exactly in the same position. I do not at all assent to the argument which was maintained by one of the defenders' counsel that that is a matter which the Court ought not to take into account, either because of its being merely a pastime or because the facts are too obscure for investigation. The enjoyment of trout-fishing as a sport is an incident of property, and therefore the Court is bound to recognise it, and I do not see that there should be any greater difficulty in ascertaining the determining facts than there is in ascertaining the facts in a great many other questions which are not within the range of common knowledge. But then the complaint which is made appears to me to be a great deal too vague for the Court to proceed upon. For the pursuer to make out that the enjoyment of sport has been destroyed or materially diminished it would in my opinion be necessary to show some definite case of interference with his own enjoyment. It was suggested in the course of the argument by one of the defenders' counsel that if it could be said that the pursuer could not fish without being exposed to the imminent risk of another boat crossing his drift, that would be very good ground for complaint. I think it would, and I daresay—though I do not know—that some other illustrations of the same kind might be given. But whatever the complaint is, there must, in my opinion, be some definite ground upon which the pursuer can say—"The enjoyment of the sport is interfered with in this or that particular," and there is no attempt to make such a case in evidence. It appears to me, therefore, that upon both points the evidence fails. I should add that I entirely sympathise with Lord M'Laren in the difficulty which he feels in reconciling the specific manner in which it is proposed to regulate the right with the terms upon which the right has been fixed by the judgment of the House of Lords, because we are asked to measure the rights of the proprietors by reference to their frontage to the loch. I agree that there is very great difficulty in measuring the right in that way, because it is established, as I have already said, that in its exercise it has no relation to frontage at all. But then I should have great difficulty in seeing how it is to be regulated in any other way, and therefore I do not desire to express any decided opinion that if a case for interference had been made out, and if we had ascertained the exact number of boats which ought to be allowed to fish at one time on Loch Rannoch, we might not have been compelled to distribute that number amongst the various proprietors with reference to frontage. I agree it is not very logical, but I do not at present see any other very satisfactory means of making a distribution. The principle suggested in Lord Cranworth's judgment in the House of Lords seemed to be that Rannoch would be entitled to the same proportion of boats in competition with the other proprietors on the loch as it would have been entitled to before the subdivision of Struan into different properties. But what number of boats Rannoch would have been entitled to, and what number the other property of Struan would have been entitled to, in these circumstances, we do not know. The great difficulty I should have in making any regulation arises at an earlier stage of the process of reasoning, and that is, to find any sound basis for determining any definite number of boats which may be allowed to all the proprietors together, and it is only when that has been done that we should be in a position to consider what proportion of the whole should be allowed to each. I do not think there is any evidence to enable the Court to define the numbers of boats that ought to be used on Loch Rannoch, and indeed I do not think there is any evidence to enable us to say that the number used is excessive; but if it is excessive—if it is more or less than the proper number—there is nothing, so far as I can see, to enable us to say what the proper number is. On the whole matter, therefore, I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to, but I do not think we have reached the stage at which we can usefully consider what the precise method of regulation should be in a case where a case for regulation had been made out.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Sol.-Gen. Dickson, K.C.—E. H. Robertson. Agents—W. & J. Cook, W.S.

Counsel for the Defenders and Respondents—Shaw, K.C.—Wilson, K.C.—Clyde—J. H. Millar—Sandeman—Chree—R. S. Brown. Agents—A. P. Purves & Aitken, W.S.—Davidson & Syme, W.S.—Charles P. Finlay, W.S.—Skene, Edwards, & Garson, W.S.—Mackenzie & Black, W.S.

Tuesday, June 4.

FIRST DIVISION.

SCOTTISH PROVIDENT INSTITUTION *v.* ALLAN.

Revenue—Income-Tax—Interest from Securities Abroad—Remittances of Interest or Repayment of Capital—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, Case* 4.

A mutual insurance society in Scotland were assessed for income-tax under the fourth case of Schedule D of the Income-Tax Act 1842, upon sums remitted to them from Australia in 1898. They maintained that they were not liable to be so assessed, upon the ground that the sum so remitted was not in payment of interest but in repayment of capital. Between 1885 and 1890 the society had sent various sums to Australia for investment. The interest on these investments was received by the Society's representatives in Australia, and paid into a bank account there; and prior to 1893 it was not brought to this country but invested in

Australia. In and after 1893 certain sums were remitted to Scotland from Australia, and in 1898 the sum upon which income-tax was now claimed was so remitted. After all these remittances had been made, there still remained in Australia a sum greater than the total of all the sums originally sent out for investment. Upon appeal, *held* (1) that where the remittances had been made by the representatives of the society from their account in Australia, in which repayments of capital had been immixed with interest, and where the particular remittances had not been definitely identified with any particular repayments of capital, they must, at least so long as a sum equal to the amount of capital originally remitted for investment to Australia remained still invested there, be presumed to be remittances of interest, and that the Society was liable to be assessed upon the sums so remitted; but that (2) they were not liable to be so assessed upon a sum which had been remitted in part repayment of a loan direct to the Society in London by the borrower's solicitor in Australia.

The Scottish Provident Institution appealed to the Commissioners of Income-Tax for the county of Edinburgh against an assessment for the year 1899-1900 on the sum of £217,350, being the amount of sums remitted to the Institution from Australia during the year 1898, which according to the contention of the appellants were remittances not of interest, but in repayment of capital sums sent out from this country for loan on mortgage in Australia.

The Commissioners were of opinion that the sum in question was interest, and was assessable accordingly, and dismissed the appeal.

The Scottish Provident Institution obtained a case, in which the following facts were set forth as found or admitted:—The Scottish Provident Institution (which was a mutual life insurance society) was established in 1837, and incorporated by private Act in 1848. Its head office was in Edinburgh, and its ordinary management and administration were wholly vested in a board of directors established there.

By its Act of incorporation the institution was "entitled to carry on the business, . . . receiving money for investment and accumulation, and in general for carrying on all the business which now is or may come to be connected with a life assurance society in all the various branches thereof in any part of Her Majesty's dominions of Great Britain and Ireland, and the colonies or elsewhere."

The Scottish Provident Institution Act 1884 empowered the directors to lend out the Institution's funds in various countries outside the United Kingdom, and in 1885 they began to invest large sums in Australia, and they had representatives in Melbourne who managed the Australian investments, which, however, were subject to the approval of the directors in Edinburgh.

Prior to 1885 the Institution had no funds in Australia, and it was consequently necessary to make remittances from this country to meet loans made there, such remittances being made against specific investments. No sums were remitted from this country to Australia for investment after 1890. The interest accruing on Australian investments prior to 1893 was not brought to this country but invested in Australia as it fell due.

The total amount sent out to Australia for investment in manner above mentioned up to 31st December 1898 was £1,504,000

The total amount of interest from funds there after deducting all Australian expenses up to 31st December 1898 was	1,034,707
Total amount sent out with accumulated interest to 31st December 1898 . . .	£2,538,707
Total remittances from Australia to 31st December 1898 .	716,500
Total funds remaining in Australia as at 31st December 1898	£1,822,207

The total amount of £716,500 remitted from Australia to 31st December 1898 was made up as follows:—1893, £32,000; 1895, £115,000; 1896, £101,000; 1897, £251,150; 1898, £217,350. It was upon the said sum of £217,350, remitted during the year 1898, that the assessment, the subject of appeal, had been made.

The case contained a table setting forth (1) certain of the sums remitted to Australia for investment, with the respective dates on which the remittances were made; (2) the repayments of part of these sums in Australia, with the dates on which the repayments were made; and (3) the remittances from Australia during 1898 with the dates on which they were made. The Institution sought to identify the remittances in (3), with the repayments in (2).

The repayments in Australia were shown to have been made at various dates between June 1st 1891 and November 14th 1898. When these repayments were made they were, with one exception mentioned below, paid into the bank account of the Institution's representatives in Melbourne, to which account interest earned in Australia was also paid, and when the repayments in question were paid in to the account, that account at the time might or might not contain other sums, which had been earned as interest in Australia.

Included in the sum of £217,350 shown as remitted in 1898 there was one sum of £5000, being in part repayment of a principal debt of £70,000, which was cabled direct by the borrower's solicitor in Australia to the Institution in London, and never passed through the Institution's Australian representatives' funds.

Between the dates of repayments into the Australian bank account and the dates of the remittances from that account to this country which the Society sought to identify with the repayments, there were periods varying from about seven years to

two days. In the cases where there were considerable periods between repayment and remittance, fresh investments had been made by drawing upon the bank account in Australia, and had been repaid to that account between the two dates.

The Melbourne representatives of the Society were instructed that all remittances to this country were to be against sums sent out from this country, and the following excerpt was taken as a sample of the terms of the letters which accompanied remittances:—"For your guidance in dealing with the Inland Revenue Department the above amount represents proceeds of the draft for £25,000 drawn by the attorneys of the institution on 21st May 1886."

The whole of the Society's income in Australia was interest arising from its securities there, and whether brought home or not that interest was regularly included in its annual revenue accounts as part of its income.

The appellants maintained that they were not liable to be assessed on any part of the sum in question. "All interest earned by them in Australia was re-invested there as soon as suitable investments were found. In addition to these accumulations of interest invested in Australia, they had large sums of money there originally sent out from this country, and lent upon mortgage. According as these mortgages were repaid, and the sums so lent were available, they were returned to this country. In cases where the remittance to this country had followed soon after the repayment, though the amount repaid had for a short period been immixed with sums that might or might not have included interest in Australia, that fact did not affect the identification of the sum remitted with that originally sent out, and the same general principle applied in cases where there had been a longer interval between repayment and remittance to this country, viz., that so long as the Institution had any funds in Australia which had originally been sent out from this country, and which, owing to the repayment of the original loan, were available, they were entitled to treat all remittances to this country as the return of funds originally sent out and not as remittances of income earned in Australia. The result of the converse proposition maintained for the Crown would be that unless the Institution were to withdraw all their funds from Australia they could never bring home the capital sums sent out from this country without paying income-tax on them when received.

It was maintained for the Surveyor of Taxes that money having been remitted from this country and lent in Australia, all remittances from there were to be treated as being to account of interest so long as an amount at least as great as the sum originally remitted for investment was still due. The payments might be made half-yearly or yearly, or at irregular intervals, interest bearing interest from the due date till the date of payment, but all such payments within the amount of the accrued interest were to be treated as payments of interest. The sum still remaining in Australia exceeded the amount originally sent there for investment, and the whole remittances made in 1898 fell to be treated as interest collected in that and preceding years, and were liable to income-tax under the fourth case of Schedule D of the Act of 1842.

The Income-Tax Act 1842, 5 and 6 Vict. cap. 35, Schedule D, provides as to the fourth case—"The duty to be charged in respect of interest arising from securities in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement."

The arguments sufficiently appear from the contentions stated above. At the hearing the following cases were cited:—

For the appellants—*Scottish Mortgage and Land Investment Company of New Mexico* v. *Commissioners of Inland Revenue*, November 19, 1886, 14 R. 98; *Inland Revenue* v. *Scottish Provident Institution*, December 17, 1895, 23 R. 322; *Colquhoun* v. *Brooks*, 1889, 14 App. Cas. 493.

For the Surveyor of Taxes—*Leeds Benefit Building Society* v. *Mallandaine*, [1897], 2 Q.B. 402.

At advising—

LORD PRESIDENT — The question is whether the sum of £217,350, received by the Scottish Provident Institution in the United Kingdom from Australia during the year ending 31st December 1898, and for convenience taken as the year of assessment, should, upon the statements in the case, be regarded as consisting of capital of loans repaid, or of interest assessable in terms of the fourth case of Schedule D of the Act 5 and 6 Vict. cap. 35? This would seem, *prima facie*, to be a question of fact rather than of law; but our judgment upon it is asked, I suppose, upon the view that the proper inferences to be drawn from admitted facts may involve legal considerations.

The Scottish Provident Institution is a mutual life assurance society. It was established in the year 1837, and incorporated by a private Act of Parliament in 1848. Its head office is in Edinburgh, and the ordinary management and administration of its business are exclusively vested in a board of directors there.

By the Scottish Provident Institution Act 1884, the directors were empowered to lend out the funds of the Institution in various countries outside of the United Kingdom. In 1885 they began to lend money in Australia, and they have since invested large sums on loan there. The Institution has representatives in Melbourne charged with the duty of attending

to the Australian investments. All investments proposed in Australia are, however, submitted to the directors in Edinburgh for consideration, and are made only if approved of by them. Prior to 1885 the Institution had no funds in Australia, but between that year and 1890 it remitted large amounts from this country for investment on the security of land there. The sums so remitted were to be placed upon specific investments, and were so marked at the time. No money has been remitted by the Institution from this country to Australia for investment since 1890. The interest accruing on the Australian investments prior to 1893 was not remitted to this country, but was invested in Australia. The total amount sent to Australia for investment down to 31st December 1898 was £1,504,000, and the total amount of interest which accrued from funds invested there, after deducting all Australian expenses down to that date, was £1,034,707. The sums sent out, with accumulated interest to 31st December 1898, amounted to £2,538,707, and the total remittances made from Australia down to 31st December 1898 amounted to £716,500, while the total amount of the funds remaining in Australia as at 31st December 1898 was £1,822,207. The funds still remaining in Australia thus exceed by £318,207 the sums sent there for investment.

The amount remitted to this country from Australia in 1898 was £217,350, and the present appeal relates to the assessment which has been made upon that sum. The particulars of the remittances from this country for investment in Australia, the repayments of money invested there, and the remittances from Australia in the year 1898, are set out in a table in the case.

It appears that a sum of £5000 mentioned in the table, repaid by a borrower in Australia and remitted to this country on 12th May 1898, was not paid to the representatives of the Institution in Australia, but was cabled direct by the borrower's solicitor in Australia to the Institution in London. I am of opinion that this sum cannot be regarded as consisting of interest assessable in terms of the fourth case of Schedule D of the Act 5 and 6 Vict. cap. 35, and consequently that the decision of the Commissioners is erroneous in so far as it is concerned. It never was immixed with the funds of the Institution in Australia, but was sent to this country by the borrower as and for payment of his capital debt.

The other sums set out in the table which, along with the £5000 just mentioned, make up the £217,350, appear to me to be in an essentially different position. The first of these sums may be taken as an example. £25,000 was remitted from this country to Australia for investment on 21st May 1886, that sum was repaid by the borrower in Australia on 1st June 1891, and £25,000 was remitted to this country by the Institution's representatives in Australia on 1st February 1898. During the period of nearly seven years throughout which the £25,000 remained in Australia after it was repaid by the borrower, and before the remittance was made, it was, as I understand, immixed with the funds of the Institution in Australia, having been paid into its bank account there. It is not stated in the case that the £25,000 remitted to this country on 1st February 1898 was in fact the £25,000 repaid by the borrower nearly seven years before, and it appears to me that the statements in the case do not require or warrant the inference that it was so. In so far as inference from the facts stated is admissible, the natural and proper inference from the known course of business seems to me to be that the money remitted was the interest accruing from funds invested in Australia. In some of the other cases the remittance was made shortly after the repayment in Australia by the borrower, the most favourable case for the Institution being that of the £28,000 which was remitted to Australia for investment on 14th November 1888, and repaid by the borrower there on 14th November 1898, while £28,000 was remitted to this country by the Institution's representatives there on 16th November 1898. Even that sum, however, was immixed with the funds of the Institution in Australia for two days, and no information is given in the case as to the state of the Institution's bank account in Australia, or as to the other operations upon it at or about that time. In particular, it is not stated in the case that the £28,000 was in fact the amount of the loan repaid on 14th November 1898, and I am unable to find in the facts stated in the case any sufficient ground for drawing the inference that it was so.

With respect to the sums in the table other than the £5000 already mentioned, I am of opinion, upon the statements in the case, that the Commissioners were right in drawing the inference that they were, and in holding that they must be regarded as interest arising from securities in Australia received in this country during the year of assessment, not as capital sums withdrawn from investment in Australia and returned to this country. The interest was not kept separate from the other funds of the Institution in Australia, and so invested there as to preserve its identity as interest, and in the absence of evidence to the contrary it appears to me that the drafts upon the bank-account for the purpose of making new investments should be presumed to have been upon the capital of loans repaid, the interest in natural course being forwarded to this country. If, in terms of the agreement with a borrower in Australia, the interest on his loan had been remitted by him to the Institution in this country, it would not in my judgment have been doubtful that it (the interest) was assessable to income-tax here, and it does not appear to me to make any difference that, for the purposes of administration, the interest was paid to representatives of the Institution in Australia, by them lodged in bank there, and remittances, not proved to have been repayments of capital, made to this country. Further, I consider that money which was truly interest would not for the purposes of the present question cease to possess the character of interest by being

invested by the Institution for a time on loan in Australia—on the contrary, I think that if and when the money so invested was repaid, remitted to, and received in this country, it would be chargeable with income-tax here, as it was in fact interest of money invested in Australia.

The whole income of the Institution in Australia has consisted, and still consists, of interest arising from money invested there, and this interest, whether brought home or not, was, I understand, regularly and properly included in the annual revenue accounts of the Institution as part of its income, and so far as received or accrued up to 31st December 1894, the date of the last septennial investigation, was taken into account as the surplus to be divided amongst the members by way of bonus or otherwise, while the interest received since 31st December 1894 will form part of the surplus to be dealt with at the next investigation.

I am not leaving out of view the case of the *Inland Revenue* v. *The Scottish Provident Institution*, 23 R. 322, in which it was held that where interest derived from colonial investments was not remitted to this country, but was retained and reinvested in Australia, the mere fact of its being entered in the Institution's accounts did not constitute constructive remittance to this country so as to render the interest chargeable with duty under Case 4, Schedule D, of the Income-Tax Act 1842. When, however, the question is, whether particular remittances, the real origin and character of which as capital or interest are not definitely established, should be regarded as consisting of capital or of interest, the fact that the amounts were entered in the accounts of the Institution and treated as income in this country may be admissible evidence upon that question. It further appears to me that under the circumstances indefinite remittances to this country must be presumed to consist of interest, not of capital, so long as the amount of capital remitted to Australia for investment still remains invested there.

For these reasons I am of opinion that the decision of the Commissioners is right except as to the £5000.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I wish to say that I do not think that the sum of £5000 referred to in the concluding part of your Lordship's opinion creates any embarrassment or any difficulty in dealing with this case from the point of view of principle, because if a colonial debtor pays up his loan direct to the company in this country that has lent him the money, then he is only liable to pay income-tax upon so much of the payment as consists of interest, but he pays nothing on the sum which he has remitted as capital. Now, in the present case the sum remitted was only £5000 out of a larger debt, amounting, I think, to £70,000, and that was admitted to be a payment in reduction of capital, and therefore it is not subject to duty. But where a capitalist company, as in the present case, has invested large sums for a period of fifteen years in a colony, and has an agent employed not only to receive interest but also to receive the capital of the investment when paid up, and to reinvest it, then if unappropriated remittances are made to this country I think every one would agree that they must be dealt with according to the ordinary course of business, and these remittances must be presumed to be paid in the first place out of interest, and in the second place out of principal or capital. I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he has income uninvested lying at his disposal.

But then these sums were appropriated, and the terms of the appropriation are a little curious, because we have the following statement in the case consisting of an extract from a letter which is taken as a sample, and the extract is this—"For your guidance in dealing with the Inland Revenue Department the above amount represents proceeds of the draft for £25,000 drawn by" so and so, the intention being to represent that this is capital or the proceeds of payments to account of capital and not to income. Now, I cannot think that in a question between the Crown and the subject the liability to duty is to be determined by a representation of that kind made by arrangement between the creditor and his agent for the purpose of enabling him or his agent to appropriate a payment in such a manner as to avoid payment of duty, the appropriation being contrary to what one would expect in the ordinary course of business. There may be cases, special cases, like the one which we have dealt with specially, and which are determined by the facts of the particular transaction, but I think the sound principle is the one announced in your Lordship's opinion, that the source of the fund remitted, in the absence of evidence to the contrary, must be determined according to the ordinary course of business in dealing with uninvested funds.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Affirm the determination of the Commissioners, except to the extent of the tax upon £5000 remitted direct by the borrowers' solicitor in Australia to the Institution in London in part repayment of a principal debt of £70,000: Order repayment of the tax upon the sum of £5000, with interest thereon at four per cent. per annum from the date of payment until repaid," &c.

Counsel for the Appellants, the Scottish Provident Institution — Dundas, K.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Counsel for the Respondent, the Surveyor of Taxes — Jameson, K.C. — A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.