Friday, November 16.

FIRST DIVISION.

[Exchequer Cause.

LOCKHART *v.* MALCOLM.

Revenue — Income Tax — Stallion's Fees — Mode of Assessment—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 63, *Schedule B, and sec.* 100, *Schedule D, First Case, Rule First, and Sixth Case—Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedules B and D.*

The Income Tax Act 1853 enacts—Section 2—"For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively A, B, C, D, and E, and to be charged under such respective schedules—that is to say," Schedule B, "for or in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof." Schedule D—"For or in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, . . . and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profit or gain."

The above schedules replace Schedules B and D of the Income Tax Act 1843, but the cases and rules applicable to the Schedules B and D of that Act are still operative, and of these the following are the First and Sixth Cases under Schedule D:—First Case—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." Sixth Case—"The duties to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of the other schedules contained in this Act."

The tenant and occupier of a mixed farm of 400 acres at a rent of £580 kept a stallion which he used to serve his own mares on the farm and also to serve mares belonging to others. The stallion was also chosen by a horse society to serve mares belonging to members of that society. The mares were either served at the farm or at other places where the stallion attended under the care of the owner's servants. All the expenses in connection with the stallion were met by its owner, and when it was not standing elsewhere the stallion was kept at the farm with the other horses there. The owner was assessed under Schedule B of the Act of 1853 upon the rental of his farm as tenant thereof, and in the year of assessment his gross earnings from the stallion amounted to £290. The Commissioners for the General Purposes of the Income Tax decided to assess the owner of the stallion upon the profits derived from its ownership under Schedule D of the Act of 1853. *Held*, in a case on appeal against the assessment, that the Commissioners' decision was right, in respect that the possession and use of the stallion was not an essential part of the owner's business as a farmer but was a separate trade coming under Schedule D, First Case, and that it was immaterial whether the mares were served at the farm or elsewhere.

The Income Tax Act 1843 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First and Sixth Cases, and the Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, and Schedule B and D, are quoted *supra in rubric.*

William Taylor Malcolm, farmer, Dunmore Home Farm, Airth, *appellant*, being dissatisfied with an assessment made upon him for the year 1915-16 of £250 in respect of profits of the stallion "Prince Ossian" by the Commissioners for the General Purposes of the Income Tax Acts at Falkirk, took a case in which C. H. Lockhart, Surveyor of Taxes, Stirling, was *respondent.*

The assessment, which was made under the Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Case 6, and the Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D, was as follows:—"W. T. Malcolm—Profits of 'Prince Ossian,' £250."

The Case set forth—"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. 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 the 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.'

The *judgment of the Commissioners* was —"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 and 6 Vict. cap. 35, sec. 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 show 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, 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*, February 20, 1886, 13 R. 590, and *Earl of Derby* v. *Aylmer*, [1915] 3 K.B. 374, 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."

Thereafter the appellant having failed to offer proof of the net earnings of "Prince Ossian," the above assessment was confirmed.

Argued for the appellant — Primarily income tax payable by a farmer as such was regarded as an assessment in respect of the occupation of lands, and was estimated broadly and assessed upon his rental — Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 63, Schedule B; Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule B. That method of assessment still prevailed, though one-third of the rental was adopted as the basis of assessment for a time —Finance Act 1896 (59 and 60 Vict. cap. 28), sec. 26 (1). The full rental was restored later — Finance (No. 2) Act 1915 (5 and 6 Geo. V., cap. 89), sec. 22. But while the rent continued to be taken as the estimate for income tax purposes, the farmer was given the option to treat his farming like any other business, and to make a return of his actual profits, and claim to be taxed under the Act of 1842, section 100, Schedule D, and the Act of 1853, section 2, Schedule D—Customs and Inland Revenue Act 1887 (50 and 51 Vict. cap. 15), sec. 18. The taxes imposed under Schedule B were in respect of the occupation of lands, and a farmer as such might be assessed under that schedule; the taxes imposed by Schedule D were in respect of the profits of a trade or occupation, and Case 6 under the Act of 1842 applied to all such annual profits not otherwise covered. The option to make a return of actual profits for assessment under Schedule D lay entirely with the farmer, and in the present case he had not exercised that option, and accordingly fell to be assessed under Schedule B. The mere fact that the appellant kept a stallion and made profit out of it did not make him a proprietor of a business separate and distinct from farming which was assessable under Schedule B. A farmer might quite well engage in another business besides husbandry, and in respect of that business become assessable under Schedule D—*e.g.*, selling milk—1842 Act, section 100, Schedule D, Third Case (3) —but the keeping of a stallion was quite a common and usual thing on a farm, and was incidental to the husbandry and as much a part of it as the raising of crops,

and accordingly the profits were included in and completely covered by the taxes imposed under Schedule B. To charge the farmer under Schedule B, and in addition in respect of the profits of the stallion under Schedule D, would be to charge him twice in respect of the same thing. Further, the payment for the serving of mares was regarded as a cost incidental to husbandry, and therefore the fee for the service of the mare should also be regarded as a return from husbandry. Here the stud business was merely incidental to the husbandry, and was not so disproportionate to the farming business as to merge the agricultural business in it. The *Earl of Derby* v. *Aylmer*, [1915] 3 K.B. 374, was distinguished, for there the business was admittedly a stud business, not a farm, and chargeable under Schedule D. Further, the method of taking the rental as the estimate of the profits was adopted owing to the difficulty of arriving at the net profits. Here it would be impossible to segregate the net profits of the stallion from the rest of the farming business. Further, if the respondent was right, and a farmer as such was to be assessed under Schedule B for his husbandry, and under Schedule D for the profits of a stallion, if the farmer made a loss on his farm, he could not set off that loss against the profits of the stallion—*Brown* v. *Watt*, 1886, 13 R. 590, 23 S.L.R. 403. The appellant should be assessed only under Schedule B. *The London County Council* v. *The Attorney-General*, [1901] A.C. 26, *per* Lord Macnaghten, at pp. 36 and 37, and Dowell, Income Tax Laws, 7th edn. pp. 181, 184, 237, 300, 310, 444, were referred to.

Argued for the respondent—The appellant was assessable in respect of the profits upon the stallion under Schedule D. The sole question was whether the profits of the stallion were part of the income derived in respect of the occupation of land. That was a question of degree, and it was immaterial whether the mares were served at the farm or not. The selling of surplus products of the farm—*e.g.* milk, butter, and eggs—would not result in an income which was not in respect of the occupation of the land. What was contemplated *primo loco* in Schedule B was the return derived from applying labour to the land and thereafter invoking the aid of nature. But here the stallion was selected by a society, and was available to anyone who paid the fee. Apart from that the stallion might be advertised to stand at a certain place, or even at Dunmore, to serve mares for anyone who paid the fee. That had nothing to do with the occupation of land; it was a distinct business in which the appellant had become a hirer out of a moveable. No doubt the stallion served brood mares on the farm, and was fed there, but when the gross income derived from the stallion amounted to £290 it had ceased to be a mere overflow of surplus from the farming business, and had become a trade in itself. Further, the use of the stallion was not merely occasional, but it was regularly employed. On the same principle a farmer who did occasional carting, or lent a horse to a neighbour occasionally, would be assessable under Schedule B, but when the carting or lending had become regular and considerable, and the horses so used worked only incidentally upon the farm, the farmer had become a jobmaster, and was assessable under Schedule D. The same applied when the lessor of land turned it into a golf course—*Carlisle and Silloth Golf Club* v. *Smith*, [1913] 3 K.B. 75.

At advising—

LORD PRESIDENT—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, as the Commissioners have found, "the employment of a stallion for stud purposes for hire outside of 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 also 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 between 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, &c., 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 the stallion over and above those from his farming, unless he could make out that the keeping of "Prince Ossian" for the purposes in question was an occupancy of the lands for the purposes of husbandry.

Has, then, the keeping of a stallion to serve mares for the public at fees any relation to the occupation of a farm? I think not. It is not the occupation or any part of the occupancy 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 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 keynote 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. 63, 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 concern in the nature of trade not contained in any other schedule of the Act." That would appear comprehensive enough to cover the appellant'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. 26, at p. 35 and 36, that income tax "is a tax on income. It is not meant to be a tax on any-

thing 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. 75—"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. 374, except to 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 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. The 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 grows forage, and, of course, when it comes to the stage of striking the true income—which was never reached in this case—then he will charge as against the fees earned by the stallion the cost of feeding 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 it directly falls under the first case of Schedule D, Case 1, and that these profits are liable to duty, to be charged "in respect of any trade, manufacture, adventure, or concern in 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 insisted upon his appeal. As soon, however, as one understands what is the real question intended to be raised the answer is seen to be a very simple one. I agree with what has been said by your Lordships and have nothing to add.

The Court affirmed the judgment of the Commissioners.

Counsel for the Appellant — Blackburn, K.C. — W. T. Watson. Agents — Guild & Guild, W.S.

Counsel for the Respondent—Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent —Sir Philip J. Hamilton-Grierson, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Monday, December 17.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Parmoor.)

NORTH BRITISH RAILWAY COMPANY *v.* BIRRELL.

(In the Court of Session, March 16, 1917, 54 S.L.R. 339.)

Railway — Statute — Construction — Superfluous Lands—North British Railway Act 1913 (3 *and* 4 *Geo. V, cap. lxxxix*), *sec.* 41 *—Lands Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 120 *and* 121.

The North British Railway Act 1913, sec. 41, enacts—"And whereas lands have from time to time been purchased or acquired by the company, the Forth Bridge Railway Company, and by joint committees incorporated by Act of Parliament or Order on which the company may be represented, adjoining to or near to railways or stations belonging to the company or the Forth Bridge Railway Company, or belonging to or worked or managed by such joint committees, but such lands are not immediately required for the purposes of the undertaking of the company or of the Forth Bridge Railway Company or of such joint committees, as the case may be, and it is expedient that further powers should be conferred upon the company and the Forth Bridge Railway Company, and such joint committees respectively, with respect to such lands: Therefore, notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or in any Act or Order relating to the company or the Forth Bridge Railway Company, or any such joint committees with which that Act is incorporated, the company or the Forth Bridge Railway Company or any such joint committees shall not be required to sell or dispose of any such lands or any lands acquired under the powers of this Act which may not be immediately required for such purposes