that Article had provided in terms for the payment of interest, the decision of the Court might well, I think, have been in favour of the Crown. The view expressed by Wright, J., in the case of the *National Bank of Wales* seems to have been approved by Lawrence, L.J., in *Simpson v. Kay* (see 14 T.C., at page 606), although other Judges have somewhat pointedly declined to express approval of it. As I have said, neither it, nor, indeed, any reported decision, is directly in point, because the precise question before us comes up for decision for the first time. I propose to express no opinion on any but that precise question, and I do not find it necessary on this occasion to approve or disapprove the view expressed by Wright, J.

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For the reasons which I have given, I am of opinion that the interest awarded to Mr. Riches was subject to tax.

The second question seems to me to be one of some difficulty. It follows necessarily from the language of Section 3 of the Act of 1934 that the sum awarded by way of interest is included in the judgment debt. Throughout the argument I felt, and I fear that I too often expressed, a doubt whether a defendant, who is required by the Order of the Court to pay a judgment debt for a fixed sum (which includes interest), can be said to be making a payment of interest when he pays that sum. As between himself and the judgment creditor there is no longer a liability to pay the interest which is included in the judgment debt. That liability is superseded by, or merged in, the judgment debt. If the judgment debtor fails to pay the judgment debt, he cannot be made liable in a further action for interest, but he is technically liable to be sued on the judgment. This is trite law and no authority need be cited for it. Suffice it to say that the principle was stated by Baron Parke in *King v. Hoare* (1844), 13 M. & W. 494, at page 504, and that some of the relevant cases are collected in Bullen & Leake's Precedent of Pleading, 9th ed., at page 212.

Mr. Donovan, for the Bank, did his best to dispel my doubts, and Mr. Grant, for Mr. Riches, said nothing to encourage them. Both learned Counsel contended that, if indeed the interest merged in the judgment debt, the result would be that the Crown would lose its right to Income Tax, since the interest debt would be merged for all purposes. I do not agree with this contention. The doctrine of merger, though it has many important consequences, does not operate to effect a mystical metamorphosis, binding on all the world, of all debts which together constitute the judgment debt. No one would suggest that a plaintiff who obtains a judgment against his debtor for arrears of interest (no allowance having been made for deduction of tax in the Statement of Claim or claimed in the Defence) could defeat the right of the Crown by a plea that his debtor had paid him, not interest, but a judgment debt. It is only as between plaintiff and defendant that there is a merger, and the rights of third parties are not affected. My doubt was not as to the right of the Crown to demand tax, but as to the duty of the debtor to deduct it. A similar doubt was entertained by this Court in the case of *In re Cooper*, [1911] 2 K.B. 550, but unfortunately it was not then necessary to resolve it. The relevant Sections at that time were Sections 102 and 103 of the Income Tax Act, 1842. The Court held that tax was not deductible at all because the interest payable was not "yearly interest", and only touched upon the question whether, if it had been deductible, it could have been deducted from a judgment debt—see per Cozens-Hardy, M.R., at page 554, and per Buckley, L.J., at page 555. Although that question was left in doubt, it may be said that the Master of the Rolls and the Lords Justices did not rule out the possibility of deducting tax from a judgment debt, if certain conditions were fulfilled. I must add that, while I was considering this judgment, I learned that Cassels, J., sitting as Vacation Judge during the Long Vacation of 1944, had held that a judgment for an amount which included interest (payable on money for which persons acting in a fiduciary capacity were accountable) was satisfied by payment of the total amount of the judgment less Income Tax on that part of it which consisted of interest. The judgment was given on the hearing of a summons which was adjourned into Court, but it apparently escaped the notice of the reporters. The judgment debt in question was that which the House of Lords decreed to be due in *Regal (Hastings), Ltd. v. Gulliver and Others*,

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[1942] 1 All E.R. 378. We are obliged to Cassels, J., for furnishing us with a copy of his written judgment.

After full consideration, I am bound to say that the doubt which I have expressed seems to me to have a sound logical foundation and has not been wholly removed. When Oliver, J., awarded interest he, at the same time, *uno flatu*, included it in the judgment debt. It ceased, therefore, to be due as interest, and I find some difficulty in saying that payment of a judgment debt is payment of interest, even when an examination of the record shows that the debt includes interest. Since interest as such is not due and owing, it is difficult to see how what the debtor pays can be called interest. I confess that I was the more attracted by this view of the matter because of the inconvenience of deciding a question of liability to Income Tax in proceedings in which the Crown is not a party, and the desirability of the determination of such a question by the tribunals designated for the purpose by the Legislature. In the end, however, I have come to the conclusion that the view which at first attracted me is too technical. The law is not always completely logical. It is our duty to give effect to the intention of Parliament, as expressed in the relevant statutes, and, on the whole, I am prepared to concur in the opinion that Parliament intended the deduction of tax to be obligatory on the payer under Rule 21, even when the interest payable was included in a judgment debt. That Rule is mandatory, and it seems plain that its object is to ensure the collection of Income Tax and so to protect the interests of the Crown. The judgment, on its face, orders the payment of £10,028 as interest, and the first, and indeed the only, opportunity which the Bank had of obeying the direction contained in Rule 21 came when it satisfied the judgment debt. It is not, I think, in doubt that the Bank complied with Rule 21 (2) and has been, or will be, duly assessed.

On the whole, therefore, I do not dissent from the view which my brethren are I know about to express, that the Bank must be regarded as having paid the total amount of the interest and of the judgment debt to Mr. Riches. I would add that I am clearly of opinion that, if no part of the judgment debt had been paid, execution could, and should, have been levied for the total amount of the judgment, though the right of the Crown to tax would not, of course, have been affected thereby. I am confirmed in this view (which, indeed, was not contested at the Bar) by the judgment of Cozens-Hardy, M.R., in *In re Cooper*, [1911] 2 K.B. 550.

In the action against the Bank, the learned Judge directed that the final judgment should be so drawn as to make it clear that a specific sum was awarded as interest. In similar cases I think it will be well that this precedent should be followed.

I only desire to add that nothing that I have said in this judgment is intended as a criticism of the arguments addressed to us, and that I wish to express my personal indebtedness to the Counsel for their assistance.

The appeal must be dismissed with costs.

Morton, L.J.—The facts of this case have been so fully and clearly stated by the learned Judge that I need not restate them.

Was the further sum of £10,028 awarded by Oliver, J., "interest of money" within Paragraph 1(b) of Schedule D to the Income Tax Act, 1918? In my view it was. If one asks, "Was the sum interest?", the answer would seem to be "Yes". Judgment was given for this sum under Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which

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empowers the Court, in any proceedings for the recovery of any debt or damages, to give "interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". Thus, that which the statute empowers is the giving of interest, and the sum in question was rightly described as "interest" in the Order of Oliver, J.

Again, if one asks the question, "Of what was it interest?", or, to use a more modern expression, "On what was it interest?", the answer would seem to be: "It was interest on money, i.e., on the debt of £36,255 which Ridsdel owed to Riches and ought to have paid to Riches in 1936. More particularly described, it was interest on that debt at the rate of 4 per cent. per annum from 14th June, 1936, to 14th May, 1943." It may be that neither the use of the word "interest" in the Act, nor the use of the same word in the Order, is conclusive of the matter, but it is difficult to see how the sum in question could be more accurately described than by calling it "interest on money" or "interest of money". I may add that if a sum awarded under this Section as interest on a debt is not liable to Income Tax, certain curious results would follow. For instance, if the debt for which judgment was given happened to be instalments of an annuity payable to the plaintiff, and the Judge awarded interest at 4 per cent. on each instalment from the date on which it became payable, the debt itself would be subject to Income Tax, and yet interest on the debt would not. I have limited my observations to cases, such as the present case, where interest is awarded upon a debt, but I doubt whether any distinction can be drawn, as regards the liability to tax, between such interest and interest awarded, under the same Section, on damages for which judgment is given.

On these short and simple grounds I agree with Evershed, J., that the sum of £10,028 was subject to Income Tax, but I think I ought to explain briefly why I reject Mr. Grant's able argument for the Appellant. Counsel's first point was that this sum is not interest of money because it is a payment of damages or in the nature of damages. He asks us to arrive at this conclusion by three stages: (a) Sums awarded under Section 28 or Section 29 of the Civil Procedure Act, 1833, were awarded as damages and not as interest: (b) The quality of sums awarded under Section 3 of the Act of 1934 is the same as the quality of sums awarded under Section 28 or Section 29 of the Act of 1833: (c) There are cases which show that when a sum is awarded as damages, or as a payment in the nature of damages, it is not "interest of money" within the Income Tax Act, 1918, even if the award describes it as "interest". As to (a), in my view sums awarded under Section 28 of the 1833 Act were interest. I do not think it is necessary to discuss this matter at length, as the Court is not construing that Section, but there is, to my mind, a very clear and significant contrast of language between Section 28, which is concerned with "debts or sums certain" and gives power to allow "interest to the creditor", and Section 29 which is concerned with actions of "trover or trespass de bonis asportatis" and speaks of "damages in the nature of interest". A careful study of all the cases which were cited to us by Mr. Grant leads me to the conclusion that in none of them was it decided that interest awarded under Section 28 was not interest properly so called. As to (b), I agree that the quality of sums awarded under Section 3 of the Act of 1934 is the same as the quality of sums awarded under Section 28 of the Act of 1833, but, in my view, sums awarded under Section 29 of the earlier Act are on a different footing. As

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to (c), I think the true view is that a sum awarded as interest does not lose its quality of interest because it is awarded as compensation to the plaintiff for being deprived of the use of his money. On the other hand, a sum awarded as damages does not cease to be damages because it is arrived at by calculation of interest on a particular sum at a particular rate for a particular period. As Lord Buckmaster said in *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 427, at page 464: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test."

Counsel's second point is that it is one of the essential characteristics of "interest of money" that it should have the quality of being recurrent or of being capable of recurrence. This sum of £10,028, he says, has not got this quality; there was no right to it until judgment was given by Oliver, J., and that judgment was the beginning and the end of it. Counsel bases this argument upon a dictum of Lord Maugham in the case of *Moss' Empires, Ltd. v. Commissioners of Inland Revenue*, [1937] A.C. 785, at page 795; 21 T.C. 264, at page 299. Lord Maugham, referring to Rule 21 of the General Rules of the Income Tax Act of 1918, which refers to "any interest of money, annuity, or other annual payment", said this: "In rule 21 'annual' must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence." I do not understand Lord Maugham as saying that nothing can be interest on money unless it is in fact recurrent or capable of recurrence. No doubt interest on money ordinarily has the quality of being recurrent, but I cannot see why a sum of money should be excluded from the description of "interest of money" or "interest on money" merely because it comes into existence for the first time under an Order of the Court, and is interest on money in respect of a period up to the date of the Order and no further.

Finally, Counsel argues that as there is a judgment for £46,283, that judgment cannot be satisfied by payment of a lesser sum. He relies upon the words in the Order of Oliver, J., "such sum of money and costs to be levied on the goods and chattels", etc., and says that if execution were to be levied, the Sheriff would be right in retaining the whole of the sum of £46,283. I think it is true to say that if execution were levied the Sheriff would be free to retain £46,283, but I am far from thinking that by these means Mr. Riches could escape the payment of tax. However that may be, the answer to Counsel's argument lies in the concluding sentence of General Rule 19(1): "The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." In the present case the deduction was made under General Rule 21, in which this sentence does not appear, but it was conceded before us that this sentence must be implied in Rule 21 also. This concession was rightly made in view of the observation of Viscount Simon, L.C., in *Allchin v. Coulthard*(¹), [1943] A.C. 607, at page 619: "The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in rule 21, but must be implied." Thus the Plaintiff Bank, having made the deduction in

(¹) *Allchin v. Corporation of South Shields*, 25 T.C. 445, at p. 461.

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respect of tax, is in the same position as if the whole sum had been actually paid.

The result is that, in my view, the decision of the learned Judge was correct in all respects, and this appeal must be dismissed with costs.

Since writing this judgment I have had the advantage of reading the written judgments of my brethren. As we are in agreement I need only add that I agree with the observations which Cohen, J., is about to make in regard to the case of *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629.

Cohen, J.—Like Morton, L.J., I find it unnecessary to add to the full and clear statement of the facts contained in the judgment in the Court below.

Evershed, J., heard arguments from the parties, and also from the Attorney-General and Mr. Hills as *amici curiæ*, and by a reserved judgment delivered on 28th March, 1945, found in favour of the Bank, and made a declaration that the judgment obtained against them in the King's Bench action as judicial trustees of the will of the late Mr. Ridsdel had been satisfied. From this judgment the Defendant now appeals.

Before considering the arguments addressed to us it will be convenient to refer to the relevant provisions of the Income Tax Acts. I need not read them in full, as they have been stated by du Parcq, L.J. Suffice it to say that, although Rule 19(1) of the General Rules is not directly applicable to the present case, since it is common ground between the parties that the judgment debt was not satisfied out of profits or gains brought into charge to tax, it has been held that, although the second paragraph thereof is not included in Rule 21, a similar provision binding the recipient to treat the payer as acquitted of liability in respect of the amount deducted must be implied—see *Allchin v. Coulthard*, [1943] A.C. 607, per Viscount Simon, L.C., at page 619; 25 T.C. 445, at page 461.

The question, therefore, on which the decision of this appeal rests is whether the sum of £10,028 included by Oliver, J., in the Order of the King's Bench Division under the discretion vested in him by Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, is interest of money within Paragraph 1 (b) of Schedule D of the Income Tax Act, 1918, and Rule 21 of the All Schedules Rules. The material portions of Section 3 of the 1934 Act have been stated by my brethren. I shall, therefore, not reread them, but I would say that I agree with Evershed, J., that, "If the matter rested merely upon the language of Section 3 of the Act of 1934 I confess I should feel no difficulty in concluding that the language used meant what it said, that 'interest' meant interest and that the sum awarded, being interest on the principal sum of £36,255 at 4 per cent. per annum from June, 1936, to May, 1943, was interest of money within the meaning of Paragraph 1 (b) of Schedule D of the Income Tax Act and Rule 21 of the All Schedules Rules⁽¹⁾."

But Mr. Grant and Mr. Mustoe have argued that (a) notwithstanding the language of the Section, this sum of £10,028 is a payment of damages or a payment in the nature of damages, and the decisions in the Income Tax Acts establish that where a sum, even if described as interest, is awarded as damages or as a payment in the nature of damages, it is not interest of money within Schedule D. Alternatively (b) the sum in question is non-recurrent and not capable of recurrence, and, for this reason also, it is not interest of money within Schedule D.

(1) See page 161 ante.

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The second point was apparently treated as subsidiary in the court below, and it will be convenient to deal with it first. It is based on a dictum of Lord Maugham in *Moss' Empires, Ltd. v. Commissioners of Inland Revenue*, [1937] A.C. 785, at page 795; 21 T.C. 264, at page 299. This dictum is as follows: "In rule 21 'annual' must be taken to have, like interest on 'money or an annuity, the quality of being recurrent or being capable of 'recurrence.'" Now in that case Lord Maugham was dealing with annual payments and had not to direct his mind to the specific point of "interest 'of money'"; but assuming that he did intend to lay down that a payment must have the essential characteristic of recurrence if it is to be interest of money within Rule 21, I agree with Evershed, J., that an award of interest under Section 3 of the 1934 Act possesses this characteristic. In making such award the Judge has to determine the amount of the debt on which interest is to be calculated, the rate at which it is to be calculated, and the period over which it is to run. In my view such interest must be deemed to have accrued during the whole of the period so specified, notwithstanding that it only becomes payable in one sum by reason of the exercise by the Judge of the discretion conferred on him by the Section.

I turn to the first point. Mr. Grant argues that (1) the quality of sums awarded under Section 3 of the 1934 Act is the same as the quality of sums awarded under Sections 28 and 29 of the Civil Procedure Act, 1833, which were repealed by Sub-section (2) of Section 3 of the 1934 Act; and (2) interest awarded under Section 28 of the 1833 Act has been held to be damages, or in the nature of damages, and accordingly, interest awarded under the 1934 Act has the same quality. Mr. Grant cited no authority in support of the first of these propositions and, speaking for myself, I feel considerable doubt whether we should be justified in placing an artificial meaning on the word "interest" in the 1934 Act because a similar artificial meaning was placed on the word "interest" in Section 28 of the 1833 Act, but I will assume in his favour that the word "interest" bears the same meaning in both Acts.

Now Sections 28 and 29 of the Civil Procedure Act, 1833, are in the following terms so far as relevant. Section 28 is: "And be it further enacted, 'that upon all debts or sums certain, payable at a certain time or otherwise, 'the jury on the trial of any issue . . . may, if they shall think fit, allow 'interest to the creditor at a rate not exceeding the current rate of interest 'from the time when such debts or sums certain were payable, if such debts 'or sums be payable by virtue of some written instrument at a certain 'time, or if payable otherwise, then from the time when demand of pay- 'ment shall have been made in writing, so as such demand shall give 'notice to the debtor that interest will be claimed from the date of such 'demand until the term of payment; provided that interest shall be payable 'in all cases in which it is now payable by law.'" Section 29 provides: "And be it further enacted, that the jury on the trial of any issue, or on 'any inquisition of damages, may, if they shall think fit, give damages in the 'nature of interest, over and above the value of the goods at the time 'of the conversion or seizure, in all actions of trover or trespass de bonis 'asportatis, and over and above the money recoverable in all actions on 'policies of assurance made after the passing of this Act.'" Mr. Grant says that "interest" in Section 28 must mean interest in the nature of damages. He says that interest in the ordinary sense is only payable under contract or by custom, and cannot be given merely for the wrongful detention of money—see per Lord Herschell, L.C., in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429, at page 437.

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Accordingly, when Section 28 purports to authorise a jury to award interest, it is really allowing them to award damages under the guise of interest. This argument seems to ignore the contrast between the language of Section 28 and that of Section 29, but Mr. Grant says that its correctness is established by the decision of the House of Lords in *Cook v. Fowler* (1874), L.R., 7 H.L. 27, and of this Court in *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch.D. 169. The former case had, as Evershed, J., pointed out, nothing to do with Section 28 of the Civil Procedure Act, 1833, and I agree with him that the noble Lords in that case were stating a general principle in regard to interest not limited to the application of the Civil Procedure Act; that they were explaining that the principle on which Courts of Equity allow interest in cases where it would not have been allowed at Common Law is compensation, but that they were not purporting to alter the quality of interest so awarded or to distinguish, so far as relevant to the present enquiry, interest so awarded, as, for example, in the case of a mortgage silent as to interest after the redemption date, from the interest in terms stipulated in a contract, for example, stipulated interest up to the redemption date in a mortgage.

I also find myself in complete agreement with Evershed, J.'s two final observations when dealing with this case—(1) that the element of “wrong-doing” in the debtor is, *prima facie*, irrelevant to the question of the quality of the sum awarded for interest, though it may well be relevant to the question whether, in equity, the claimant is entitled to any “interest” or “compensation”, and (2) that Section 28 of the Civil Procedure Act, 1833, introduced no new principle affecting the quality of “interest” awarded in respect of money claims, though it enlarged the class of cases in which it was competent for a jury to award interest.

In *Webster v. British Empire Mutual Life Assurance Co.*(¹), Section 28 of the Civil Procedure Act, 1833, was relevant to the point at issue, and there are passages in the learned Judges' judgments which at first sight appear to support the argument put forward by Mr. Grant, in particular the passage in the judgment of Cotton, L.J., 15 Ch.D., at page 175, where he says: “The question we have to consider is, whether interest has been properly given as against the Defendants. The instrument sued upon was a policy of assurance. It contained no stipulation whatever that the company should, under any circumstances, pay interest. Interest, therefore, is no part of the debt or of the sum stipulated by the contract to be paid. If it can be recovered, it must be in the nature of damages. I say so because, whether it comes under section 29, where it is clearly to be granted, if granted at all, in the nature of damages, or under section 28, where the language is different, in both cases it comes as damages and is referable to the principles upon which damages can be given. In the case of a policy of assurance subsequently to the Act, as much as in a case before the Act as regards other instruments, where no stipulation appears for payment of interest but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages.” I think, however, that these observations were directed merely to showing the principle on which interest is awarded in such cases, and that their Lordships' minds were not directed to the quality of the interest in the hands of the recipients. They were concerned to show that the underlying principles on which the jury were to award interest under Section 28, or

(¹) 15 Ch.D. 169.

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damages in the nature of interest under Section 29, was in each case compensation, but I do not think they were holding that, although Section 28 authorised the award of interest, what the jury awarded under that Section was in fact damages. I think the true contrast is between an award of interest by way of compensation for the detention of a sum of money and an award of damages, the damages being ascertained as a matter of convenience by an interest calculation.

This distinction is a fine one, but it is recognised in the tax cases to which Mr. Grant called our attention. On the one side of the line fall *Schulze v. Bensted*, 7 T.C. 30; *Sweet v. Macdiarmid*, 7 T.C. 640, and *Commissioners of Inland Revenue v. Barnato*, 20 T.C. 455. In *Schulze v. Bensted* the income on which tax was claimed was interest at the rate of 3½ per cent. on a sum which a negligent trustee had failed to get in to the trust. In *Sweet v. Macdiarmid* it was interest on balances of *jus relictæ* recovered by the respondent from the trustees of her deceased husband's estate. In *Commissioners of Inland Revenue v. Barnato* it was compound interest recovered by the respondent from two gentlemen who had been trustees of two wills under which he was interested, and who had for a short time been partners with him in business, the interest being recovered as the result of an Order of the Court. In all these cases it was held that the interest was taxable income.

On the other side of the line fell *Commissioners of Inland Revenue v. Ballantine*, 8 T.C. 595, and *Simpson v. Kay's Executor*, 14 T.C. 580. In *Commissioners of Inland Revenue v. Ballantine* a firm of contractors claimed "additional costs and damage" against a railway company, and the arbitrators to whom the claim was referred awarded a certain sum mainly as damages, together with interest thereon at 5 per cent. The Revenue claimed tax on the amount of such interest, but the Court of Session rejected the claim. Their reasons are conveniently summarised in a sentence from the judgment of the Lord President (Clyde) where he says, 8 T.C., at page 612: "If the decree was substantially one of damages, the interest ordered to run on it was just part of the damages, and not therefore chargeable to Income Tax."

In *Simpson v. Kay's Executor* the alleged income on which tax was claimed was compensation under Article 297(e) of the Treaty of Versailles, which provided for compensation being paid to nationals of the Allied and Associated Powers in respect of damage or injury inflicted upon their property, rights or interests. This compensation was awarded by the Mixed Arbitral Tribunal on the basis of interest at 5 per cent. on certain sums specified in the award. Rowlatt, J., rejected the claim for tax, and his decision was affirmed by the Court of Appeal. The reasons for the decision sufficiently appear from a passage from the judgment of Lawrence, L.J., 14 T.C., at page 605, where he says: "Article 297 of the Treaty says nothing about the payment of interest, and the money paid under the direction of the Mixed Arbitral Tribunal was paid as compensation and not as interest."

On which side of the line does the present case fall? In my opinion it is governed by the principle on which *Schulze v. Bensted* was decided. In that case, to quote the language of Lord Johnston, 7 T.C., at page 34: "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

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" 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 to have termly 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." So here the principal sum of £36,255, being the amount due to Mr. Riches on taking the account of profits, ought to have reached his hands by 14th June, 1936, and he could have invested it at interest. Oliver, J., in his discretion awarded interest thereon at the rate of 4 per cent., and it may, I think, be taken that such rate of interest represents his estimate of the return which the principal sum would have earned had it been duly paid. Had the principal sum in fact been paid and earned interest, that interest would have been subject to Income Tax and, like Lord Johnston, I can see no sound reason for holding that the substituted sum awarded by Oliver, J., is not equally liable to tax.

Mr. Grant suggested that the distinction is that in *Schulze v. Bensted* there was no element of wrongdoing, whereas in the present case there was an element of fraud. As I have already said, I agree with Evershed, J., that the element of wrongdoing is irrelevant, but in fact I think it is clear from the report of the case in which the interest was recovered (*Lees' Trustees v. Dun*, 1912 S.C. 50) that the basis on which interest was awarded was that the late Mr. Dun had been negligent in the discharge of his duty as trustee.

For these reasons I find myself in complete agreement with the conclusion reached by Evershed, J. But Mr. Grant says we cannot reach this conclusion without disregarding the decision of Wright, J., in *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629. That was a case of misfeasance, it being alleged that the respondent had been party to the payment of dividends out of capital. The learned Judge found against the respondent and awarded a principal sum with what the learned Judge called (at page 651) "penal interest" at 5 per cent. The respondent claimed that Income Tax should be deducted from the interest mentioned in the judgment, but the learned Judge, notwithstanding Orders in certain cases where interest had been directed to be deducted, rejected the claim. His decision on the question of misfeasance was reversed on appeal by this Court and the reversal was upheld by the House of Lords, but the point relevant to the present case was not discussed in the higher Courts. I find myself unable to agree with the conclusion reached by Wright, J., unless it can be explained on the ground suggested by Lord Wright, M.R., in *Commissioners of Inland Revenue v. Barnato*, 20 T.C., at pages 509/10, that Wright, J., was awarding damages for fraud and merely using interest as a convenient method of calculating the damages.

In conclusion I should say a word about a point raised by the Court in the course of the hearing. It was suggested that, whatever be the rights of the Crown against Mr. Riches, the Bank was not entitled to deduct tax, since any right to interest had merged in the judgment, and the Bank was not paying interest but merely satisfying a judgment for the lump sum of £46,283. Counsel on both sides were agreed that this point was not well founded, and I think Mr. Donovan was correct when he said that, although Mr. Riches' only remedy after judgment was to enforce the judgment, the

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quality of the elements making up that judgment was not changed, and that, at any rate, for the purpose of determining whether Income Tax was chargeable on the payer or was deductible by the payer, interest retained its original quality. The opposite conclusion might well deprive the Crown, who are not parties to the litigation, of a vested interest. It is true that if the judgment had not been satisfied the duty of the Sheriff would have been to levy execution for the full amount of the judgment, but the only result would have been that Rule 21 would never have come into operation, and the Crown would still have been able to claim tax from Mr. Riches. The principal sum and interest less tax having been paid, the judgment is, in my opinion, satisfied, since Mr. Riches is bound to acquit the Bank of the amount deducted. See *Allchin v. Coulthard*⁽¹⁾ (*supra*).

I agree that the appeal should be dismissed with costs.

Mr. Mustoe.—I am instructed to ask for leave to appeal to the House of Lords in this case. I have to recognise that the judgments have all been one way so far.

du Parcq, L.J.—But it is a new point.

Mr. Mustoe.—It is a new point.

du Parcq, L.J.—What do the Respondents say about it?

Mr. Parrish.—They have no objection, my Lord.

du Parcq, L.J.—We all think there should be leave to appeal to the House of Lords.

Mr. Mustoe.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Wright, Porter, Simonds and Normand) on 23rd, 24th, 27th and 28th January, 1947, when judgment was reserved. On 21st March, 1947, judgment was given unanimously in favour of the Bank, with costs, confirming the decision of the Court below.

Mr. Frederick Grant, K.C., and Mr. N. E. Mustoe appeared as Counsel for Mr. Riches, and Mr. Terence Donovan, K.C., and Mr. L. C. Graham-Dixon for the Bank.

JUDGMENT

Viscount Simon.—My Lords, the question which the House has to decide has not, it seems, come previously before the Courts. It is whether a sum of money awarded under the powers conferred by Section 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934, as interest, and included in the total sum for which judgment is given, is "interest of money" within the meaning of Schedule D to the Income Tax Act, 1918.

If it is, the Defendant, when paying the judgment debt, is entitled to deduct Income Tax on the amount of this award of interest, and the Plaintiff must "allow such deduction" upon receipt of the balance, while the Defendant

(1) *Allchin v. Corporation of South Shields*, 25 T.C. 445

(Viscount Simon.)

will retain what is deducted if he has paid it out of profits or gains brought into charge to tax (Rule 19 of the All Schedules Rules), or will account for it to the Revenue in so far as the payment is not made out of profits or gains brought into charge (Rule 21 of the All Schedules Rules).

The facts which give rise to this question may be shortly stated as follows. The Appellant had an agreement with one Ridsdel that, in consideration of the Appellant introducing to him a transaction for the purchase of a block of shares, Ridsdel would pay to the Appellant half of any profits which he realised on the resale of the shares. Ridsdel resold the shares at a profit, but fraudulently pretended that the sum which he thereafter paid over represented the whole of the Appellant's share of the profit. Later, the Appellant ascertained that the profit of which he was to receive one-half was much greater than Ridsdel had represented, and after Ridsdel's death he brought an action before Oliver, J., against the Respondents, as judicial trustees of Ridsdel's estate, for the balance due to him, which was ascertained to be a sum of £36,255. The learned Judge, exercising his power under Section 3 of the Act of 1934, in addition to giving judgment in the Appellant's favour for this amount, awarded an additional sum of £10,028, being the equivalent of interest on £36,255 at 4 per cent. per annum from 14th June, 1936, to 14th May, 1943, so that the total sum for which judgment was given was £46,283. The Respondent Bank has paid to the Appellant the amount due under the judgment except that it has deducted £5,014 representing Income Tax at the rate of 10s. in the £ on the additional sum of £10,028.

The Appellant contends that the additional sum of £10,028, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts Income Tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest.

Before the coming into force of the Act of 1934, the rule at common law prevailed that when an action for the payment of a debt succeeded the Court could not add interest on the debt down to judgment unless interest was payable as of right under a contract expressed or implied. Provisos (b) and (c) of Section 3 show that these exceptions were not touched by the Act of 1934, and the discretion conferred on the Court by the enacting words is a discretion to add interest when judgment is given for a debt or damages, although there is no contractual right to interest. The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest. This is the view taken by Evershed, J., and by the Court of Appeal (du Parcq and Morton, L. J.J., and Cohen, J.). Notwithstanding Mr. Grant's excellent argument, this view, in my opinion, is correct.

Two decided cases which might seem to give support to Mr. Grant's argument are *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, and *Simpson v. Executors of Bonner Maurice*, 14 T.C. 580.

In the former Mr. Justice R. S. Wright had before him a case in which an ex-director of the bank had been ordered to pay to the liquidator of the company a sum of money together with interest thereon at 5 per cent. per annum on the ground that he had been guilty of misfeasance in sanctioning the payment of dividend out of capital. The learned Judge declined to allow this individual to deduct Income Tax from the interest he was ordered to pay. He is reported as saying, on page 651, that it is not a question of contract at all and that the Order made had the effect that the company had had its capital withheld and

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had suffered damages equivalent to 5 per cent. per annum for that reason. The learned Judge added: "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." These observations have long been considered as of doubtful validity and the time has come to say that they are wrong. If damages are increased by adding interest upon a principal sum, that does not prove that such interest is not liable to tax.

The case of *Simpson v. Executors of Bonner Maurice* (14 T.C. 580) was of a very special character. It arose under Article 297 of the peace treaty with Germany after the 1914-1918 war. Article 297 provided that the nationals of Allied and Associated Powers should be entitled to compensation in respect of damage or injury inflicted upon their property rights or interests in Germany. Before the war a British subject had deposited securities, stocks and shares in banks in Germany. He died during the war, and as a result of the peace treaty claims on the part of his representatives were admitted in respect of amounts representing in part the capital value of those securities and in part compensation under the treaty computed on the basis of interest on certain amounts. The decision of Rowlatt, J., that this compensation could not be regarded as interest was confirmed by the Court of Appeal. The treaty did not give to the claimants any right to interest as such, and the view taken was that the whole amount was compensation such as was authorised by the treaty. Rowlatt, J., observed, at page 593, that the case was "like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest." I do not consider that this decision can be regarded as leading this House to a conclusion in favour of the Appellant.

Mr. Grant advanced a further argument that the added sum was not in the nature of "interest" in the sense of that expression in the Income Tax Acts, because the added sum only came into existence when the judgment was given, and from that moment had no accretions under the Order awarding it. (Interest on a judgment debt is, of course, a separate matter, and Mr. Grant did not challenge the view that this latter interest was subject to tax.) But I see no reason why, when the Judge orders payment of interest from a past date on the amount of the main sum awarded (or on a part of it), this supplemental payment, the size of which grows from day to day by taking a fraction of so much per cent. per annum of the amount of which interest is ordered, and by the payment of which further growth is stopped, should not be treated as interest attracting Income Tax. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment.

I move that the appeal be dismissed with costs.

Lord Wright.—My Lords, this appeal raises the question whether a sum of £10,028 awarded to the Appellant as interest pursuant to Section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934 (hereinafter called "the Act"), and included pursuant to that Section in the total sum for which judgment in the King's Bench Division was given in favour of the Appellant, is "interest of money" within the meaning of Paragraph 1 (b) of Schedule D to the Income Tax Act, 1918, which enacts (*inter alia*) that "Tax under this Schedule shall be charged in respect of... (b) All interest of money".

The Appellant brought the action against the judicial trustee of one Ridsdel claiming one-half of the profits realised by Ridsdel by the sale on joint account with the Appellant of certain shares in 1936. The action was commenced in 1939 when the Appellant discovered that Ridsdel had not disclosed the true amount

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of the profit realised. The Judge at the trial by his judgment given on 17th May, 1943, found in favour of the Appellant, holding that £36,255 was due on balance to him, and in addition awarded him £10,028 in exercise of his discretion under the Act, as being interest at 4 per cent. per annum on £36,255 from 14th June, 1936, when the profits were realised by Ridsdel, to 14th May, 1943. The Court of Appeal affirmed that judgment. The Respondent claimed that he had satisfied the judgment by a payment of £41,451 11s. 11d., which was arrived at after deduction of £5,014 representing Income Tax on the sum of £10,028 pursuant to General Rule 21 of the Income Tax Act, 1918. The Appellant claimed that Income Tax was not deductible and the Respondent then brought the action out of which this appeal arises, claiming that the payments made by the Respondent satisfied the judgment. The dispute involved the question whether the sum of £10,028 was interest under the Act. It clearly affected the rights of the Revenue. The House accordingly gave the Revenue authorities the opportunity of intervening in the proceedings, but they disclaimed any desire to take part and were content to leave it to the decision of the House, which in any case must declare the proper law applicable to the facts.

The main questions in the appeal may be described as being whether the sum of £10,028 awarded as part of the judgment was interest under the Act and, if so, whether it fell within the words of the charging Section of the Income Tax Act, 1918, which have been quoted above. Both Courts below (as already stated) answered both questions in the Respondent's favour. Their judgments deal so admirably with the issues that I should have been content to agree with them without more, but having regard to the general importance of the questions I add a brief statement of my reasons for agreeing.

The contention of the Appellant may be summarily stated to be that the award under the Act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due by the Respondent to the Appellant, and hence the deduction made as being required under Rule 21 is not justified because the money was not interest. In other words the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. Evershed, J., in his admirable judgment, rejected that distinction. The Appellant's contention is in any case artificial and is, in my opinion, erroneous, because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under Section 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same, and the compensation is properly described as interest. For reasons that go back far in history, the distinction between interest proper, as it has been called, that is, interest due under a contract, statute or the like, and interest by way of damages, that is, not due under an agreement express or implied, has since very early days been recognised in England whether in the Ecclesiastical or Common Law Courts. Moneylending was condemned by the mediaeval mind

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as usurious (Tawney, "Religion and the Rise of Capitalism", at pages 54 and 55). The reproach of usury was not answered by saying the interest was due under a contract. "What remained to the end unlawful", says Tawney, page 54 ⁽¹⁾, "was. . . interest as a fixed payment stipulated in advance for a loan "of money or wares without risk to the lender." The profits should go, it was said, to the borrower, since he makes the loan profitable by his work.

These ideas could not survive the exigencies of modern commerce, but they did, and still in a sense do, influence the rules relating to interest. The Legislature found it necessary to intervene in 1833 by means of the Civil Procedure Act (Lord Tenterden's Act) of that year, which qualified the old English rule that, *prima facie*, money claims do not carry interest. Before that date it had been held, as for instance in *Page v. Newman* (1829), 9 B. & C. 378, that a Common Law Court in awarding damages was not entitled to award interest in addition in the absence of express or implied contract or statute. The Admiralty Court, however, claimed and exercised that right. The Court of Equity also when making a money decree held itself entitled to award interest for the period between the time when the money was due and the date of the decree when it thought that proper in order to effect a *restitutio in integrum*.

The Act of 1833 corrected to some extent the limitations of the Common Law Courts' powers in this matter. By Section 28 of that Act the jury were to be entitled, if they should think fit, to allow interest to the successful plaintiff in a limited class of cases, that is, where the debt was a sum certain under a contract in writing payable at a time certain or, if otherwise, made payable by a demand in writing fixing a certain date and notifying the debtor that in default interest would be claimed. Section 29 similarly enabled the jury to give damages "in the nature of interest" in certain torts and also on claims upon policies of insurance.

The element of discretion found in the earlier Act was preserved by the Act of 1934. The Act was general in its terms; it made no distinction between interest and damages in the nature of interest. The word indeed was used indifferently. The essential similarity of different types of interest is put beyond doubt by Section 3 (1) (b) of the Act, which, after excluding power to give compound interest, provides that the Act is not to apply to any debt where the interest is payable as of right. This would include all cases of what is called interest proper, under a contract or the like, so that the interest particularly dealt with by the Act is what has been called interest by way of damages. The category (c) included in Sub-section (1) of Section 3 of the Act was necessary to exclude interest awarded on the dishonour of a bill of exchange, the award of which, though often described as damages, is now statutory. The award is not in the discretion of the Court where the interest is payable as of right.

It is clear that the Act used the word interest in its widest sense, including both interest proper and interest by way of damages. It is not a consolidating Act, but a reforming or amending Act. It is intended to enlarge the powers of the Court. In 1893 this House, in the case of the *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429, reviewed the then existing position as it stood at common law and the established principle up to that date. Lord Herschell, L.C., at page 440, said that the words of Lord Tenterden's Act (the Act of 1833) kept claims for interest within very narrow limits which to him seemed too narrow for the purposes of justice. But he held that the authorities which he cited made it impossible to reopen the question or to hold that in the circumstances before the House in that case interest could be

(1) Page 42 in the 1926 and 1936 editions.

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awarded. The interest in question was an instance of what has been called interest by way of damages. But it may be noted that throughout such interest is still described as interest, even though the Court was debarred from awarding it by the then state of the law. The case itself was typical. A large sum of money was due but was not paid for a substantial period. The decision was that as it was not within the express terms of the Act of 1833 no interest could be awarded. The purpose of the Act of 1934 was to remove the fetters still left under Lord Tenterden's Act and to effect the reform which the Lord Chancellor thought that justice required. In my judgment the Act has done so.

The question that remains is whether the interest is within the scope of the charging words of Schedule D to the Income Tax Act of 1918, cited above, which charges "all interest of money". In my opinion there is no incompatibility for this purpose between interest proper and interest by way of damages, especially since the Act of 1934, and, as I think, before that Act. Thus there does not seem to be any reason why the sum in question should not be taxed. I do not repeat the reasoning which I have sought to explain in the earlier part of this judgment. It is true that in *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, Wright, J., distinguished damages from interest. The Judge held that the debtor should repay 5 per cent. per annum on sums which he had wrongfully withheld. He said: "It is called 'interest,' but it is really damages.⁽¹⁾" If the Judge was meaning that such damages were not capable of being treated as interest, he was in my opinion guilty of an error in law, even before the Act of 1934. I do not think it necessary to express any opinion on the actual decision of that case, which turned upon its particular facts. The same may be said of various decisions under the Income Tax Act determining whether particular payments were interest within Schedule D. The distinction through these cases is whether the payments were payments of profits, that is, were income, or were payments on capital account estimated in terms of interest. This latter type of case is less frequent in the books, but a good illustration is to be found in *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 427, in which it was held that the sum there awarded was in truth, though described as interest, only a method of determining the value of the fireclay sterilized in the hands of the company for which it was entitled to compensation. That was a payment on capital account; it was for the destruction of a capital asset, which was indeed the source of profits but could not be regarded as income. On the other side of the line is *Commissioners of Inland Revenue v. Barnato*, 20 T.C. 455, where the payment was a sum of compound interest which had been made to the taxpayer in commutation of his share of profit in a partnership. It was a sum of profit, not capital. I need not go through the numerous cases which have been cited to illustrate the circumstances under which a sum has been taxed as income or has been held immune on the ground that whether called interest or not it was really a payment on capital account. In regard to some of these decisions opinion may differ as to the exact result arrived at on the facts, but they all agree in using the word interest, and in drawing as the relevant distinction that between capital and income. This distinction depends on substance not on the mere name.

Of some minor contentions which have been raised I shall briefly advert to one. It was said that the sum in question could not be interest at all because interest implies a recurrence of periodical accretions, whereas this sum came to existence *uno flatu* by the judgment of the Court and was fixed once for all. But in truth it represented the total of the periodical accretions of interest during the whole time in which payment of the debt was withheld. The sum

(1) [1899] 2 Ch., at p. 651.

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awarded was the summation of the total of all the recurring interest items. The objection fails.

In my judgment the appeal should be dismissed.

Lord Simonds.—My Lords, my noble and learned friend **Lord Porter**, who is unable to be here, has asked me to say that he has read and concurs in the opinion which I am about to deliver.

My Lords, this appeal, which is brought from an Order of the Court of Appeal affirming an Order of Evershed, J., raises for the first time a question of some general importance arising under Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.

The question arises in this way. The Appellant in the year 1936 entered into an agreement with one Ernest Bramwell Ridsdel under which, in consideration of his introducing to Ridsdel a transaction which involved the purchase of a block of shares in a certain limited company, Ridsdel was to pay him one-half of any profits which might be made upon a resale of the shares. Ridsdel bought the shares and resold them at a profit of £93,350, but he paid to the Appellant sums amounting to £10,420 only, alleging that the profit was no more than £20,840.

On 2nd April, 1939, Ridsdel died and the Appellant, having discovered shortly afterwards that the profit was far greater than was alleged, on 2nd April, 1942, commenced an action in the King's Bench Division against the Respondent as judicial trustee of Ridsdel's last will in which he claimed (*inter alia*) an account of the profits made upon a resale of the said shares and payment of the difference between the sum already received by him and one-half of the profits found to have been made on taking such account. It is unnecessary to say anything more about this action, which was vigorously defended, except that Oliver, J., gave judgment for the Appellant for the sum of £36,255 (being the difference between the sum of £10,420 already received by the Appellant and £46,675, i.e., one-half of the profit of £93,350 admittedly made by Ridsdel) together with a further sum of £10,028 (making £46,283 in all) which the learned Judge in the exercise of his discretion awarded as interest under the Section to which I have referred. This sum of £10,028 represents interest at 4 per cent. per annum on £36,255 from 14th June, 1936 (when that sum should have been paid), to 14th May, 1943 (the date of judgment). From this judgment the Respondent appealed to the Court of Appeal but his appeal was dismissed.

In July and August, 1943, the Respondent paid the Appellant sums amounting to £41,451, made up of the sum of £36,255, of a sum for interest of the judgment after the date of judgment, and of a sum of £5,014, being the sum of £10,028 included in this judgment as interest after deduction of Income Tax therefrom at the standard rate then prevailing of 10s. in the £. For this balance of £5,014 the Respondent held itself accountable to the Crown.

The Respondent made this deduction under General Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, and it is common ground that the deduction if permissible must be made under this Rule.

The Appellant however contended that the deduction was not permissible and threatened to levy execution under the judgment unless the balance of £5,014 was paid to him. To avert this event the Respondent commenced an action in the Chancery Division against the Appellant claiming that the judgment had been satisfied by the payments already made. In this action Evershed, J., gave judgment for the Respondent. The Court of Appeal unanimously affirmed his decision. Hence this appeal.

(Lord Simonds.)

My Lords, to me the case appears a very plain one and, but for the novelty and importance of the point, I should have been content to adopt without further words of my own the reasons and conclusion of the learned Judges in the Courts below.

The question may be simply stated. It is whether, where in an action for the recovery of any debt or damages the Court exercises its discretionary power under Section 3 of the cited Act and orders that there shall be included in the sum for which judgment is given interest on the debt or damages, the sum of interest so included is taxable under the Income Tax Acts.

I will remind your Lordships first of the provisions of the Income Tax Act, 1918, under which, if at all, this sum is taxable. Under Section 1 of the Act tax is charged on profits and gains described or comprised in the Schedules A, B, C, D, E, contained in the First Schedule to the Act and in accordance with the Rules respectively applicable to those Schedules. By Paragraph 1 (b) of Schedule D it is enacted that tax under this Schedule shall be charged in respect of "(b) All interest of money . . ." I do not think it necessary to make further reference to the provisions of the Income Tax Act. It is sufficient to say that in order to attract tax it must be established that the sum in question was income, and that it was that species of profit or gain which answers the description "interest of money".

It is convenient now to set out the Section of the Act of 1934 under which payment was ordered. It is as follows :

" 3.—(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment :

" Provided that nothing in this section—

" (a) shall authorise the giving of interest upon interest ; or

" (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise ; or

" (c) shall effect the damages recoverable for the dishonour of a bill of exchange.

" (2) Sections twenty-eight and twenty-nine of the Civil Procedure Act, 1833, shall cease to have effect."

My Lords, I do not think that it could readily have occurred to anyone that interest awarded under this Section was not "interest of money" within the taxing provision, were it not that behind it there lies a history to which I must shortly refer. Taken by itself the Section provides in unambiguous terms that, where judgment is given for a principal sum, the Court may order that it shall be an interest-bearing principal sum. The principal sum is "money" and the interest upon it is "interest of money". I can see no reason why it should not be "interest of money" for the purposes of tax. That the word "interest" is used in no unusual sense plainly appears from provisos (a) and (b) where it can only have its familiar meaning.

It has, however, been urged by Counsel for the Appellant that this view of the Section, simple and straightforward as it is, ought not to be entertained by your Lordships, and, as I have said, he invokes the history of this branch of the law to support his argument. My Lords, while I am ever prepared to consider any statute in the light of pre-existing law, I must admit to a reluctance to be diverted by the shadow of the past from the plain meaning of plain words.

(Lord Simonds.)

So it is that in this case I get little help from the Aristotelian view of the sterility of money, or the mediaeval conception, embodied in some of our earliest statutes, that the increase of money by way of interest is indefensible usury, or even from the way in which in statute and in judicial utterance reference is made to "compensation" or "damages" when interest becomes payable otherwise than under a contractual obligation.

The stages of the Appellant's argument clearly appear in his formal reasons. They may be thus summarised. First, he says that interest awarded under the Act of 1934 is of the same character as interest awarded under Sections 28 and 29 of the Civil Procedure Act, 1833; second, that interest awarded under those Sections was an award of damages or in the nature of damages, and third, that an award of damages or in the nature of damages is not interest of money within the meanings of the Income Tax Acts.

The first stage in this argument does not carry me far. By Sub-section (2) of Section 3 the relevant Sections of the earlier Act are repealed. The character of the interest to be awarded under Sub-section (1) is surely to be ascertained from the words of that Sub-section rather than from those of the Sections which it supersedes.

But, assuming that the latter statute is to be interpreted in the light of the earlier one, it can only be to Section 28 that reference may be made. It will be observed that in the Section we have now to construe, "debt" and "damages" are joined together. Whether the principal sum for which judgment is given is in respect of debt or damages, interest may be awarded in respect of that sum. This may be contrasted with the earlier statute, which by Section 28 provided for the allowance of "interest" *simpliciter* but by Section 29 provided for the giving of "damages in the nature of interest". I should not be prepared to concede that it makes any difference for the purposes of Income Tax whether a sum of money is called "interest" or "damages in the nature of interest" or "interest in the nature of damages." But the Appellant's argument ties him to Section 28 which refers to the allowance of "interest" and nothing else.

I come then to the second stage and ask what is the character of interest allowed under Section 28 of the Act of 1833. Here the argument is that, call it interest or what you will, it is damages and, if it is damages, then it is not "interest in the proper sense" or "interest proper", expressions heard many times by your Lordships.

This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the Court. In the first case it may be called "interest" and in the second and third cases "damages in the nature of interest", or even "damages". But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead.

I will illustrate my meaning by a citation from Lord Herschell's speech in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429, at page 437: "But, my Lords", he said, "the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money

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“ is owing from one party to another and that other is driven to have recourse
 “ to legal proceedings in order to recover the amount due to him, the party who
 “ is wrongfully withholding the money from the other ought not in justice to
 “ benefit by having that money in his possession and enjoying the use of it,
 “ when the money ought to be in the possession of the other party who is
 “ entitled to its use. Therefore, if I could see my way to do so, I should certainly
 “ be disposed to give the appellants, or anybody in a similar position, interest
 “ upon the amount withheld from the time of action brought at all events.
 “ But I have come to the conclusion, upon a consideration of the authorities,
 “ agreeing with the Court below, that it is not possible to do so, although no
 “ doubt in early times the view was expressed that interest might be given
 “ under such circumstances by way of damages.” I note in passing that what
 Lord Herschell would fain have done was done by the Section now under
 review. But my purpose in citing this passage is to show that interest may be
 none the less interest because it is awarded by way of damages. So again in
Webster v. British Empire Mutual Life Assurance Co. (1880), 15 Ch.D. 169, where
 a claim was made for interest upon certain policy moneys but the policy contained
 no provision for interest, James, L.J., at page 174, said : “ A policy of assurance
 “ does not bear interest. That is conceded on all hands. In itself, there is
 “ neither an express nor an implied contract to pay interest on the amount
 “ payable. Under the Act 3 & 4 Will. 4, c.42, whether it comes within any common
 “ law principle or not, anything in the nature of interest can only be given, in my
 “ view, as damages for the wrongful detention of money which ought to have
 “ been paid.” These and similar observations, which I might multiply (e.g., in a
 line of cases concerned with “ specially indorsed ” writes, see *Ryley v. Master*,
 [1892] 1 Q.B. 674) were cited on behalf of the Appellant to show that a sum
 awarded as interest under Section 28 is in essence not “ interest proper ” but
 damages. But to my mind the answer is given by Evershed, J., in his judgment
 in words which I cannot improve upon and therefore adopt : “ The proposition
 “ that interest is awarded as damages, or by way of damages, as in the case
 “ of *Cook v. Fowler* (1874), L.R. 7 H.L. 27, imports the justification for the
 “ award or for the rate awarded, but does not affect the quality of interest as
 “ such . . . (1).” Perhaps the position may become even clearer if for “ damages ”
 the word “ compensation ” is substituted. It would be difficult, I suppose,
 in a case where a man, being deprived of the use of his money, was awarded
 interest by way of compensation, to say that what he was awarded was not
 interest but something else. That is the very language of equity : c.f. *Vyse v.*
Foster (1872), 8 Ch.App. 309. In that case, as James, L.J., points out at page 328,
 the executors or trustees had committed a breach of trust by allowing trust
 money to remain outstanding on the personal security of persons engaged in
 trade ; they were bound therefore to make good the trust funds and interest.
 The language that James, L.J., employs is illuminating. “ This Court ”, he
 says, at page 333, “ is not a Court of penal jurisdiction. It compels restitution of
 “ property unconscientiously withheld ; it gives full compensation for any loss
 “ or damage through failure of some equitable duty ; but it has no power of
 “ punishing anyone.” The trustee must pay interest to compensate his *cestui*
que trust (I say nothing of his alternative remedy) for the interest he has lost.
 It might equally well be called damages or interest by way of damages. It is
 inherently a sum of money of precisely the same character as the interest
 awarded in a Court of Law under the Civil Procedure Act, 1833.

My Lords, having discussed in a general way the nature of a sum of money
 awarded as interest under Section 28 of the Civil Procedure Act, I turn to the

(1) See page 165 *ante*.

(Lord Simonds.)

cases decided under the Income Tax Acts to see whether they assist the Appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature: that is the test for Income Tax purposes, not whether it is called "interest" or "damages". Thus in *Commissioners of Inland Revenue v. Ballantine*, 8 T.C. 595, arbitrators to whom a claim for (*inter alia*) "additional costs, loss and damages" was referred, awarded an amount which included a sum described as interest. The Court of Session, having concluded that what was described as interest was in fact part of the total sum awarded by way of damages, rejected the claim of the Revenue to tax upon it. As Cohen, L.J., has observed, the matter is summed up in the judgment of the Lord President where he says: "If the decree was substantially one of damages, the interest ordered to run on it was just part of the damages, and not therefore chargeable to Income Tax.⁽¹⁾" Again, in *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 427, the claim to tax was rejected because, though certain sums were described as interest, yet in substance a capital sum of compensation was awarded, the element of interest being introduced *in modum aestimationis*. So also in *Simpson v. Executors of Bonner Maurice*, 14 T.C. 580, tax was held not to be exigible upon any part of a sum which was paid by way of compensation under Article 297 (e) of the Treaty of Versailles. It is sufficient to cite a sentence from the judgment of Lawrence, L.J., in that case to show how different were its circumstances from those where interest was allowed under the Civil Procedure Act, 1833, or is ordered under the Act of 1934: "Article 297 of the 'Treaty', he said, 'says nothing about the payment of interest, and the 'money paid under the direction of the Mixed Arbitral Tribunal was paid as 'compensation and not as interest.'⁽²⁾"

Numerous cases also were cited which fell on the other side of the line, i.e., in which sums of money described and paid or received as interest were held to be "interest of money" and taxable as such. I will mention only two of them. In *Schulze v. Bensted*, 7 T.C. 30, the question was as to the liability to tax of interest on a sum which a negligent trustee had failed to get in and which he had been ordered to make good to the trust estate, a state of affairs strictly comparable with that to which I referred when observing upon *Vyse v. Foster* ⁽³⁾. The trustee having duly paid the interest, it was in the words of Lord Johnston "a surrogatum for that which ought to have termly reached the hands of the 'trustees and have been applied by them as income'⁽⁴⁾". It was accordingly liable to tax. In *Commissioners of Inland Revenue v. Barnato*, 20 T.C. 455, the circumstances were very similar. There too the defendants became bound under a consent Order, founded on certain admissions, to pay not only a principal sum but interest upon it, and compound interest at that. And it was held that such interest was liable to tax. This decision, if I may say so with respect, was plainly right. It illustrates the proposition, that which reaches the hand of the recipient as interest upon a principal sum is income liable to Income Tax, notwithstanding that it may come to him in a single sum and as the result of a hostile suit.

I have left to the last a case rightly relied on by the Appellant. I refer to *In re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629. In that case a director having been found liable to refund to the company the principal sum of £37,000 (being the amount of certain dividends improperly paid out of the funds of the company) was ordered also to pay interest at the rate of 5 per cent. from the dates when the dividends were paid. A question arose upon settling the minutes of

⁽¹⁾ 8 T.C., at p. 612. ⁽²⁾ 14 T.C., at p. 605. ⁽³⁾ 8 Ch. App. 309. ⁽⁴⁾ 7 T.C., at p. 34.

(Lord Simonds.)

judgment whether Income Tax should be deducted from the interest so ordered to be paid. Wright, J., declined to allow tax to be deducted, saying that it was not a question of contract at all, that the matter must be regarded as if the director had fraudulently given away £37,000 of the capital of the company, that the company had by its capital being withheld all those years suffered damages equal to 5 per cent. per annum, and that he saw no reason why it should not get the whole of the damages back. He concluded: "It is called 'interest,' but it is really damages for withholding its capital from the company. I have tried to find some authorities on the question, but I am unable to find any.⁽¹⁾" I agree with the Counsel for the Appellant that, if this case was rightly decided, he is entitled to succeed here. But the reasoning of Wright, J., cannot, in my opinion, be supported and his decision must be overruled.

It was further urged on behalf of the Appellant that the interest ordered to be paid to him was not "interest of money" for the purpose of tax because it had no existence until it was awarded and did not have the quality of being recurrent or being capable of recurrence. This argument was founded on certain observations of Lord Maugham in *Moss' Empires, Ltd. v. Commissioners of Inland Revenue*⁽²⁾, [1937] A.C. 785, at page 795, in regard to the meaning of the word "annual". It would be sufficient to say that we are here dealing with words in the Income Tax Act which do not include either "annual" or "yearly", but in any case I do not understand why a sum which is calculated upon the footing that it accrues *de die in diem* has not the essential quality of recurrence in sufficient measure to bring it within the scope of Income Tax. It is surely irrelevant that the calculation begins on one day and ends on another. It is more important to bear in mind that it is income.

Finally it is right to say a very few words upon a point taken by du Parcq, L.J., in his judgment and for that reason, but, as I understand it, for that reason only, put forward in this House on behalf of the Appellants. The learned Lord Justice expressed a doubt, which argument did not dispel, whether a defendant who is required by the Order of the Court to pay a judgment debt for a fixed sum, which includes interest, can be said to be making a payment of interest when he pays that sum. The liability to pay interest, he suggested, is superseded by, or merged in, the judgment debt⁽³⁾. This opens an attractive vista, e.g., to mortgagees, who, by persuading their mortgagors to allow judgment to be recovered against them for the interest from time to time due, might thus escape liability to tax upon that interest. But with great respect to the learned Lord Justice I do not think that the suggestion is well founded. No doubt for some purposes an obligation of lower degree is merged in one of higher degree, a doctrine presumably based on the policy of avoiding multiplicity of suits. But I do not think that this has any relevance as between third parties, as, e.g., between the creditor and the Crown, when the question is whether a certain sum is capital or income and if income whether it is taxable income in the hands of the creditor. The question is the same and must be determined by the same considerations whether the sum is paid voluntarily or under an Order of the Court.

I would add that, having had the privilege of reading the speech which my noble and learned friend Lord Normand is about to deliver, I wish to express my concurrence in his observations upon the cases decided by the Court of Session upon this subject.

In my opinion this appeal should be dismissed.

(1) [1899] 2 Ch., at p. 651.

(2) 21 T.C. 264, at p. 299.

(3) See page 177 *ante*.

Lord Normand.—My Lords, I respectfully agree with the opinion of my noble and learned friend on the Woolsack and also with that of my noble and learned friend Lord Simonds. I propose merely to add some observations on the Scots law as it is affected by the decision in this appeal and on the Scots cases cited by Counsel.

Claims for interest may arise in Scots law *ex facto*, *ex lege* or *ex mora*. Interest *ex facto* is beyond question income in the hands of the recipient. The same may be said of interest *ex lege*, and it was so decided in *Sweet v. Macdiarmid*, 7 T.C. 640. Interest *ex mora* corresponds to the interest awarded to the present Appellant under the Law Reform (Miscellaneous Provisions) Act, 1934, Section 3. That interest ran from the date at which the principal sum was first wrongfully withheld from the Appellant, and it is wrongful retention of the debt from the creditor that is the legal ground for an award of interest *ex mora* in Scotland (*Carmichael v. Caledonian Railway Co.* (1870), 8 Macpher. H.L. 119, Lord Westbury, at page 131). The correspondence is not complete; for example, interest is awarded by the Scottish Courts as of right, whereas in England the award depends on the exercise of a discretion which the statute has committed to the jury or the Court. Nevertheless the principle of the decision in this appeal will apply to interest awarded *ex mora* in Scotland.

The retention of the principal sum in the present instance was fraudulent, but the award of interest either under the statute in England or *ex mora* in Scotland does not depend on proof of fraudulent retention or of negligent retention of the principal. The commonest example indeed of an award of interest *ex mora* is a decree for interest from the date of citation in an action in which the pursuer has successfully sued for the disputed amount due to him on an open account, where there is neither averment nor proof of fraud or negligence (*Blair's Trustees v. Payne* (1884), 12 R. 104). The wrongful withholding is then merely the refusal of the creditor's demand contained in the summons and the implied denial of his right. Even when there is no proof of fraud or negligence the interest awarded is sometimes spoken of as damages both in England and in Scotland. But in Scotland at least it would, I think, be more appropriately described as compensation.

This matter of terminology is, however, of no great importance, for the liability of a payment to Income Tax does not depend on whether or not it is a payment of damages, but on whether or not it is received as income. The interest payments which were the subject of litigation in *Schulze v. Bensted*, 7 T.C. 30, had been decerned for in an action (*Lees' Trustees v. Dun*, 1912 S.C. 50) raised by trustees against the representatives of a deceased trustee on the same estate. It was an action of damages based on negligence. In allowing the Revenue's claim to Income Tax on this interest, the Lord President cited with approval the definition of interest in Bell's Dictionary: "Interest of money may be defined to be the creditor's share of the profit which the borrower or debtor is presumed to make from the use of the money (1)"; and he treated the interest awarded as the just recompense to the creditors for being deprived of the use of the money or, in other words, as interest awarded *ex mora*. He held accordingly that this interest was received by the creditors as the fruit or income of the principal sum which ought to have been paid to them on the date from which the interest ran. Lord Johnston, agreeing with the Lord President's conclusion, said: "When it" (the interest) "reached the hands of the trustees it was a surrogatum for that which ought to have termly 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

(1) 7 T.C., at p. 33.

(Lord Normand.)

"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.⁽¹⁾" Lord Johnston in the course of his opinion took occasion to say that where a pursuer recovers damages with interest from the date of decree he did not think that that interest was chargeable. I do not agree with Lord Johnston on this point, and I am of opinion that in such a case the interest, even if it is properly to be considered as part of the damages, is nevertheless received as income by the creditor in the judgment debt. However that may be, *Schulze v. Bensted* is authority for the proposition that interest awarded *ex mora*, even in an action of damages, is income and not capital in the hands of the creditor and is subject to Income Tax. In short it decided practically the same point as has arisen in the present appeal and it decided it in complete accordance with the opinion which has been expressed by my noble and learned friend.

There are cases in which a calculation of interest is used as a means of arriving at a capital sum of damages. *Commissioners of Inland Revenue v. Ballantine*, 8 T.C. 595, is an example. In that case an arbiter having a duty to award a sum as compensation for "outlays and loss" assessed it in the form of annual interest, and it was held that, though the compensation was described as interest and though it was calculated as interest is calculated, the creditor received it as capital. Similarly in *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue* ⁽²⁾, 1922 S.C. (H.L.) 112, a sum received by a company as compensation for deprivation of a capital asset and calculated on the basis of the annual profits which the company might have expected to earn by exploiting the asset was treated as a capital sum. But while there may be difficulty in deciding in particular cases whether a payment described and calculated as interest is not in truth a capital payment, it is now settled that interest awarded *ex mora*, whether it is to be regarded as damages or not, is income of the creditor.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that the appeal be dismissed with costs.

The Contents have it.

[Solicitors :—Kenneth Brown, Baker, Baker ; Last, Riches & Co.]

⁽¹⁾ 7 T.C., at pp. 34-5.

⁽²⁾ 12 T.C. 427.