No. 384.—COURT OF SESSION (SCOTLAND), FIRST DIVISION.
16TH NOVEMBER, 1917.

HOUSE OF LORDS.—28th January, 1919.

MALCOLM v. LOCKHART (Surveyor of Taxes).[1]

Income Tax (Schedule D).—Liability of a farmer to assessment in respect of stallion fees. A farmer, who was assessed to Income Tax (Schedule B) in respect of his farm, owned a stallion that was used for breeding purposes. In addition to serving the farmer's own stock the stallion served the mares of other farmers for which service fees were received. The farmer claimed that the fees which he received in respect of the stallion's services should be deemed to be part of the profits of his farm, the Income Tax liability in respect of which was covered by the Income Tax Schedule B Assessment.

Held, *that the farmer was chargeable to Income Tax Schedule D in respect of the service fees.*

CASE.

At a meeting of the Commissioners for the general purposes of the Income Tax Acts, and for executing the Acts relating to the Inhabited House Duties for the District of Falkirk, in the County of Stirling, held at Falkirk on 15th February, 1917.

WILLIAM TAYLOR MALCOLM, Dunmore Home Farm, Airth (hereinafter referred to as the "Appellant"), appealed against an assessment made upon him for the year 1915-16 of £250 in respect of profits of the stallion "Prince Ossian."

The assessment was made under the Act 5 & 6 Vict. cap. 35, S. 100, Schedule D, Case 6, and 16 & 17 Vict. cap. 34, S. 2, Sched. D. The assessment was made as follows:—

W. T. Malcolm—Profits of "Prince Ossian," £250.

I. The following facts were admitted:—

(1) The Appellant is the owner of an entire horse called "Prince Ossian" which is used for breeding purposes, and in addition to serving Appellant's own stock earns fees for serving mares of other owners.

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(1) Reported 1918, S.C. 81, and [1919] A.C. 463; H.L. (Sc.) 35 L.T.R. 231.

I. The following facts were admitted:—

(1) The Appellant is the owner of an entire horse called "Prince Ossian" which is used for breeding purposes, and in addition to serving Appellant's own stock earns fees for serving mares

(2) When a foal the said horse "Prince Ossian" was purchased by the Appellant He was reared and fed by him on Dunmore Home Farm; as part of the stock of the farm on the produce of the farm. After reaching three years old he became suitable for breeding purposes. The animal is still fed and attended to by the ordinary farm servants in the employment of the Appellant.

(3) The Appellant has used said horse since three years old during the breeding season for the service of agricultural mares in his own possession, and in addition he sells the services of the horse as a breeding animal to owners of agricultural mares who desire to mate their stock with him, at varying rates. Many mares are sent to Dunmore to be served by "Prince Ossian" there, while in other cases the horse is sent under the care of Appellant's servant to the stables of the owners of mares, and service effected there.

(4) The breeding season extends from the month of April to the beginning of August, and during that period the horse is part of the time away from the farm, always under the charge and care of Appellant's farm servant. The Appellant pays for his keep during the period he is off the farm, as well as the wages of the farm servant attending upon him, and all charges for shoeing and veterinary attendance.

(5) For the season of 1915 "Prince Ossian" was selected by the Stirlingshire Horse Society to serve mares belonging to the members of that Society, but in addition he also served farm mares belonging to the Appellant. The Appellant received £2 and £4 as stud fees from the Stirlingshire Horse Society for each mare served and proved to be in foal, and in addition an initial payment of £60 from the Society. He admitted that his gross earnings from the horse amounted to £290.

(6) The Appellant is tenant and occupier of the Home Farm of Dunmore on the estate of Claude Archibald Mackenzie Bruce Hamilton, Esquire of Dunmore, at a rent of £580, where he breeds and maintains a stud of Clydesdale horses, and also a herd of pedigree shorthorn cattle. He is assessed, under Schedule B, as tenant of the farm, at £580, and by his return he has other sources of income amounting to £80 in dividends and £11 as a director's fee—total, £671.

(7) The farm is a mixed one of 400 acres, and the Appellant also rents grass parks to the extent of 100 acres. On the farm there are generally 30 horses, including 16 work horses, 8 entire colts and horses, and 6 breeding mares; 400 sheep, 30 bullocks, 8 bulls, 2 three-year-old bulls, 7 heifers, 8 cows, and 4 calves, and 20 yearling bulls. One other stallion besides "Prince Ossian" is used for stud purposes, but it is not dealt with in this case.

II. The Commissioners reserved judgment.

III. At a meeting of Commissioners held of this date, 3rd April, 1917, the following judgment was delivered:—

The Commissioners are of opinion that the Appellant, Mr. Malcolm, must be assessed upon the profits made by him out of the employment of his stallion in serving mares away from his own farm.

The Commissioners think that such profits fall under either the First Case of Schedule D, or the Sixth Case of the same Schedule, 5 & 6 Vict. c. 35, S. 100. The profits in question may very fairly

be considered to fall under the First Case, but if not, the Commissioners are firmly of opinion that they fall under the Sixth Case.

It does not appear to the Commissioners that the employment of a stallion in the manner disclosed in this case can be said to fall within the terms of Schedule B. The employment of a stallion for stud purposes for hire outside of his own farm is no part of the business of a farmer. The Commissioners see no reason for holding that before a party in the occupation of land chargeable under Schedule B can be charged under Schedule D it is necessary for the Crown to shew that he is carrying on a separate business. There is no substance in the contention that businesses are to be charged separately (except in so far as the provisions of Section 101 of the Income Tax Act, 1842, are applicable). The Income Tax Act is to be taken as a whole. The opinion of Lord Macnaghten in *London County Council* v. *Attorney-General*, 1901, A.C. 26, 36, 37,(1) is referred to. There it is made clear that the view that the Schedules are to be considered as if they were separate enactments is not sound.

The case also of *Brown* v. *Watt*, Feb. 20, 1886, 13 R. 590,(2) and *Earl of Derby* v. *Aylmer* (1915), 3 K.B. 374,(3) may also usefully be referred to in this connection.

As the actual amount of profit made by Mr. Malcolm is not admitted or ascertained, the Commissioners will hear the parties now on this matter or continue the case for the adjustment of the amount. This is necessary if the Appellant is not satisfied with the determination of the Commissioners and desires to have a special case stated. In the event of a special case being requested, the facts must be clearly determined and the amount of the assessment fixed.

ALEX. MOFFATT, *Chairman*.

IV. After the foregoing judgment was intimated, the Appellant stated that he wished a decision by the Supreme Court upon the question of his liability, and that he wished such a decision before he disclosed the amount of his profits derived from the hiring out of "Prince Ossian." He reserved the right, after the question of his liability for assessment was finally determined, to lead evidence, if that should become necessary, as to the net profits earned by "Prince Ossian" during the year of assessment.

The Commissioners decided that the Appellant having failed to offer proof at this stage of the net earnings of "Prince Ossian" for the year in question, they had no option but to confirm the assessment made by the additional Commissioners.

The Commissioners therefore confirmed the assessment.

ALEX. MOFFATT, *Chairman*.

V. Whereupon the Appellant expressed his dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and having duly required the Commissioners to state and sign a case for the opinion of the Court of Session, as the Court of Exchequer in Scotland, this case is stated and signed accordingly.

ALEX. MOFFATT,
H. M. SALVESEN, } Commissioners.
CHAS. BROWN,

Falkirk, 21st June, 1917.

(1) 4 T.C. 265. (2) 2 T.C. 143. (3) 6 T.C. 665.

The case was heard by the First Division of the Court of Session on the 6th November, 1917, and judgment was given on the 16th November, 1917, in favour of the Crown with expenses.

INTERLOCUTOR.

Edinburgh, 16th November, 1917.—The Lords of the First Division having considered the Stated Case and heard Counsel for the parties; Affirm the Determination of the Commissioners and Decern: Find the Respondent entitled to expenses and Remit the Account thereof to the Auditor to tax and to report

(Signed) STRATHCLYDE,
I.P.D.

OPINIONS.

The Lord President.—My Lords, I am of opinion that the Appellant falls to be assessed to Income Tax under the First Case of Schedule D in respect of trade or concern of the nature of trade which he carries on.

He is the tenant and occupier of the Home Farm of Dunmore. The rental is £580. On that rental he is assessed to Income Tax under Schedule B in respect of the occupation of lands, tenements, &c., at the annual value thereof.

In addition to working his farm, the Appellant does what some but not all farmers do—he sells the services of his stallion "as a breeding "animal to owners of agricultural mares who desire to mate their stock "with him, at varying rates. Many mares are sent to Dunmore to "be served by 'Prince Ossian' there, while in other cases the horse is "sent under the care of the Appellant's servant to the stables of owners "of mares and service effected there." The Appellant admitted that his gross earnings from the stallion amounted to £290. In short, the Appellant sells for money the services of the stallion.

It is, no doubt, very convenient for him, in connection with this business, to have a farm, but it is by no means essential. If the farm lease terminated to-morrow, then he would, if, as I presume, it was for his profit, certainly continue to carry on this business. And, therefore, I traverse at once and emphatically the one and only argument which was submitted by his counsel, in support of this appeal, that the possession and use of a stallion is an essential part of the farmer's business. It is not an essential part of the farmer's business. On the contrary, the Commissioners have found that "the employment of a stallion for "stud purposes for hire outside his own farm is no part of the business "of a farmer." And, accordingly, I think that the First Case applies directly.

Criticism has been directed against an expression of opinion by the Commissioners to the effect that the Appellant "must be assessed upon "the profits made by him out of the employment of his stallion in "serving mares away from his own farm." If the Commissioners mean by that expression to indicate that the case would have been different if the mares had been brought to the stallion, then I disagree, for it seems to me wholly immaterial whether the stallion is taken to the mares upon other farms or the mares are brought to the stallion at the Appellant's farm. But I cannot help thinking, from other expressions

in the stated case, that they were not of that opinion. A more probable explanation seems to be that suggested by the Lord Advocate that, when using the expression "away from his own farm," the Commissioners really meant "apart from his own farm."

Thus interpreting it, I agree with their opinion and am for upholding their judgment.

Lord Johnston.—The Appellant is a farmer paying a rent of £580 for his farm. Presumably from its locality it is an arable farm, but I infer from the statements in the case that he uses it to some extent for the breeding of pedigree stock. He keeps an entire horse "Prince Ossian" not merely for the service of his own stock, but for the service for fees of the mares of other owners, some of which are brought to the Appellant's farm to be served, and some are served at their own farms, when the horse travels his rounds. The question which we have to determine is, whether the Appellant is assessable to Income Tax for the profits or gains which he thus makes through the service by this horse for fees of other owners' mares.

The Commissioners have restricted their assessment to the profits made in serving mares away from the Appellant's own farm. In holding such profits assessable I think they were right. But I do not understand the grounds of their limitation. I cannot, as at present advised, draw any distinction betwen mares served away from the farm and mares brought to the farm to be served. The Appellant's own mares are, of course, in a different position. In holding that the Commissioners were right, so far as their judgment goes, I am not, therefore, to be held as acceding to the limitation which it contains.

As tenant of the farm the tenant is assessable under Schedule B of the Income Tax Act, 1853, superseding that of the Act of 1842, "for "and in respect of the occupation" of the lands let to him on the yearly value thereof, defined to be the rent by the year where the lands are let at rack rent, Income Tax Act, 1842, Secs. 60 and 63.

I do not know exactly what was in the mind of the Legislature when they fixed on annual value, represented in the ordinary case by rent, as the basis of assessment of the occupant. One can suggest more than one explanation, and one can also see that many tenants between 1842 and 1887 may have felt aggrieved at being assessed on a value represented by their actual rent. But by the Customs and Inland Revenue Act, 1887, Sec. 18, it was made lawful for any person occupying lands for the purposes of husbandry only to elect to be assessed under Schedule D —that is to say, if he prefers it, he may be assessed on the profits or gains of his farming in place of on his rent. Had he taken that course he would have fallen to be assessed on the profits and gains from the service of his stallion, over and above, unless he could make out that the keeping of "Prince Ossian" for the purposes in question was an occupancy of the lands for the purpose of husbandry.

Has then the keeping of a stallion to serve mares for the public at fees any relation to the occupation of the farm? I think not. It is not the occupation or any part of the occupation of the lands. A stallion kept for this purpose has no necessary relation to a farm or to the adventure of a farmer. Such an animal may be kept in a separate stable, and may be kept by a person who is not a farmer. The obvious advantages of keeping him at a farm are indirect considerations. He may be kept at a farm, and yet not be the property of the farmer or bring the farmer any profits or gains other than those derived from his keep, which as it involves the consumption of the farm produce, is only one way of marketing or realising the fruits of the occupation of the farm.

Turning then to Schedule D of the Act of 1853, superseding that of the main enactment of 1842 we pass from assessment in respect of property under Schedule A, in respect of occupation under Schedule B, in respect of profits arising from interest, &c., payable out of any public revenue under Schedule C, to assessment for and in respect of the annual profits or gains arising or accruing to any person from any kind of property whatever and for and in respect of the annual profits or gains arising and accruing to any person from any profession, trade, employment, or vocation under Schedule D. The key note of this Schedule is "profits and gains." And I think that it must be admitted that a stallion is an article of property, from whose service of mares at a fee profits and gains do arise and accrue to the owner in the sense of the Schedule. It may also be said that the keeping of a stallion for such purpose is an employment, or vocation, from which profits arise and accrue, just as much when the owner is a farmer, as when he is not engaged in farming.

Under the Rules for assessing and charging the duties under Schedule B it will be noted (Act of 1842, sec. 53, Rule No. IX) that the said duties "shall be charged on and paid by the occupier for the time being," a provision which is quite inappropriate to the duties on such profits or gains as are here involved.

Again if we turn to the Rules under which the duties granted under Schedule D are to be assessed, as these are found in the Act of 1842, sec. 100, we find that these last-mentioned duties are to extend to any description of property or profits which shall not be contained in either of the Schedules A, B, or C, and the First Case dealt with comprises "Duties "to be charged in respect of any trade, manufacture, adventure, or con- "cern in the nature of trade not contained in any other schedule of the "Act." That would appear comprehensive enough to cover the Appel- "lant's adventure in the service for profit or gain of other owners' mares. But if there is any doubt as to the inclusion of this source of profit or gain there is always the Sixth Case, which in sweeping general language brings in any annual profits or gains not falling under any of the foregoing rules and not charged by virtue of any of the other schedules contained in the Act. I do not think that recourse to this Case is required for the inclusion under the First Case is clear.

Lord Macnaghten pointed out in the *London County Council* case (1901) A.C., at p. 35(1), that Income Tax "is a tax on income. It is "not meant to be a tax on anything else. It is one tax, not a collection "of taxes essentially distinct. There is no difference in kind between "the duties of Income Tax assessed under Schedule D and those assessed "under Schedule A" (for which for the purposes of this case I may substitute Schedule B), "or any of the other Schedules of charge. . . . "The standard of assessment varies according to the nature of the "source from which taxable income is derived. That is all. . . . "In every case the tax is a charge on income, whatever may be the "standard by which the income is measured." I may also quote Buckley, L.J., in the *Carlisle and Silloth Golf Club* case (1913), 3 K.B.D., p. 81(2). "To determine this question, it is not the character "of the person who carries on but the character of the concern which "is carried on that has to be regarded."

These two considerations appear to me exactly to meet the present case and to lead to the conclusion at which the Commissioners have arrived. I do not advert to *Lord Derby's* case (1915), 3 K.B.D. 374(3), except to

(1) 4 T.C. 293. (2) 6 T.C. 199. (3) 6 T.C. 665.

say that while it is not a decision on the present question, the parties seem to have accepted that the contention of the Appellant here was untenable.

Lord Mackenzie.—I agree with your Lordship. The conclusion to which the Commissioners have come is, in my opinion, correct, although I am not prepared to agree with the observations which were made by them in the statement of the case.

The problem appears to me to be a very simple one. The Appellant here maintains that he cannot be assessed under Schedule D because he is already assessed under Schedule B. Schedule B provides for income arising in respect of the occupation of land. And the simple question is—whether a man who keeps stallions for service purposes derives therefrom an income in respect of the occupation of land. In my opinion he does not, and that irrespective of whether the stallion travels the country or whether the mares are sent in to the farm where the stallion is standing.

No doubt, to a certain degree, the owner of the stallion reaps a benefit from being himself the farmer who produces foggage and, of course, when it comes to be a question of striking a true figure—which was never reached in this case—then he will charge as against the fees earned by the stallion the cost of foggage and so forth; he will treat it just as he would treat any other separate business. But it is a separate business inasmuch as it cannot be brought under the language of the clause dealing with land. It appears to me that it directly falls under the First Case of Schedule D, Rule 1, and that these profits are liable to duty, to be charged "in respect of any trade, manufacture, adventure, or concern of the nature of trade not contained in any other Schedule of this "Act." Therefore, I am of opinion that the conclusion arrived at by the Commissioners is correct.

Lord Skerrington.—Looking to the manner in which this case has been stated, I am not surprised that the Appellant thought it his duty to take an appeal. As soon, however, as one understands what the real question intended to be raised for our consideration is, the answer is at once seen to be a very simple one. I agree with what has been said by your Lordships and have nothing to add.

Mr. Malcolm having appealed, the case came on for hearing in the House of Lords before Lords Buckmaster, Finlay, Dunedin and Atkinson on the 28th January, 1919, when judgment was unanimously given in favour of the Crown, affirming the decision of the Court below, with costs.

JUDGMENT.

Lord Buckmaster.—My Lords, the Appellant in this case is a farmer who has a farm at Dunmore. Upon this farm he has a considerable quantity of stock and horses. Among his animals he possesses a stallion known by the name of "Prince Ossian"; this stallion he has been in the habit of using for the service both of his own mares, six in number, upon the farm and also for the service of the mares of adjacent farmers who desire to get the benefits of the horse. It is not the only stallion which serves his farm; he has another which he also keeps upon the premises. The service of the stallion, "Prince Ossian," apart from its use in connection with the farm, is so much sought for and is of such value, that the Appellant received in the Income Tax year 1915 the gross sum of £290 in respect of its use. The Income Tax Commissioners sought to assess the Appellant to Income Tax upon £250, part of this sum of

£290, and he thereupon required them to state a special case raising the question as to whether or no the use of this stallion in the manner that I have described did or did not render him liable for the tax. That special case, which was stated on the 21st June, 1917, was referred to the Court of Session for decision, and the Judges of the First Division have unanimously decided that the assessment was correct.

My Lords, the question which arises for determination is one which not infrequently occurs in connection with the Income Tax Acts and which in the result always becomes the determination of a simple question of fact. It is well known that by Schedule B of the Income Tax Act of 1853 provision is made for taxation in respect of the occupation of lands in the United Kingdom, and there then follow provisions in Schedule D which secure that further duties under that Schedule are to be exacted in respect either of any trade, adventure or concern in the nature of a trade not contained in any other Schedule, or in the case of duties to be charged in respect of annual profits or gains not falling under any foregoing rule. There can be no question, therefore, that these profits are liable to taxation unless it can be properly asserted that they arise for, and in respect of, the occupation of the lands which the Appellant holds as his farm.

It is quite possible that an entire horse may be used by a farmer in connection with his farm in such a manner that its use outside will, in relation to its use for his own purposes, be so trivial and unimportant that there would be no tax exigible in respect of profits received for its services; or on the other hand it may be that the real use and purpose of the animal and its real advantage to its possessor lie in the moneys which can be obtained by the use of its services outside. My Lords, this question is essentially a question of fact; the Commissioners in this case have decided that the use by the Appellant of this stallion is a use that provides a profit which does not arise in respect of the occupation of his lands. There seems to me no reason whatever why that finding of fact should be investigated more closely. Had it been found in terms it would have been outside the competence of a Court to discuss it further. It is not found in exact language, but it is found inferentially, and the facts to which I have referred—namely, the number of mares on the Appellant's farm, the number of entire horses that he possesses, and the extent of the profits which this horse has earned—are, in my opinion, abundant to justify the conclusion which has been reached.

For these reasons in my opinion this Appeal fails and should be dismissed with costs.

Lord Finlay.—My Lords, I am of the same opinion. Every case of this kind really depends upon questions of fact, and very largely in most cases it resolves itself into a question of degree. I see no reason whatever which would justify us in overruling the conclusion at which the Commissioners have arrived, and it seems to me that the Appeal must be dismissed.

Lord Dunedin.—My Lords, I concur.

Lord Atkinson.—My Lords, I concur.

Questions Put.

That the Interlocutor appealed from be reversed.

The Not Contents have it.

That the Interlocutor appealed from be affirmed and this Appeal dismissed with costs.

The Contents have it.