NO. 873.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
4TH AND 5TH JUNE, 1931

COURT OF APPEAL—15TH, 18TH AND 19TH JULY, 1932

HOUSE OF LORDS—21ST, 23RD AND 24TH FEBRUARY AND
14TH MARCH, 1933

LORD GLANELY v. WIGHTMAN (H.M. INSPECTOR OF TAXES)[1]

Income Tax—Profits from stallion fees.

The Appellant was the owner of a racing establishment and of a stud farm, comprising arable land, stud paddocks and pasture land, at which he maintained a stock of selected horses and carried on breeding operations. Horses bred from the Appellant's stock were sent to his training stables and raced, and those which were considered satisfactory were subsequently sent to the stud. Additions to the stock of horses at the stud farm were made, by purchase, from time to time and unsatisfactory horses were sold.

Mares belonging to other owners were served by the Appellant's stallions at his stud farm in return for fees, and, on occasions, the services of the Appellant's stallions to other mares were exchanged for the services of other stallions to the Appellant's mares.

The Appellant was assessed to Income Tax under Schedule D in respect of profits from stallion fees. He appealed to the Special Commissioners contending:

(a) that any profit derived from stallion fees was covered by the Schedule B assessment on the stud farm;

(b) alternatively, that the stallion fees were not a separate subject of assessment, but were receipts of the trading undertaking of breeding and racing horses, in which, as a whole, no profit had been made;

(c) that if the stallion fees were assessable as a separate item, a deduction should be allowed of the cost to the Appellant of the service of his mares by the stallions of other owners, and there should not be included in the assessment the value of the services of the Appellant's stallions which were exchanged for the services of outside stallions.

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(1) Reported (K.B.D.) 145 L.T. 446, (C.A.) 48 T.L.R. 644 and (H.L.) 49 .L.R. 356.

The Special Commissioners rejected the Appellant's contentions and upheld the assessments in principle.

Held, *that the occupation of the land being for the purpose of a stud farm, the use of the stallions upon the farm was not separable from the purpose of the occupation and the fees for their services were not taxable under Schedule D.*

Malcolm *v*. Lockhart (7 T.C. 99) distinguished.

CASE

stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on the 24th and 29th October, 1929, Lord Glanely, hereinafter called the Appellant, appealed against an assessment under Schedule D of the Income Tax Act, 1918, for the year ended the 5th April, 1922, in the sum of £15,000, and two similar assessments for the year ended the 5th April, 1927, in the sums of £2,000 and £13,000, respectively. These assessments were made upon the Appellant in respect of profits derived from stallion fees as hereinafter set out.

2. The Appellant has had a very successful business career, having been prominently associated with big business interests (chiefly shipping) in South Wales.

In 1910, he bought his first racehorse, which he raced and sent to the stud. In the course of the next few years he acquired further horses. In 1915, he bought a stud farm of his own at Danebury in Hampshire. He kept his racehorses and brood mares at the farm at Danebury and at one time had three or four stallions standing there, and up to 23 or 24 brood mares.

3. In 1917, the Appellant bought a yearling, called "Grand "Parade", which won the Derby in 1919. At the end of the 1919 racing season "Grand Parade" was sent to the stud. As the stud farm at Danebury was not big enough to send "Grand "Parade" to stand at stud there, and no additional land could be bought in the neighbourhood, the Appellant decided to acquire a stud farm at Newmarket, which was a better breeding place than Danebury, since he had got everything together there as one establishment; there was more room, and he wanted to be on the spot himself.

4. Accordingly, in 1919, the Appellant acquired Exning House, Newmarket, and the stud farm attached to it. He subsequently acquired in 1923 an adjoining stud farm called "North End".

The total area of the Exning and North End properties is about 888 acres. This area is divided approximately as follows :—

House, gardens and park	86 acres.
Stud paddocks...	284¾ ,,
Agricultural pasture land	59½ ,,
Arable land	357¾ ,,
Woodland belts and waste land	100 ,,
	888 acres.

There are about 40 paddocks in all on the estate and about 105 horse boxes. The paddocks have a double belt of trees round them to shelter the horses, are enclosed in post and rail fences, with the exception of the paddock in which " Grand Parade " is kept, which has a close boarded fence all round, and water is laid on to every paddock. The horses at the farm are run on these paddocks and graze there until the paddocks become stale or horse-sick when other paddocks are used. The paddocks which have become stale are then grazed by bullocks owned by the Appellant. The paddocks are limed every two years. As many bullocks are run on the paddocks as horses.

The boxes are up-to-date buildings of concrete and wood and some are lit by gas, others by electricity.

The stud farm is laid out and run in a similar way to other stud farms at Newmarket.

The produce grown on the arable land is used for the most part on the stud farm and in the racing stables. The wheat grown is sold, but the straw is retained for conversion into manure by the bullocks above referred to and by pigs kept mainly for this purpose. This manure is used for dressing the paddocks and for the growing of crops on the farm. It is not possible, on this property, to feed the beasts and the bloodstock entirely on the produce of the arable land, and a considerable amount is purchased. The bullocks are fattened off and sold in the winter.

The Appellant was assessed under Schedule B in 1921–22 on double annual value in respect of the land used for agricultural purposes and on single annual value in respect of the land used for stud and racing purposes. In 1922–23 and subsequent years, the Schedule B assessments were on single and one-third annual value, respectively.

A copy, marked " A ", of a plan of the Exning property is attached hereto and forms part of this Case[1].

5. In addition to the Exning property, the Appellant bought at Newmarket, about 1919, the Grange racing establishment and the Grange stud farm. The Grange stud farm was sold in 1923, when

(1) Not included in the present print.

the North End Stud Farm was acquired. The Danebury property was retained and used as a stud farm until 1925, when it was sold. The total capital outlay on the Exning property, with the bloodstock and everything thereon, is in the neighbourhood of £250,000.

6. The number of staff employed at Danebury and Exning in 1920 was 42, and in 1925 was 48, while the staff at Exning, in 1926 after Danebury was sold, was 41. In addition, between 17 and 30 men were employed at the Grange racing establishment. The staff is interchangeable as between the stables and the stud farm.

A copy, marked "B", of the details of the staff is annexed hereto and forms part of this Case(1).

The Appellant also employs a trainer, a manager and a secretary. The trainer, who is also a veterinary surgeon, selects with the Appellant the animals that he considers are good for racing and breeding from. The selected animals are then sent to the racing stables. Those that after trial on the racecourse are found to be superior and look like making good brood mares go back to the stud. The manager has general superintendence over the whole establishment. He works in conjunction with the trainer and has authority over all the servants on the staff. The secretary has charge of the various books of account, as hereafter stated.

7. The numbers of the stock of horses owned by the Appellant at the end of each of the four years ended the 31st March, 1926, were as follows :—

	31st March, 1923.	31st March, 1924.	31st March, 1925.	31st March, 1926.
Stallions	6	5	6	4
Mares	53	56	63	51
Foals	29	21	36	33
Yearlings	24	27	19	31
Horses in training ...	30	42	47	46
Total ...	142	151	171	165

8. The Appellant's stallions, in addition to serving mares of his own, also served the mares of other owners from other parts of the country, and from Belgium, France and Germany.

The following table shows the number of services of the Appellant's stallions to his own mares and to those of other owners, with the fees charged for the years from 1920 to 1927, inclusive :—

(1) Not included in the present print.

	1920			1921			1922			1923			1924			1925			1926			1927		
	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee	Own	Visiting	Fee
"He"	13	9	£98	11	13	£99	9	21	£99	7	7	£99	4	11	£99	3	13	£99	—	—	—	—	—	—
"Skyrocket" ...	7	22	£48	10	33	£99	11	35	£200	7	27	£200	11	18	£200	10	8	£200	9	17	£9 19	9	31	£9 19
"Grand Parade"	14	8	400 gns.	15	22	400 gns.	17	25	400 gns.	11	14	400 gns.	13	29	400 gns.	14	28	400 gns.	17	20	400 gns.	18	18	400 gns.
"Westward Ho"	—	—	—	—	—	—	—	—	—	10	3	£48	10	21	£49	10	39	£49	—	—	—	—	—	—
"Blue Ensign" ...	—	—	—	—	—	—	—	—	—	7	4	19 gns.	10	24	19 gns.	21	28	£24	13	23	£24	10	29	£24
"Treclare" ...	3	6	19 gns.	5	11	19 gns.	3	6	19 gns.	1	6	19 gns.	—	—	—	—	—	—	—	—	—	—	—	—

Services are sometimes given to other owners' mares in exchange for the services of other owners' stallions to the Appellant's mares and no fee is given or received.

The following were the service fees received by the Appellant in the respective years :—

1918–19	... ...	£18 18*s*. 0*d*.
1919–20	... ...	£66 3*s*. 0*d*.
1920–21	... ...	£4,011 14*s*. 0*d*.
1923–24	... ...	£11,370 9*s*. 0*d*.
1924–25	... ...	£15,232 4*s*. 0*d*.
1925–26	... ...	£18,586 19*s*. 0*d*.

These figures do not include the value of services exchanged mentioned above.

The figures for the years 1921–22, 1922–23 and 1926–27 were not in evidence before us.

The other owners' mares were served at the Appellant's stud farms. These mares always arrived at the farm some time before service and remained there for about four months in all. They generally are sent in foal so that they may be served on the Appellant's farm after foaling. Being animals of value, they need careful attention while they are under the Appellant's care. In addition to the service fees, the Appellant receives payment for the keep of the mares during the period that they were at his stud farm.

None of the stallions for which fees were received were bred on the Appellant's stud farms during the years under review, though he was always hoping that he would be successful in breeding such an animal. In fact, one stallion bred on the Appellant's stud farm had been sent to the stud in 1929.

9. For the purpose of racing and also of getting suitable blood in his stud, the Appellant buys horses from time to time. Of the mares, most are bought as yearlings. A few of them are bought as brood mares when in foal. The stallions are mostly bought as yearlings.

The horses bought as yearlings, as well as the suitable horses bred by the Appellant, are in due course sent to the Appellant's training stables and raced. Those horses found to be satisfactory on the racecourse and which are otherwise suitable are subsequently sent to the stud. In buying mares, only those are bought which are of blood suitable for the Appellant's stallions.

Mares that for any reason are not fit or are no longer fit for the Appellant's stud, and unsuitable yearlings bred by him, are sold either by auction or privately.

The purchases and sales of bloodstock in the years 1923, 1924 and 1925 were :—

1923	...	Bought 16	...	Sold 18
1924	...	,, 10	...	,, 23
1925	...	,, 17	...	,, 43

The Appellant races on a fairly large scale and makes about 300 entries a year for races, though not all the horses entered race.

A list, marked " C ", of the bloodstocks bought and sold in the years 1923, 1924 and 1925 is annexed hereto and forms part of this Case(1).

10. The stallions, with the fee charged for their service, are advertised in the " Racing Calendar " and the sporting papers. The Appellant also issues a card each year giving the particulars of his stallions available for the service of other owners' mares and of his brood mares, horses in training, yearlings and foals.

Copies, marked " D1 ", " D2 " and " D3 ", of the cards issued for the seasons of 1923, 1924 and 1925 are annexed hereto and form part of this Case(1).

11. The books and accounts kept by the Appellant's secretary are as follows :—

A journal is kept in which are entered all receipts and all expenditure on account of the stud farm, racing, training, household, gardens, parks and game. A cash book is also kept. All receipts were paid into the bank account at Newmarket and all outgoings, including household, etc., expenses, were paid out of that account and at the end of the year the Appellant sent one cheque from his private account at Cardiff to make good the deficiency. Ordinarily, each year a summarised account of receipts and expenditure was prepared covering all these items. The Appellant stated that such an account was sent to him each year. The books and accounts are audited each year.

12. Brought into these accounts, among the receipts, are the racing winnings, the sales of the blood stock, the service fees and the sums received for the keep of the other owners' mares and the sales of farm animals and produce. The expenditure consists of the entry fees for races, forfeits, jockeys' expenses, carriage of horses, purchases of bloodstock, cost of maintenance of the stud farm and cost of training the horses.

Although in the Appellant's own books there is no valuation of the bloodstock at the beginning and end of each year, in the accounts attached to this Case the following system had been adopted. A list was made of the horses owned by the Appellant at the material dates and against each horse is put its purchase price, or, if bred by the Appellant, the stud fee for the service by the stallion and an approximate estimate added for the keep of the dam and foal for one year. In the case of bloodstock, the value can only be accurately ascertained by a sale at public auction.

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(1) Not included in the present print.

The accounts for the three years to the 31st March, 1926, showed the following results :—

For the year to 31st March, 1924, a loss of £19,419
,, ,, ,, , 1925, ,, £7,207
,, ,, ,, , 1926, ,, £18,534

With the exception of the year 1919, when Grand Parade won the Derby, the Appellant had always made a heavy loss on his breeding and racing activities. Copies, marked " E1 ", " E2 " and " E3 ", of the accounts for the three years to the 31st March, 1926, are annexed hereto and form part of this Case(1).

13. The following further facts were admitted or proved in evidence at the hearing :—

(*a*) Success in breeding thoroughbred horses could only be attained by submitting them to the test of the racecourse in order to find out whether they possessed the necessary speed and stamina. The test was essential to ascertain the value of both stallions and mares for producing high-class progeny and it was only by the successful racing of the progeny of a stallion that the fee for his services could be maintained. In some instances, the owner of the stud did not race his horses himself, but the capabilities of the horses bred by him were tested on the racecourse by the purchasers. The method followed by the Appellant is the one usually adopted.

(*b*) It is not conducive to successful breeding to send a mare every year to the same stallion and better results may be obtained by sending the mare to different stallions in different years. Further, in course of time, after the fillies, bred at the breeding stud, have finished their racing career, they return to the breeding stud, but it sometimes happens that, owing to close relationship to the stud stallions, they cannot be mated with any of them for fear of the ill-effects of inbreeding. Consequently, it was sometimes necessary to procure for the Appellant's mares the services of a stallion or stallions belonging to other owners, for which fees were paid, or for which the services of stallions to the Appellant were given in exchange. In these cases, the Appellant, in addition to the stallion's fees, pays for the keep of his mares at the stud visited and the necessary travelling expenses.

(*c*) Thoroughbred stallions must stand at a properly equipped stud farm and it is not practicable to send them about the country to serve other owners' mares. The owner of stallions must therefore either occupy sufficient land

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(1) Not included in the present print.

to accommodate the stallions and the visiting mares, or else the stallions must stand at some other similarly equipped breeding establishment.

In the case of a stud with 40 visiting mares, a large number of paddocks is required for the accommodation of the visiting mares and the owners' own mares, and a number of spare paddocks and loose boxes is also needed. After foaling, mares must not be crowded and only two or three mares can be put at the same times into a six or eight acre paddock.

It is usual to find a high-class stud farm with the paddocks divided by fences, lined by trees, with water laid on, and equipped with loose boxes lit with electric light.

(*d*) A mature stallion should serve 30 to 40 mares each season, and the Appellant did not have sufficient mares, especially when regard is had to the evidence set out in (*b*) above, to keep his stallions fully employed. He was therefore obliged to let their services to the owners of other brood mares. Apart from keeping the stallion in health, the obtaining of nominations from first class mares is the best way of proving the value of the stallion as the sire of good progeny.

(*e*) The Appellant did not expect to make a profit out of racing alone, but hoped he might make a profit out of the breeding and racing establishment as a whole. This might be possible if he obtained at least one more really first class stallion commanding a fee of 400 guineas. He had always run the whole establishment on what he considered to be commercial lines.

14. It was contended on behalf of the Appellant :

(1) that any profit derived by him from stallion fees was covered by the assessment under Schedule B of the Income Tax Act, 1918, upon the lands in his occupation and that the assessments should be discharged;

(2) alternatively, that the stallion fees cannot be treated as a separate subject of assessment, but must be treated as a part of the composite undertaking of breeding and racing horses, which was a concern in the nature of trade, and that, inasmuch as there was a loss in this trade, the assessments should be discharged;

(3) that if the stallion fees were assessable to Income Tax as a separate item, there should be deducted therefrom, for the purpose of computing the assessable profit, the cost to the Appellant of the service of his own mares by the

stallions of other owners and the keep of his mares while at the studs visited and the travelling expenses, and that, in the case of the exchange with other owners of the services of stallions, the value of the services of the Appellant's stallions should not be included in his receipts and that the assessments should be amended accordingly.

15. It was contended on behalf of the Crown:

(1) that the profit derived by the Appellant from stallion fees was not covered by the Schedule B assessment on the land in his occupation;

(2) that breeding and racing were not carried on by the Appellant on commercial principles, and were not a trade or concern in the nature of trade;

(3) that the letting out of the services of the stallions was carried on on commercial lines and that the profits derived therefrom were separable from the enterprise as a whole and were profits of trade, adventure or concern in the nature of trade, assessable under Case I of Schedule D or, alternatively, were other annual profits assessable under Case VI;

(4) that no deduction was admissible for the cost of the service of the Appellant's mares by the stallions of other owners;

(5) that the value of the services of his stallions, which were exchanged for the service of the stallions of other owners, should be included in his receipts in respect of stallion fees;

(6) that the assessments were correct in principle and should be confirmed.

16. Having considered the evidence and arguments addressed to us, we gave the following decision:—

"(1) The Appellant's first contention is that the stallion fees "are covered by the assessment under Schedule B on "the Exning estate.

"The identical point was raised in the case of "*McLaughlin* v. *Mrs. Blanche Bailey*(1) and decided "against the taxpayer. This decision is supported by "the observations of Lord Buckmaster in the case of "*Malcolm* v. *Lockhart*(2), in which he contrasts the use "of a horse in connection with the farm with its use "outside, the phrase 'use outside' being clearly used "to mean 'not in connection with the farm.'"

(1) 7 T.C. 508. (2) 7 T.C. 99 at p. 106.

"We hold that we are bound by the decision in the "case of *McLaughlin* v. *Mrs. Blanche Bailey*, the facts "in this case not being sufficiently distinguishable to "enable us to depart from the decision in the *Bailey* "case.

"(2) The second contention is that the whole enterprise consisting of breeding and racing establishments and "earning outside fees is a single commercial enterprise "and that the results of the whole enterprise must be "considered for the purpose of assessment under "Schedule D. Having considered the facts we are "unable to accept this view.

"The Appellant was clearly not breeding horses for "sale, as admittedly in the main he only sold those "which were useless for his own stud. Racing in itself "is not an enterprise of a commercial nature. The "only portion of the enterprise run on a commercial "basis was the letting out of the stallions to earn fees. "The absence of any proper accounts of the enterprise "and the remote prospect of getting any substantial "return on the capital sunk in the enterprise, or even "of making a profit at all, clearly point to the enterprise as a whole not being a commercial one.

"We hold, therefore, that the letting out of the stallions for fees was separable from the rest of the enterprise, and that the profit therefrom is assessable under "Schedule D.

"(3) The third contention was that there should be deducted "from the stallion fees earned the amount of the fees "paid for the service of the Appellant's mares by outside stallions.

"We are unable to see that there is any connection "between the expenditure on the service of the Appellant's mares by outside stallions and the earning of "the stallion fees assessed, and we hold that this "expenditure is not wholly and exclusively laid out for "the purpose of earning those fees.

"We accordingly uphold the assessments in principle."

We also decided that the value of the services of the Appellant's stallions, which were exchanged for the services of the stallions of other owners, must be added to the stallion fees received for the purpose of computing the assessable profit.

17. The Appellant, immediately after the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a

Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

J. JACOB, H. M. SANDERS, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
5th November, 1930.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 4th and 5th June, 1931, and on the latter date judgment was given in favour of the Crown, with costs.

Sir J. Simon, K.C., Mr. W. Greene, K.C., and Mr. C. L. King appeared as Counsel for the Appellant and the Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—In this case the Appellant has been assessed in respect of sums received as fees for the service of his stallions to mares not his own, under the circumstances set forth in the Case. I assume that all proper deductions have been made in the way of expenses and charges which he had to pay in order to earn these fees; that is not the question before me. The question is whether, in the first place, he is not protected from this taxation by reason of the circumstance that the stud farm on which these stallions are kept has already been assessed under Schedule B—whether that is not the end of it. He has been assessed in addition under Schedule D in respect of these profits. That is the first question.

Schedule B is the Schedule which provides for taxation in respect of the occupation of land. That is not confined, as has been pointed out, to land used for the purposes of husbandry. It strikes, in the first place, at the occupation of all land, but the exception under the first Rule takes out of it warehouses and other buildings occupied for the purpose of carrying on a trade or profession. If you have a trade or profession carried on not in a warehouse or building, I apprehend that the land is subject to Schedule B tax and to Schedule D tax in addition.

The difficult question that arises in this case is whether there is a Schedule D trade superimposed upon the occupation, whether things are done and operations are conducted which constitute the carrying on of a trade in addition to those acts and operations which constitute the occupation. You may occupy land without doing

(Rowlatt, J.)

something on it, and certainly you may do a certain number of things on it, and then, going a little further, you may occupy it, for instance, merely to cultivate it. The case about the potatoes[1] is clear enough, that if you occupy it by raising produce from the soil, you do not further occupy it for the purpose of the same trade by raising that produce from the soil. So much is clear. It has always seemed to me extremely difficult to know exactly on what principle one is to say that you get a trade supervening upon a mere occupation under Schedule B. Of course, nothing is simpler than to contemplate, in the case of land, the land being tilled entirely from its own resources and sowed from its own resources and manured from its own resources and the produce disposed of. But those cases do not occur in practice. You buy manure to put on the land, you buy seed to put on the land, and yet you are only occupying the land, you are not doing anything more than occupying the land, although you are bringing in outside factors which contribute to the increase which you get while you are on the land. Then you buy food for your beasts off the land, but that does not make you do more than occupy the land—feeding your beasts which are upon the land, if you buy some food from outside. Of course there comes a point—I am thinking of the chicken case[2]—where, if you get so many creatures upon the spot and buy all the food outside, you may come to the point where you are carrying on something by way of trade and not merely occupying the land. It is very difficult to fix a limit, but one can see that the position does change colour in time.

Then, with regard to what you get out of the land, I have not heard it said—Mr. Hills rather hinted at it—that if by great skill and expenditure and industry and enterprise you manage to get phenomenal results out of the land, we will say, merely by tilling, that takes you out of mere occupation and brings you into a trade. If a man raises pedigree stock or fancy seeds, perhaps bulbs and sweet peas that sell for guineas each individual pea or bulb, it might be said that, merely by reason of his high degree of enterprise in and upon the land, he would thereby come to carry on a trade. I should not like to say that. I should be rather surprised if it was so merely on that account. But when you get to a question of a stud farm, perhaps a rather different question arises. Mr. Hills says that it is not to be assumed that the carrying on of a stud farm is merely occupying the land. He says that it may be that the degree of activity, the amount of skill, the number of people, the elaborateness of all the proceedings that take place upon a stud farm, show that what you are really doing is conducting an enterprise there which is not merely occupying the land. Of course, you have to be upon it, but it is not merely occupying the land,

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(1) Back v. Daniels, 9 T.C. 183.
(2) Jones v. Nuttall, 10 T.C. 346.

(Rowlatt, J.)

it has become a trade or venture of that kind as opposed to occupation of land. I do not know about that, but I do feel that at any rate it is decided for all the purposes of to-day, and I should say for good and all, because it has been so held in the House of Lords(1), that, at any rate as regards the earnings of entire animals that belong to the farm but are used to earn fees by serving outside females, that is a trade, superimposed upon the mere occupation of land, assessable under Schedule D, subject, of course, to this, that it must be a substantially separable part of the activities of the occupier of the land. Because the mere casual use of the surplus power of the entire animal kept by a farmer to accommodate his neighbours who do not keep any entire animals but only keep two or three female animals, would disappear under the principle of *de minimis non curat lex*; it is not a matter of substance. But where there is in substance a practice of earning fees by outside use—that is to say, by the use with outside females of entire animals on a farm—it has been decided that that is a trade assessable under Schedule D.

I think that in this case the materials certainly are ample to justify the Commissioners in having held, and certainly enough to prevent me being able to interfere with them having held, that here we have a separate enterprise in the way of trade, consisting in the use of these animals in this way.

The next question is this. Assume that to be so—I am not taking the points in Sir John Simon's order—are they to be taken by themselves or are they to be taken with the other side of the stud farm so far as its breeding relations with the outside world are concerned, namely, the service of his mares by outside stallions? That is what is raised thirdly. Then a question wider still is: is the whole thing—all his activities, including racing, which must be done in order to prove the value of his stock—is all that expense to be brought in, too? It does strike me as rather curious that the earnings of stallions should be treated apart from the question of the mares. He has stallions and he has mares. The mares are united with outside stallions, and the stallions are united with outside mares. The mares yield him foals which he can sell and which he does sell for money or money's worth. The stallions yield him fees, moneys directly. I am bound to say it puzzles me; why is one a separate trade, and not the other? I think it was so considered in the Irish case(2), and it may be that the reason is that the progeny is regarded as the increase of the female and that the male is disregarded, and it is merely a question of earning the fee in the case of the male. Anyhow, I think I am bound to look at it in that way. I do not think I can confuse the two together and say that, as a matter of law, the cost of having the mares served outside should be set against the earnings of the stallions serving outside.

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(1) Malcolm *v.* Lockhart, 7 T.C. 99. (2) McLaughlin *v.* Bailey, 7 T.C. 508.

(Rowlatt, J.)

As regards the still wider question, I do not think I can have any doubt. The Commissioners, of course, have found against it and I do not think I can possibly upset them; I do not see how very well they could have found the other way—in spite of the fact that you must have racing, the animals must be raced, I cannot see how, once you reach the point that the stallions' fees are assessable subject matter, you can possibly bring in all the expenses of the racing, and, as I have already said, not the expenses of the general breeding, in order to make one whole of it.

I think the Commissioners' findings in answers (2) and (3) cannot be disturbed. Under these circumstances, I cannot afford this Appellant any relief and I must dismiss the appeal, with costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 15th, 18th and 19th July, 1932, and on the last-mentioned date judgment was given in favour of the Crown, with costs (Romer, *L.J.*, dissenting), confirming the decision of the Court below.

Mr. W. Greene, K.C., and Mr. C. L. King appeared as Counsel for the Appellant and the Attorney-General (Sir T. W. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Hanworth, M.R.—This is an appeal by Lord Glanely, whom I will call, as in the Case, the Appellant, against an assessment under Schedule D of the Income Tax Act for the year ended 5th April, 1922, in the sum of £15,000, and two similar assessments for the year ended 5th April, 1927. Those are the assessments that are in question. Those assessments were made upon the Appellant in respect of profits derived from stallion fees.

It appears that Lord Glanely, as set out in the Case, has a very large stud farm, and is much engaged in the breeding of horses and in the racing of horses. He holds altogether a total area of about 888 acres; that is partly surrounding and in the neighbourhood of and close to Exning House, Newmarket. The house, gardens and park comprise 86 acres; the stud paddocks about 285 acres; there is agricultural pasture land of about 60 acres; the arable land is 357 acres; and woodland belts and waste land account for about 100 acres.

He has several stallions and we have got the cards which are issued in reference to the services which the stallions can render, and there are five stallions mentioned on the cards. The particular one which stands out from the others is a horse called "Grand Parade" and that horse won the Derby shortly after he had

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been acquired by Lord Glanely; he won the Derby in 1919. At the end of that same season he was sent to the stud. I do not want to go through all the facts which are set out in the Case, although I think they are all important, but it appears that this establishment is run with a very large number of persons employed upon it. The Appellant employs a trainer, a manager and a secretary. There are a number of persons (I think about forty-two) employed, some in looking after the horses, some in taking care of the husbandry of the land and the like; but he makes a loss generally upon what I may call the user of the land, and he " did not expect to make a profit "—we are told in paragraph 13 (*e*)—" out of racing alone, but hoped he " might make a profit out of the breeding and racing establishment " as a whole. This might be possible if he obtained at least one " more really first class stallion commanding a fee of 400 guineas. " He had always run the whole establishment on what he considered " to be commercial lines." Minded, therefore, to adhere to commercial lines, he saw the opportunity of getting rid of a loss, as he thought, by this enterprise of a stallion which commanded a high fee.

In reference to the user of these stallions for their proper purposes, it appears, and we are told in the Case this, that you must have the opportunity of giving, I may call it, hospitality to the mares who are coming to the sire, because they require to be there some time to settle down quietly both before and after they have been mated, and for five stallions here, and perhaps for " Grand Parade " in particular, it is necessary to have large accommodation, and that large accommodation is provided by the stud paddocks which I have already said take up some 285 acres. This enterprise, Lord Glanely suggests, is one really to be treated as a whole, but we have got to deal with the question of whether or not these assessments under Schedule D stand good. I merely mention it because it is stated on page 3 that, in 1922–23 and subsequent years, Schedule B assessments were made in respect of some portion (I do not care what portion) of the land; in other words, there was some portion that fell within the ambit of Schedule B.

It is said that the whole of the profits that are now made the subject of Schedule D ought really to be treated as arising under Schedule B and not under Schedule D, because, it is said, the stallion renders services to mares and receives the fees, but it is necessary to keep that stallion, highly bred as he is, at his own home, and not to send him, as a shire horse often is, to various places in the country; but, in addition to that, you must provide accommodation for the mares at the home where the stallion stands; you must provide accommodation for the mares who are his visitors.

Now I go back to the principles of the Income Tax Act. Under Section 1, in such years as there is a charge to Income Tax,

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there is imposed a charge by virtue of Section 1, which brings into operation the whole scheme of the Income Tax Acts : " Where " any Act enacts that income tax shall be charged for any year at " any rate, the tax at that rate shall be charged for that year in " respect of all property, profits or gains respectively described or " comprised in the Schedules marked A, B, C, D, and E." There is the charge to tax. It is on all property, profits and gains; but the mode of the assessment is distributed to those several Schedules.

It is important to bear the distinction between those Schedules in mind. Tax under Schedule A is charged " in respect of the " property in all lands, tenements, hereditaments " according to the annual value thereof. Tax under Schedule B is " in respect of the " occupation of all lands, tenements, hereditaments, and heritages in " the United Kingdom." Tax under Schedule C is " in respect of all " profits arising from interest, annuities, dividends, and shares of " annuities payable out of any public revenue." Tax under Schedule D is " in respect of the annual profits or gains arising or " accruing to any person . . . . from any kind of property what- " ever, whether situate in the United Kingdom or elsewhere," and Schedule E is " in respect of every public office or employment " of profit."

A short examination of those Schedules shows that Schedule D is the most comprehensive. As I have pointed out, it deals with and charges tax on " The annual profits or gains arising . . . . from " any kind of property whatever," and also on any profits or gains arising from any trade, profession or employment. When one comes to look at the Cases, which is the subdivision of the Schedule, one finds that Case I embraces " Tax in respect of any trade not " contained in any other Schedule," and Case VI imposes " Tax in " respect of any annual profits or gains not falling under any of " the foregoing Cases, and not charged by virtue of any other " Schedule." It contains words, therefore, which have often been called the sweeping-up words, and embraces within it all profits or gains arising from property or any trade, unless that property or trade has been dealt with under another Schedule, and not charged by virtue of any other Schedule. It appears to me, therefore, that where you have an activity which results in profits or gains, it would *prima facie* fall under Schedule D, unless you can say that it is specially provided for in the other Schedules. That is obviously so, and easily severable in the matter of Schedules C and E—the receipts that are referred to in Schedule C from interest and annuities payable out of any public revenue, and Schedule E, the Schedule which deals with offices and employments. Then you come to Schedule A, which deals with the ownership of property, and Schedule B; and the words of Schedule B must be considered very carefully. Historically, of course, they were introduced for the purpose of meeting the cases of the farmers who were taxed

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under it on a basis of their rental value, because the practice was in those days that they did not keep accounts, and it would be very difficult indeed, and very burdensome on the farmers, to estimate according to profits, there being no data on which they could be discovered. Schedule B is this : " in respect of the occupation " of lands and tenements; and the Rules relating to it show that it is to be charged in respect of the occupation (the words are in the Rule) " for the purposes of husbandry."

When one approaches this case one has to look at what the facts are. The Commissioners have segregated the profits that have been earned in respect of the standing of these stallions and the fees earned by them and paid in respect of services rendered to the mares that come from outside; they have segregated that as an enterprise or business which falls within Schedule D and is not taken out of Schedule D by virtue of Schedule B. What are the facts exactly looked at from that point of view? Can it be said that those fees were earned in consequence of the occupation of the land? Was it due to what was being carried on upon the land that those fees were earned?

I have pointed out that in respect of these stallions there is a certain amount of advertisement provided to show that those persons who have got brood mares of the quality suitable are invited to bring their mares to the stallion, and the stallion would thus earn the fees. Page 9 says this : " Thoroughbred stallions must stand at a " properly equipped stud farm and it is not practicable to send " them about the country to serve other owners' mares. The " owner of stallions must therefore either occupy sufficient land " to accommodate the stallions and the visiting mares, or else the " stallions must stand at some other similarly equipped breeding " establishment." Therefore if you are going to get the fees that the stallion earns you have got to provide a large space for the accommodation of the mares. There are many industries which are carried on and require a greater or less amount of space to be successful. On page 9 is the passage I have already quoted, that he thought it might be possible to bring in a really first class stallion to offset the losses that otherwise might occur; and on page 9 we have this, that there was the letting out of stallions which was a portion of the enterprise which was run on this place at Exning.

It appears to me that upon those facts there was evidence before the Commissioners which would enable them to say that the stallion, so to speak, was not an incident of the occupation of the land for husbandry, but that the land was, if I may so use the phrase, appurtenant to the stallion. The land had been acquired and was used as an adjunct to the business of standing the stallion. The Commissioners, after taking these facts into their consideration, have held this—the Appellant's contention is that the stallion fees are covered by the assessment under Schedule B—and they hold

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that they are bound by the decision of *McLaughlin* v. *Bailey*[1], and that they are unable to differ from it; in other words, that there was an independent enterprise carried on in respect of the stallion which was not merged in the industry of husbandry carried on upon the land; and they hold that " the only portion of the enterprise " run on a commercial basis was the letting out of the stallions to " earn fees;" and they " hold, therefore, that the letting out of " the stallions for fees was separable from the rest of the enterprise, " and that the profit therefrom is assessable under Schedule D."

The Appellant contends that that is not so. Really, he says, there is no principle under which you can sever this enterprise from what is carried on upon the land; the land was necessarily occupied when you had got the stallion, and the activities of the stallion are really merged in the occupation of the land and, if there are any cases, those cases have not determined that point; it is therefore wrong to hold that there is to be an assessment under Schedule D; all these profits, or so-called profits, from the stallion fall within the proper industry or husbandry carried on upon the land. Secondly, it is said: " But even if you do sever them, still you " have not got the profits on the right basis, because you ought to " take into account a great many other matters such as are set out " in the Case and in the contentions, which will show that the " figure in respect of which the assessment is made is far too " large."

Those two points really run very much the one into the other. It is by no means easy to keep them apart, because the second question in its facts affords you some test as to the first point, as to whether there is a severable enterprise taxable under Schedule D.

The Commissioners, as I have said, upheld the assessment. Mr. Justice Rowlatt affirmed the decision of the Commissioners, and he said this: there is an industry of standing entire animals and it is quite true that sometimes with the case of a bull, and so on, it may be that the bull is kept for the purposes of the farm. If he does serve a cow that is sent to him it is so small a matter that you may dismiss it with *de minimis non curat lex*[2]; " But " where there is in substance a practice of earning fees by outside " use—that is to say, by the use with outside females of entire " animals on a farm—it has been decided that is a trade assessable " under Schedule D. I think that in this case the materials cer- " tainly are ample to justify the Commissioners in having held, " and certainly enough to prevent me being able to interfere with " them having held, that here we have a separate enterprise in " the way of trade, consisting in the use of these animals in this " way," and he holds " I think I am bound to look at it in that " way," and he comes to the conclusion therefore that the Commissioners were right.

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[1] 7 T.C. 508. [2] See page 647 *ante*.

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I have come to the conclusion that Mr. Justice Rowlatt's decision ought to be upheld. I think that this question, difficult though it may be, is one of fact. I think that it is possible to sever the enterprise of standing the stallions at that farm and earning fees from outside mares, and to treat them as severable and independent of what might be called the occupation of land as intended by Schedule B.

Now I go back to what I think is the case which helps one as much as any on this case, *Carlisle and Silloth Golf Club* v. *Smith*(1). That was a case in which there was a members' golf club and they allowed strangers to come and play upon that golf course and received fees from them. It is quite true that they were not discussing the question of whether or not you were to segregate one portion into Schedule A or Schedule B or Schedule D, but what was being considered is this: where you have got land, as they had there the expanse of the golf course, was it a case in which you could find something that was an independent business or enterprise? Mr. Justice Hamilton, as Lord Sumner then was, says this(2): " The first question . . . . is whether under the circum-" stances . . . . the Club does carry on any concern or business " in respect of which it receives remuneration that is assessable. " Whether there are any profits or gains derived from that business " is another matter, but the first question is whether it can be said " to carry on something that can be called a business for the special " purposes of income tax duty or not, and I think on the whole I " must decide that it does."—it is a case where it received revenue from strangers—" this aggregate of gentlemen here . . . . treated " as one person, have annexed to their club an enterprise which is " separate from it, and which results in pecuniary receipts to them-" selves." That was affirmed in the Court of Appeal.

It is quite true that you may have a business attached to the occupation of land; the business of a farmer is to sell his produce and if he only sells his produce he still remains chargeable under Schedule B and not severally under Schedule D. The case of *Back* v. *Daniels*(3) illustrates that very well. That was where a man grew potatoes under somewhat exceptional terms and sent the potatoes up to market and sold them in the market, and it was suggested that he was carrying on a severable and separate business as potato merchant and salesman, and ought to be charged in respect of the profits so made. But it was held that what he did was no more than getting rid of the produce of the soil just as if he had taken them to the neighbouring market in a country town. But equally in that case it was pointed out by Lord Justice Scrutton that you may get a severable activity which arises from, or, at any rate, can be connected with the user of the land. Thus he says on

(1) 6 T.C. 48 and 198. (2) *Ibid.* at pp. 54, 55. (3) 9 T.C. 183.

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page 544 of *Back* v. *Daniels*, in [1925] 1 K.B.([1]) : " Where there " is a separate distinct operation unconnected with the occupation " of the land, such as a cheese factory dealing with the milk of a " dairy farm, or a butcher's shop dealing with the beasts of a " cattle farm, I can understand a separate assessment of that " operation; but I do not think that the fact that the farmer sells " his produce either on the farm or at the local market, or at Mark " Lane, or even if he sells it in a shop, justifies an assessment " under Schedule D as well as or in substitution for Schedule B."

But there are other illustrations which I should like to give of where you get a severable enterprise although the origin of what you are dealing with may have come from the land. Let me take the case of *Brown* v. *Watt*. I am only using this for the purpose of seeing whether you can have a separate activity. That case of *Brown* v. *Watt* is reported in 2 T.C. 143; the headnote is: " A " seed merchant taking a farm, and working it in connection with " his seed business, cannot claim any allowance from the assessment " on his profits as a seed merchant in respect of losses on the farm." In other words, you have got two enterprises separated, the one the carrying on of the production of some of the seed, another the selling of seed as a seed merchant. They were not so united as to justify setting off the losses in one against the profits in the other. I quite agree with Mr. Greene that it did not have to determine the point that we have got to decide in this case, but it is an illustration of the fact that, although the origin of the product you sell may be the land, you may be dealing with it in such a way as to give rise to a severable enterprise.

Let me take another case, *Donald* v. *Thomson*([2]), where there was a man who took grazings on outside land, and the assessment upon the appellant under Schedule B in respect of his own farm did not cover his liability to Income Tax in respect of profits arising from something else which he had done by means of these grazings which he took, and which fell to be assessed under Schedule D.

On the other hand, in *Lean* v. *Ball* in 10 T.C.([3]), you have got a case on the other side, a case where there was on a poultry farm of only 33 acres a large head of poultry, something like 1,000 on the average, but it was there held that the business so carried on was one which fell within Schedule B and was not severable, because, as it is put there, the poultry were raised from and fed in part from the user of the land.

There have been a certain number of cases in relation to this very question of standing a stallion. In none of them has the

([1]) 9 T.C. at p. 203. ([2]) 8 T.C. 272.
([3]) Lean and Dickson *v.* Ball, 10 T.C. 341.

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exact point arisen, unless it be in the *Bailey* case[1], which comes from Ireland, and which is not binding upon this Court; but I find there is guidance in the cases which have been decided. Much criticism was directed against the use which had been made by the Commissioners of the case of *Malcolm* v. *Lockhart*[2]; that was a case in which the horse travelled; but I agree with the interpretation, which I think is clearly right, which Lord Justice Slesser suggested with regard to the passage which is found on page 106 of 7 T.C.: " 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 the profits received for its services."

Let us take the case of a man who is running a herd of cows and who stands a bull of the same herd, and the use of the bull is required for the herd and for nothing else. Supposing he allows a neighbour's cow to be put to the bull, that would be so trivial that no tax would be exigible in respect of that transaction if there were any profit or fee received.

Then the antithesis is this[3]: " 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." Where that prevails, Lord Buckmaster seems to say that would be taxable under Schedule D. It does not depend upon whether or not the stallion visits other places, although, of course, where it does visit, it would have to remain for some time. It does not depend on that. It depends upon whether the real use and purpose, and its real advantage to its possessor, lie in the moneys which can be obtained by the use of its services outside (that means outside the business of the farmer; his own business; his own herd) by strange mares that come from a distance. When one has that to face, one has got to bear in mind in this case that he hoped to obtain a profit which he did not obtain elsewhere by reason of this, that this might be possible if he obtained one more really first class stallion commanding a fee of 400 guineas; in other words, that would start a business which was of such a nature as would end in profits which would, on the total balance sheet, help to overset the losses.

I think those words, and that antithesis of Lord Buckmaster, really offer a guide in the present case. Was there material, or was there not, before the Commissioners to enable them to come to their decision?

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(1) McLaughlin *v.* Bailey, 7 T.C. 508.
(2) 7 T.C. 99.
(3) 7 T.C. at p. 106.

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Another case that I want to refer to is the case of *Lord Jersey* and *Lord Derby*(1). There Mr. Justice Rowlatt speaks in Volume 10 of the Tax Cases, pages 370 and 371, of this : " But the majority " of the Commissioners have isolated that part of the activities of " these Appellants which consists in allowing their stallions to earn " money by serving mares outside "—that means, outside strange mares—" and they take that by itself. This is not a new way of " looking at it. Lord Derby had a case(2) which came before me " ten years ago, in which that was the starting point." Then, finally (I will not read the passage because it has been read in argument) he ends up with this(3) : " I think, therefore, that it is " really a question of degree, and in the very analogous case of " *Lockhart*(4) in Scotland, which corresponded to *Mrs. Bailey's*(5) " case in Ireland, it was stated by the highest tribunal to be a " question of fact and of degree."

Now I want to refer to *Mrs. Bailey's* case. *Mrs. Bailey's* case is admittedly very close. She was the owner and occupier of a farm. It was chiefly devoted to the breeding of racehorses, and she possessed two stallions for the service of her own mares and also received fees for the service by those stallions of mares belonging to other owners. It is quite true that in that case, although I do not think that offers a test, it was said(6) : "'Bachelor's Double' " never leaves the farm." Chief Justice Molony said in that case(7) : " There is no doubt on the authorities that, while an " assessment under Schedule B includes everything that naturally " flows from the occupation of land, once you get a distinct entity " outside the ordinary occupation of land which brings in an annual " profit or gain there is no reason why there should not be an " assessment under Schedule D in respect of such profit or gain."

The Chancellor, Sir James Campbell, says this(8) : " Speaking " for myself, I cannot distinguish this case in principle from other " similar cases, not perhaps exactly identical but certainly running " on parallel lines. Take, for instance, a large farmer's holding " of 200 acres with a mill upon it. He uses that mill for the purpose " of grinding his own corn but that does not exhaust the potential " powers of the mill; and he invites farmers outside to send their " corn to his mill to be ground for reward to him. It seems to " me that in a case of that kind the profits, in so far as they were " acquired from outside, using the expression in the same sense as " in Lord Buckmaster's judgment(9), would be liable to assessment " under Schedule D." Lord Justice Ronan agrees.

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(1) The Earl of Jersey's Executors *v.* Bassom and The Earl of Derby *v.* Bassom, 10 T.C. 357.

(2) Earl of Derby *v.* Aylmer, 6 T.C. 665. (3) 10 T.C. at p. 371.

(4) 7 T.C. 99. (5) 7 T.C. 508. (6) *Ibid.* at p. 509. (7) *Ibid.* at p. 511.

(8) *Ibid.* at p. 514.

(9) Malcolm *v.* Lockhart, *Ibid.* at p. 99.

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Incidentally, I should like to say that I attach no importance to the fact that some strange or outside mares have to be brought to the stallion for the purposes of his health, because, if that were so and the only purpose were the stallion's health, as Lord Justice Slesser has pointed out, it would be quite easy that that provision for his health should be made without it inuring to the profit of the owner of the stallion, for the mare could be served without fee. But the purpose here was that they should be served and that the fees should be earned. That is *Bailey's* case.

When one turns, therefore, to the sequence of cases, one finds this, that there can be enterprises or industries carried on upon the land which do not fall or are not merged in Schedule B. If so, they must remain within Schedule D. In the present case, the Commissioners have been able to sever the enterprise carried on. There is evidence which, according to the cases, they would have had a right to consider and Mr. Justice Rowlatt has held that they did consider it and come to a conclusion which was within their sphere, for they are the judges of fact and in such a case as this it is a question of degree.

When one takes the case of the stallion, or the bull, used only for the purposes of the farm, there you find it would still fall within the ambit of husbandry. Where you find the case in which the stallion stands entirely for the purposes of service of outside mares, there is an industry which is severable. The complication which arises in this case is by reason of the activities on the land and the breeding done by Lord Glanely, but the question of into which category it falls is a question of degree and, if so, it is a question of fact.

Therefore, for these reasons, I have come to the conclusion that Mr. Justice Rowlatt's decision is right and must be upheld. The appeal must be dismissed with costs.

After a short adjournment

Lord Hanworth, M.R.—I ought to add to my judgment which I delivered before the adjournment that I have not overlooked the second point at all, but I thought that in what I had said upon the first point, that it was a question of fact and that the liability had been segregated the one from the other, that involved the second point which was raised and which had been argued by Mr. Greene, and I do not desire to say more upon it. I merely make this observation to show that I have not overlooked the argument by Mr. Greene.

Slesser, L.J.—I agree that this appeal must be dismissed.

This is an appeal from assessments made upon the Appellant in respect of profits derived from stallion fees under Schedule D of the Income Tax Act, 1918. The difficulty in the case arises in this way: Under Schedule D, Clause 2, it is provided that "Tax under this Schedule shall be charged under "the following Cases respectively; that is to say,—Case I.—Tax "in respect of any trade not contained in any other Schedule," and "Case VI.—Tax in respect of any annual profits or gains not "falling under any of the foregoing Cases, and not charged by "virtue of any other Schedule."

Both Case I and Case VI indicate that there may be a trade liable to Income Tax which is a trade which does not fall within Schedule D. The language of Case I, which I have quoted, says in terms: "Tax in respect of any trade not contained in any other "Schedule" and it may be that in certain cases either under Schedule A or under Schedule B, which we are here considering, a trade will be carried on liable to assessment and charge under that Schedule, which will be liable for taxation, not on the profits made, but on some other basis; but in order to come within Schedule B, it is necessary to satisfy the language of that Schedule, and the language of that Schedule which is here material is that it shall be "in respect of the occupation of . . . . lands."

The problem which the Commissioners had to consider here was whether, there being a trade, as undoubtedly there is a trade, carried on, is it a trade of such a kind as does or does not fall within Schedule B?

The Commissioners have given their opinion in language which is, perhaps, not very happy. Instead of directly deciding whether the profits made do or do not fall within Schedule B, they say this: "The identical point was raised in the case of *McLaughlin* v. "*Mrs. Blanche Bailey*(1) and decided against the taxpayer. This "decision is supported by the observations of Lord Buckmaster in "the case of *Malcolm* v. *Lockhart*(2), in which he contrasts the use "of a horse in connection with the farm with its use outside, the "phrase 'use outside' being clearly used to mean 'not in connec-"'tion with the farm.' We hold that we are bound by the decision "in the case of *McLaughlin* v. *Mrs. Blanche Bailey*, the facts in "this case not being sufficiently distinguishable to enable us to "depart from the decision in the *Bailey* case."

I say that finding is unfortunate in this sense, that the Commissioners have not in terms said what their findings were, but have rather indicated that they were sufficiently within the authority of *McLaughlin* v. *Mrs. Blanche Bailey* to justify them in holding that they were bound by that case. But what I understand them to

(1) 7 T.C. 508. (2) *Ibid.* at p. 99.

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mean, and what their findings of fact lead to, is this, that in substance the case here is the same as the case to which they refer, the Irish case of *McLaughlin* v. *Mrs. Blanche Bailey*. The facts in that case were that Mrs. Bailey kept a number of stallions, and it was there stated in paragraph 3 of the Case(1) that the horse which had earned the fees on which tax was sought to be charged never left the farm. In the Report in [1920] 2 I.R., at page 313, where the argument on behalf of the subject is reported, it is thus stated by Mr. Brown who appeared for the subject; he says this: " The stallion was on the farm only " and I am unable to draw any distinction between the facts of this case and the facts of that case. Here it is found that it was not practicable for the animal to leave the farm. In those circumstances, were this authority binding upon us, I should clearly be of the opinion that the Commissioners had applied the right principle in saying that, in these circumstances, they would find as a matter of fact that the industry of breeding the stallions was not one so immediately a part of the business of husbandry, or arising out of the occupation of lands, as to be one which would be assessable under Schedule B.

But I realise, as Mr. Greene has pointed out, that the case of *McLaughlin* v. *Bailey* is one which this Court may, if it thinks fit, consider afresh. It is an Irish authority worthy of great consideration, having been considered by two Courts in Ireland, but nevertheless, if it, in principle, is wrong, we are entitled to come to another opinion. I do think, however, that it should be remembered that that most experienced judge in Revenue cases, Mr. Justice Rowlatt, has, in my view, expressed approval of the decision in *Bailey's* case. In *The Earl of Derby* v. *Bassom* and *The Earl of Jersey's Executors* v. *Bassom*, which is reported in 10 T.C.(2), to which my Lord has already referred, the question for consideration was not the question we have to consider here, namely, whether the liability falls under Schedule B or under Schedule D; it was a case solely concerned with the question of whether there was a separate business for the purpose of Schedule D and, as Mr. Greene points out, and rightly points out, the other question was not directly considered at all, and the right or privilege (if it be a privilege) of these gentlemen of being assessed under Schedule B, was not contended for on their behalf. But there are observations of Mr. Justice Rowlatt which seem to me to go beyond the actual argument and issue in that case. He does point out at the bottom of page 370 this: He says: " But the majority of the Commissioners " have isolated that part of the activities of these Appellants which " consist in allowing their stallions to earn money by serving mares " outside, and they take that by itself. This is not a new way of

(1) 7 T.C. at p. 509. (2) 10 T.C. 357.

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"looking at it. Lord Derby had a case which came before me ten "years ago"—that is the case of *The Earl of Derby* v. *Aylmer* in 6 T.C.(1)—"in which that position was the starting point, and a "question of some deductions arose on that footing; and in "*Mrs. Bailey's* case, in Ireland, which was a case as between "Schedule D and Schedule B"—the learned Judge, as one would naturally expect, was fully alive to the fact that the issue in *Bailey's* case was not an issue which was raised directly in *The Earl of Derby* v. *Bassom*—"she had a hunter and racer breeding establishment, "which appears to have been the whole establishment: there was no "question there, I think, of racing, herself, and there the fees "earned by her stallions outside were treated as a separable matter "from her enterprise as a whole, which was breeding generally. "Of course, the question there was as between Schedule D and "Schedule B, but I think it certainly throws light upon the present "problem." Later on he says(2): "I think, therefore, that it is "really a question of degree"—speaking of the *Earl of Derby's* case—"and in the very analogous case of *Lockhart*(3) in Scotland, "which correspond to *Mrs. Bailey's* case in Ireland, it was stated "by the highest tribunal to be a question of fact and of degree."

I think, therefore, without pressing the matter too far, one is entitled to say that Mr. Justice Rowlatt has approved the decision in *Bailey's* case, which I understand to mean this, that where you have an establishment where stallions are bred, and those stallions also earn fees by serving mares outside (by which I understand is meant, not geographically outside but mares brought by outside persons to be served) in such a case, it is competent for the Commissioners to find as a fact that in a particular case a trade is being carried on within the meaning of Case I or Case VI of Schedule D. If that be so, there only remains this question: the case in the House of Lords of *Malcolm* v. *Lockhart*, I think, has laid down definitely this, that the test which has to be considered is not the geographical test, whether the stallion is or is not taken out of the particular lands to perform his functions, but whether he is or is not being used by outside persons (that is, persons other than the occupier of the land) for the purposes of those outside persons in the sense that their mares shall be benefited; for the purposes of the occupier, in the sense that the occupier shall make a profit. That, I think, is quite clear. I think it is clear from the decision of the Court of Session in *Malcolm* v. *Lockhart*, and it is made clear

(1) 6 T.C. 665.

(2) 10 T.C. at p. 371.

(3) Malcolm *v.* Lockhart, 7 T.C. 99.

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beyond any question by Lord Buckmaster(1). We were told that those who are interested in the philosophy of taxation had disputed this matter very much. I should have thought this was one of the least disputable of taxation matters. There can be no question, as I pointed out in the course of the argument, that Lord Buckmaster when he uses the word " outside " there is speaking of conditions not geographically outside but of persons outside the occupier himself. The appropriate word suggested by the Lord President in Scotland was the word " apart "(2), which expresses the same idea.

Now, can it be said here, in the light of those two authorities, one of which is binding on us and the other of which I certainly for myself think is correct and which has been followed by Mr. Justice Rowlatt, generally speaking, that the Commissioners here have committed any error of law in coming to a conclusion of fact that this is not a trade which arises out of the occupation of lands? In my opinion, it is impossible so to find. I agree with Mr. Greene that the House of Lords' decision was dealing with a slightly different subject matter. There the farmer had only two stallions, apparently, and the one which was the subject of debate in the case had been used both within and without the farm; but disregarding that distinction, which I think is not of importance, the substance of the matter, I think, is the same, and, for myself, had *Bailey's* case not been decided as it was decided, on the assumption that substantially it was governed by the decision in *Malcolm* v. *Lockhart*, I should have come to the same conclusion, the conclusion being this, not that either *Malcolm* v. *Lockhart* or *Bailey's* case compels the Commissioners in a particular case to come to a particular conclusion. Lord Buckmaster himself points out that where the Commissioners are of opinion that the service outside of the beast is, to use his language, trivial, they may say that no tax should there be extracted and, therefore, it is a matter for them to decide on the triviality, on the degree, and on the conditions generally; but so far as principle is concerned, I think both the cases cited establish that in a case of this kind, where a person does make a profit, not by merely breeding an animal, but by allowing that animal which has been raised on his land to be used for a purpose other than that directly connected with the land (what I may call the secondary purpose of producing other animals for other persons' benefit) it is within the competence of the Commissioners to say that the profits inuring are profits falling within Schedule D.

As my Lord has already pointed out, Schedule D, particularly Case VI, is a sweeping Schedule giving authority and power to charge for any trade which cannot be brought properly within any other appropriate Schedule. The Commissioners have come to the conclusion that this occupation or trade here cannot properly be

(1) 7 T.C. at p. 106. (2) *Ibid.* at p. 103.

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brought within the ambit of Schedule B, and, in my opinion, it is impossible to say that they have been erroneous in law in coming to that conclusion.

Romer, L.J.—Lord Glanely is the occupier of certain land near Newmarket, which is known as Exning, and it consists of certain paddocks, agricultural pasture land, arable land, and so on, amounting in all to 888 acres. He is also in occupation of some property known as the Grange racing establishment, situated some two or three miles, I understand, away from Exning. On and in connection with those properties he pursues certain activities connected with the breeding and racing of thoroughbred horses. He employs a great number of hands apparently for those purposes and he no doubt assists substantially in maintaining and improving the stock of thoroughbred horses in this country. But, unfortunately, in pursuing those activities, or rather as a result of pursuing those activities, he sustains a loss of something approaching £18,000 a year. The question involved in this appeal is as to what Lord Glanely should pay to the Crown in respect of Income Tax for the privilege of losing that annual sum. He says that his payment of tax under Schedule B in respect of the Exning property is quite sufficient so far as his occupation of that property is concerned. The Crown, on the other hand, say, and say quite truly, that if you regard a particular one of his activities it would be found that it is carried on at a substantial profit, the particular activity being, of course, that of letting out the services of his stallions to other owners for substantial fees.

We have been given certain figures relating to three years which show the financial result of Lord Glanely's activities. Take the year ending 31st March, 1924, for instance, and it is found that he sustained a loss, treating his activities as a whole, of £19,419 odd, but he brings into that account, as a credit, the fees received in that year from services rendered by his stallions to other owners of a sum of £11,370. It is said by the Crown that, for instance, in that year he made a profit (there is no doubt he did) out of the service of his stallions rendered to other owners, and that that profit is taxable under Schedule D and is not covered by the tax he pays under Schedule B; that is to say, it is not a Schedule B activity at all, but a Schedule D activity. The Commissioners have found, as a fact, that this activity to which I have just referred is separable from the other activities pursued by Lord Glanely in connection with Exning, and that appears to me to be a finding of fact which is binding upon us, seeing that, without question, there was evidence upon which the Commissioners could arrive at that conclusion.

On the other hand, that finding does not, as it seems to me, in the very least solve the problem that we have to determine of whether the activities in question are Schedule B or Schedule D

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activities. Clearly, it is possible for the occupier of land to discharge more than one activity in connection with his land and that all his activities are what may be called Schedule B activities, although for the purposes of account keeping or otherwise, the activities may be and are properly severable one from the other. It is for that reason that I am unable to get any assistance from such cases as the two *Lord Derby* cases(1) or the *Carlisle and Silloth* case(2), or the case of *Brown* v. *Watt*(3), all of which cases were dealing with a question of severability and not the question of whether the severed activity fell within and was covered by Schedule B.

As regards the second point made by Mr. Greene, the finding of fact of the Commissioners appears to me to be conclusive against him, and therefore I will say no more about the second point, except that I agree with the conclusion to which the other members of the Court have come. But, as regards the first and main point, which is whether this severable activity is a Schedule B activity or a Schedule D activity, I regret to find myself in disagreement with the rest of the Court.

There has been apparently extraordinarily little authority upon the question of the extent and ambit of Schedule B. In what has been called the *Rotunda* case, which is *Coman* v. *Governors of the Rotunda Hospital of Dublin*(4), reported in [1921] 1 A.C. 1, at pages 12–13 I find Lord Birkenhead saying this(5) : " Schedule A " clearly shows that the object is to tax what for the sake of brevity " may, with substantial accuracy, be called the landlord's income. " Over and above that income, there is almost without exception a " user of the premises whereby a further or tenant's profit is sought " to be made. It is for that purpose that Schedule B is directed " to tax the benefit of occupation."

In the case of *Marshall* v. *Tweedy*, reported in 11 T.C. 524, I find the Lord President, Lord Clyde, saying this—he was dealing with a case not dissimilar from the present one, except in one respect, to which I will call attention presently, where the occupier of land was using it for the purpose of breeding horses and cattle, he says this (6) : " So far as that is concerned, the profits either " of his farm, or of his horse breeding, or of his cattle dealing " are all, I assume, made by means of, and in reference to, land " which he actually occupies, and if so then they are all of them " properly taxable under Schedule B." So that the test which he applies, or thinks ought to be applied, to the question is whether the profits are or are not made " by means of, and in reference to, " the land."

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(1) The Earl of Derby *v.* Aylmer, 6 T.C. 665, and The Earl of Derby *v.* Bassom, 10 T.C. 357.

(2) Carlisle and Silloth Golf Club *v.* Smith, 6 T.C. 48 and 198.

(3) 2 T.C. 143. (4) 7 T.C. 517. (5) *Ibid.* at p. 579. (6) 11 T.C. at p. 532.

(Romer, L.J.)

Of course, some such test obviously is necessary. It would be ridiculous to suppose that a man who occupies his land merely by sitting in it and therein writing poetry or novels or painting pictures is assessable under Schedule B in respect of the profits he earns from his poetry, or his books, or his pictures. In such a case, of course, he is not earning profits by means of, or with reference to, his land. On the other hand, I can conceive that the test suggested by Lord Clyde might bring within Schedule B certain cases which would be regarded as extreme cases and, therefore, I am rather disposed to accept the test that was suggested by Mr. Hills in his interesting argument in this case, and that is the test of whether the soil of the land is being used as soil. Of course, such a test brings within the Schedule the ordinary operation of a farmer and, of course, any test must bring within its operation husbandry, because it is quite clear from the subsequent parts of the Rules of Schedule B that husbandry is included within it. But it is admitted in this case, and I think rightly admitted, in accordance with what Lord Clyde says, that the operation of breeding stock (whether horses or cattle) upon the land is a Schedule B operation, and the profits derived from it are covered by the tax assessable under Schedule B. But why is that so? For this reason, as it seems to me : the produce of the land in such cases is being used for the purposes of feeding the stock, male and female, which is breeding upon the land. The soil is being used as the soil for the purpose of turning to profitable account the reproductive capacities of the stock, male and female, which is kept upon the land. That being so, what difference can it make that the stock whose reproductive capacity is being turned to profitable account is of one sex only? If it be of the female sex, most assuredly no one would say that the activity of breeding from the female sex was not a Schedule B activity. Why should there be a difference because the reproductive capacity which is being turned to account by using the soil as soil is of the male sex only? Therefore, treating, as I am bound to treat, this business of letting out the services of stallions to the owners of other mares as a severable activity of Lord Glanely's, it is an activity which he carries on upon this land, and in the course of which and for the purposes of which he is using the soil as the soil; because in this case the stallions of Lord Glanely are not led about the country; they have to remain upon Exning; and it is not only these stallions that are fed upon Exning; for the purpose of pursuing this activity of his, he has to provide accommodation for the mares of other owners who come as a rule in foal to Exning, are kept there until they have produced their foals, are then covered by one or other of his stallions, and remain there some time afterwards. We are told in the case that the mares remain there for some four months altogether. For the purposes of keeping those mares there, as indeed for the purposes of keeping the stallions there, even if

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Lord Glanely did nothing else except employing the stallions for the purposes of giving services to the mares of other owners, the property has to be kept up; the fields have to be manured and to be kept in proper heart and condition. The agricultural part of it has to be kept up for the purpose of providing food for the animals that reside from time to time upon the land, and I for myself find it impossible, when once it is conceded that the activity of breeding thoroughbred horses or cattle or any other animal is covered by Schedule B, that is to say, as a Schedule B activity, to come to the conclusion that the activity of keeping stallions upon the land for the purposes of turning their productive capacity to account by serving other mares, for whom accommodation and food have to be provided, is not also an activity such as can properly be described as a Schedule B activity. So far, therefore, as the reason of the matter goes, I should come to the conclusion that in this case the Crown are wrong and that the profits earned by Lord Glanely from this use of his stallions are profits derived from a Schedule B activity.

But it is said that I am precluded from arriving at such a conclusion by authority. The only authority that I know that can be cited against the conclusion at which, in the absence of authority, I should arrive is the case of *McLaughlin* v. *Bailey*(1). That was a decision of the Irish Court of Appeal and, of course, is a decision which is entitled to the utmost respect. For myself, I am unable to draw any satisfactory or material distinction between the facts of that case and the facts of this; but when I look at the judgments in that case, it appears that they considered the case covered by the decision of the House of Lords in *Malcolm* v. *Lockhart*(2) and, without observing that the facts of the case before them were substantially different from the facts of the case of *Malcolm* v. *Lockhart*, they considered and treated *Malcolm* v. *Lockhart* as being decisive of the matter.

The question, therefore, that I have to consider is whether the case of *Malcolm* v. *Lockhart* is an authority which compels me to come to some other conclusion. There is an obvious distinction between the facts of *Malcolm* v. *Lockhart* and the facts of *Marshall* v. *Tweedy*(3), which followed *Malcolm* v. *Lockhart*, and the facts of this particular case. In *Malcolm* v. *Lockhart* and *Marshall* v. *Tweedy* the stallions who were earning fees for their owner by serving the mares of other owners were taken away from the farm of which the owner was in occupation and performed those services elsewhere. It is said that Lord Buckmaster in delivering his speech in the House of Lords did not really intend and did not in fact draw any distinction between such a case and such a case as the present, where all the services are performed exclusively upon the land of which the owner of the stallion is in occupation.

(1) 7 T.C. 508. (2) 7 T.C. 99. (3) 11 T.C. 524.

(Romer, L.J.)

For myself, I think it is right to treat the language of Lord Buckmaster, as I am perfectly sure he would wish it to be treated, as being applicable and intended to be applied to the facts of the case before him. So treating his language, I regard the decision merely as a decision to this effect, that where the owner of a stallion uses the services of that stallion and derives profits from the services of that stallion to third parties by sending the stallion away from the farm, the profits so derived are not profits derived from using the soil as the soil or profits earned by means of, and in reference to, land of which the owner was in occupation.

In these circumstances, I find myself, as I say, with regret, coming to a conclusion different from that arrived at by Mr. Justice Rowlatt and by the other members of the Court, and, in my opinion, the decision of *McLaughlin* v. *Bailey* is one that ought not to be followed.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Buckmaster and Lords Tomlin, Russell of Killowen and Wright) on the 21st, 23rd and 24th of February, 1933, when judgment was reserved. On the 14th March, 1933, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. W. Greene, K.C., and Mr. C. L. King appeared as Counsel for the Appellant and the Attorney-General (Sir T. W. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT

Viscount Buckmaster.—My Lords, the question arising on this appeal is whether the Appellant is liable to Income Tax in respect of payments made to him for the service by his stallions of mares sent to his stud by outside owners. He was assessed in respect of these figures for the year ended 5th April, 1922, and for the year ended 5th April, 1927; these assessments were, upon appeal, confirmed by the Special Commissioners, their decision being supported by Mr. Justice Rowlatt and by a majority of the Court of Appeal, Lord Justice Romer dissenting.

The facts of the case are these. The Appellant, in 1919, acquired a house, known as Exning House, near Newmarket, and the stud farm attached to it, and, subsequently, an adjoining stud farm called North End. Upon the land so acquired he has established a stud farm and, in substance, the whole of the area, amounting to 888 acres, is used for, and in connection with, the stud. Upon this farm he breeds thoroughbred stock and uses his stallions both for the purpose of serving his own mares and the mares of other people brought into his farm for the purpose. No mares are served outside the farm. He advertises stallions, with

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the fees charged for the service of each, and, roughly speaking, twice as many visiting mares are served as his own. It is for the fees in respect of the services for these outside mares that the assessment has been made. The mares themselves remain on the farm for about four months and the Appellant receives payment for their keep during the time.

The Appellant's claim is that he is only entitled to be taxed under Schedule B in respect of his occupation of the land, and that the profits derived from the use of the stallions are not profits of a trade, adventure or concern separate from and outside the purpose of such occupation.

It is as well to consider this contention in the first instance, apart entirely from questions of authority. It is not disputed by the Crown that the occupation of the land for the purposes of the stud farm is an occupation within the meaning of Schedule B, the terms of which contain no qualification of the occupation to which it refers. It is, of course, obvious that, in some sense, land is occupied for every purpose of trade, but, I think, it is plain that the occupation referred to is an occupation which, in itself and by its enjoyment, is the source of the income and profits to be taxed. Nor is such occupation limited to the purposes of husbandry, as is shown by the latter part of the Rule.

A stud farm is plainly an occupation of the land, and the breeding and sale of foals arises from such occupation, and for such purpose the use of the stallion is as indispensable as the use of the mare. The payment, therefore, for the services of the stallion for use upon the land is as much a breeding operation as the production of the foal by the mare, and I find it difficult to see why, when other people's mares are sent on to the farm and kept there, the payment for the services of the stallion is not a normal part of the purposes for which the land is occupied and inseparable therefrom. This is the argument which has found favour with Lord Justice Romer and I think it is sound.

It is then said that, none the less, the matter is covered by authority. Of the earlier case, known as *Lord Derby's* case in [1915] 3 K.B. 374(1), although the point might have been raised, in fact it was not, and that case and the subsequent one in 10 T.C. 357(2), afford no help. Nor, in my opinion, does the case of *Carlisle and Silloth Golf Club* v. *Smith* in [1913] 3 K.B. 75(3). In that case, all the fees paid by strangers for the use of the golf club were held liable to tax, upon the distinct ground that these fees related to a trade or enterprise entirely separable from the use of the land by the members of the golf club. The judgments of the Court were clearly confined to this issue and offer no assistance here.

(1) Earl of Derby *v.* Aylmer, 6 T.C. 665.
(2) *i.e.*, Earl of Jersey's Executors *v.* Bassom, and Earl of Derby *v.* Bassom.
(3) 6 T.C. 48 and 198.

(Viscount Buckmaster.)

The case most nearly approaching the present, is the case of *Malcolm* v. *Lockhart*, [1919] A.C. 463(1), and it is a case that requires careful and critical examination since, if it establishes the principle for which the Respondents contend, the authority binds this House. In that case, the man occupied land which was certainly treated as an ordinary farm, although, in addition to 400 sheep, the occupier bred a stud of Clydesdale horses. A stallion, which he used upon his farm, was let out and taken round the country, where it served the mares of the adjoining farms and other people who required its services. Assessment was made in respect of the profits earned by these outside services, and it is plain, from the findings of fact in that case, that it was only the moneys so received that it was sought to tax. The Court of Session treated the case upon the hypothesis that the land was occupied as an ordinary farm, and that the use of the stallion outside it was outside the purpose of this occupation. The Lord President said(2) : " If the farm lease terminated tomorrow, then he would, " if, as I presume, it was for his profit, certainly continue to " carry on this business." And Lord Johnstone stated that the employment of a stallion for stud purposes for hire outside of his own farm is no part of the business of a farmer. He says(3) : " A stallion kept for this purpose has no necessary relation to a " farm or to the adventure of a farmer." It was in these circumstances that the matter came before your Lordships' House, where the real question argued was whether there was any reason to displace the finding of fact of the Commissioners that the employment of a stallion for stud purposes for hire outside his own farm is no part of the business of a farmer.

It would not be possible for this House to question that decision, but I see no reason why it should be open to question, notwithstanding the fact that the farmer there did breed on his own land. The whole case was based upon the occupation of the land being that for ordinary farm purposes, and there was no reason to displace the finding of the Courts that the sale of the services of the stallion when taken round the countryside formed no part of that business.

The case of *McLaughlin* v. *Bailey*, [1920] 2 I.R. 310(4), does, I think, cover this case, but it was based upon the view of *Malcolm* v. *Lockhart*, which, I think, was mistaken. The phrase there used, which contrasts the use of a horse in connection with a farm with its use outside, ought to be construed in its widest sense and must be interpreted in the light of the finding of facts by the Commissioners that there was a farm business for which the land was occupied, and that the use of the stallion was for a separable and distinct purpose.

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(1) 7 T.C. 99.
(2) *Ibid.* at p. 102.
(3) *Ibid.* at p. 103.
(4) *Ibid.* at p. 508.

(Viscount Buckmaster.)

I do not think, therefore, that the case of *Malcolm* v. *Lockhart*(1) covers and disposes of this case. Each case must depend upon its own special circumstances. The occupation of the land in this case being for the purpose of a stud farm, the use of the stallion upon the farm cannot be taxed unless it can be said that it constitutes something distinct and separable from the purpose of the occupation, and I find myself unable to accept this view.

I think, therefore, that this appeal must be allowed and the assessment discharged.

Lord Tomlin.—My Lords, the conclusion reached by Mr. Justice Rowlatt and the majority of the Court of Appeal in this case is one which, with respect, I cannot accept.

It is not disputed that the occupation of land for the purposes of a thoroughbred stud farm is an occupation the profits of which are covered by an assessment under Schedule B, and that in respect of such occupation no claim founded upon Schedule D could arise. Further, it is not suggested that the stud farmer would have to account under Schedule D for the proceeds of sale of a foal from any of his mares, whether covered by a stallion of his own or by one belonging to another, yet it is contended he must account under that Schedule if his profit takes the form of a fee for allowing his stallion to cover the mare of another. Looking at the matter apart from authority, I can see no reason in logic for distinguishing between the profit derived from the reproductive capacity of the female and the profit derived from the reproductive capacity of the male.

So far as authority is concerned, the question is what was the basis of the decision in your Lordships' House in the case of *Malcolm* v. *Lockhart*, [1919] A.C. 463(1). It rested, I think, upon the fact that the occupation of the land in that case was not an occupation for the purposes in relation to which the fees were received and that such fees were, therefore, received in respect of a trade, adventure or concern separate from and outside the purposes of the occupation. I concur in the views which have already been expressed upon that decision by the noble and learned Viscount upon the Woolsack. The decision appears, therefore, to have been too broadly interpreted in *McLaughlin* v. *Bailey*, 7 T.C. 508, and I see nothing in it to prevent your Lordships from reaching the conclusion which appears to be required, that the fees in question in the present case arise from the occupation of the land and are not taxable under Schedule D.

I concur in the motion proposed.

Lord Russell of Killowen.—My Lords, but for the fact that we are adopting a view contrary to those which were entertained by Mr. Justice Rowlatt and the majority in the Court of Appeal, I

(1) 7 T.C. 99.

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would have been well content merely to agree with the opinion expressed from the Woolsack. In the existing circumstances, however, I desire to add a few words of my own.

All those portions of the Appellant's lands which are occupied and used by him for the purpose of a thoroughbred stud farm have been assessed to Income Tax under Schedule B. In other words, the Appellant has thereby been assessed to tax upon his gains in respect of his occupation of the land which he occupies for that purpose and solely for that purpose.

It was conceded by the Crown, and necessarily conceded, that the normal receipts of a thoroughbred stud farm include stud fees received for the service, by the stud farm stallions, of mares which belong to other people and which are brought on to the stud farm for that purpose. Those stud fees are, therefore, in my opinion, part of the gains of the Appellant in respect of his occupation of this land.

By what right can the Crown then claim to pick out one item from the various gains of the Appellant, in respect of that occupation, and say that it is not covered with the other gains by the assessment under Schedule B, but is available as a separate item for a separate assessment under Schedule D? I can envisage no principle which would justify such a course, nor is it supported by any authority except the case of *McLaughlin* v. *Bailey*[1] which, as has already been pointed out, is based upon a mistaken view of the decision in *Malcolm* v. *Lockhart*[2].

These stud fees are, in my opinion, merely one item among the gains of the Appellant in respect of his occupation of the lands and are, with all such gains, franked by the assessment under Schedule B.

I find myself in agreement with Lord Justice Romer and would allow this appeal.

Lord Wright.—My Lords, the Appellant, who owns and occupies a stud farm near Newmarket for the breeding of thoroughbred racing stock, not only uses the stallions he maintains for covering his own mares, but also charges fees for letting out the services, upon his stud farm, of these stallions to the thoroughbred mares of other owners; in addition to being assessed under Schedule B in respect of the lands comprised in the farm, he has also been separately assessed under Schedule D in respect of these fees. The question in this appeal is whether this additional assessment is justified, that is, whether these fees are or are not covered by the general assessment made on the lands under Schedule B.

Thoroughbred stallions cannot be sent round, like shire stallions, to the farms where the mares to be served are kept. The thoroughbred mares must be brought, generally just before foaling, to the

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(1) 7 T.C. 508. (2) *Ibid.* at p. 99.

(Lord Wright.)

stud farms where the thoroughbred stallions live, and remain there for about four months in all, partly before being served and partly afterwards. During this time, the visiting mares need the same care as the Appellant's own mares, and the use of the farm lands and of the same equipment in the way of boxes, paddocks and so forth. The Appellant's stud farm comprises 888 acres, of which the stud paddocks form 284 acres, the pasture land 59 acres, the arable land 357 acres and woodland belts about 100 acres. The paddocks, which are 40 in number, are run on by horses and bullocks alternately, the rotation being necessary to prevent them from becoming horse sick, and are limed every two years. The woodland belts shelter the paddocks. The arable land provides straw for conversion into manure by the bullocks and by pigs kept for that purpose. The whole area is necessary for the stud farm; it is assessed as a whole under Schedule B, the agricultural part at single annual value rates, and the land used purely for stud and racing purposes at one-third annual value. There were kept on the farm about 140 to 170 horses owned by the Appellant, including 6 stallions. Of these, the most famous was Grand Parade, the Derby winner of 1919, which commanded a service fee for visiting mares of 400 guineas. As a stallion needs, for purposes of health, to serve mares about 30 or 40 times in the year, Grand Parade, to take him as an example, could be and was, in fact, used not only to serve the Appellant's mares but also other people's or visiting mares; thus, in 1924, he served 13 of the former and 29 of the latter and, in 1927, 18 of the former and 18 of the latter. Sometimes, the Appellant, in order to introduce new blood, sent his mares to be served by stallions of other owners and, by way of exchange, served by his stallions the mares of those other owners; such exchanges are common in the case of stud farms and no fees are then charged on either side. The service fees received by the Appellant amounted, in 1923, to £11,370, in 1924, to £15,232 and in 1925, to £18,586.

The Appellant, whose total capital outlay on and about the property, including bloodstock, was in round figures about £250,000, has made each year a heavy loss in the whole of his breeding and racing activities, even after bringing into account the service fees; in some years, the loss has amounted to as much as £18,000 or £19,000. A single account has been kept of all the activities of the farm. The Respondents, besides claiming that there should be a separate assessment under Schedule D in respect of the service fees, including the value of the stallions' services exchanged, also claimed that these services could be severed as matters of account from all the other matters included in the accounts; on any other view, there would be no profits of the stud farm on which to tax, apart, that is, from the arbitrary assessment under Schedule B on the basis of annual value. On the latter issue, he

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has succeeded before the Commissioners, the Revenue Judge and the Court of Appeal, and the point has not been contested further before this House as being covered by concurrent findings of fact. No more need be said about it here, except that, whether rightly so decided or not, it throws no light on the question now debated, *viz.*, whether the service fees are or are not covered by Schedule B. On that issue, the Commissioners stated all the relevant facts and then decided the case on the footing that they were bound to decide adversely to the Appellant by a decision of the Court of Appeal in Ireland, *McLaughlin* v. *Bailey*, [1920] 2 I.R. 310(1). The question is thus left to the decision of the Court on the specific facts found as a question of the construction of the Act. The decision of the Commissioners was upheld by Mr. Justice Rowlatt and by the majority of the Court of Appeal; Lord Justice Romer, however, dissented.

The tax under Schedule B is expressed to be charged in respect of the occupation of lands, tenements and hereditaments in the United Kingdom for every twenty shillings of their assessable value. It is, like other taxes under the Income Tax Act, 1918, a tax on income or profits, but, save in the special cases otherwise provided by the Act, it is a tax not varying with the actual profits, or depending on there being profits at all, but the amount of the tax is fixed by relation to the arbitrary or conventional standard of the annual value. In this respect, it resembles the " landlord's " or property tax " under Schedule A, which also is on the annual value. There is, under the Income Tax Acts, only one tax : there are not as many taxes as there are Schedules, but the Schedules are merely the different ways of collecting it. This was clearly set forth by Lord Dunedin in his speech in *Fry* v. *Salisbury House Estate, Ltd.*, [1930] A.C. 432 at page 441(2), where he quotes and relies on the well-known judgment of Lord Macnaghten in *London County Council* v. *Attorney-General*, [1901] A.C. 26(3). Lord Dunedin further points out that " once assigned to its proper " Schedule, the same income cannot be attributed to another " Schedule ". This House held in *Fry* v. *Salisbury House Estate, Ltd.* (*supra*), which was a case under Schedule A, that the tax was exhaustive in respect of all the profits that flowed from the ownership of the land. The landowners had let the buildings in flats; a claim to tax the same land further under Schedule D failed, being based on the ground that, as the profits of the letting exceeded the annual value, the excess was taxable separately as profits of a business under Schedule D. In the same way, the Appellant in this case has been assessed under Schedule B in respect of the occupation of the land as a whole—it is immaterial for this purpose whether the assessment is on the basis of the whole or of one-third of the annual value—and, accordingly, no

(1) 7 T.C. 508. (2) 15 T.C. 266 at p. 308. (3) 4 T.C. 265.

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further tax can be levied in respect of the farm, unless it is shown that he is there conducting some "separate and distinct "operation unconnected with the occupation of the land," to use the words of Lord Justice Scrutton in *Back* v. *Daniels*, [1925] 1 K.B. 526 at page 544(¹). If this were shown, a further tax could, no doubt, be levied under Schedule D, Case I or VI, as was admitted to be proper in *Fry's* case in respect of the trifling services, for which a small extra charge was made, outside the actual letting of the flats. On the special facts of the case, it was similarly held in *Coman* v. *Rotunda Hospital, Dublin*, [1921] 1 A.C. 1(²), that the owners of the hospital, a charitable institution, were taxable under Schedule D on the profits of giving the use of rooms for entertainments with equipment, lighting and other accessories: they were held to be carrying on a business for profit outside their status as owners of the land.

The question here is, accordingly, whether the fees charged for the service of the stallion constitute a matter outside whatever is included in "occupation". Schedule B exhausts all profits that come within occupation of the land; such profits are dealt with once for all by the assessment and cannot be taxed otherwise or again: Schedule D has no application to such profits. The Act does not define "occupation", but does throw some light upon its meaning: thus, it distinguishes occupation only or mainly for husbandry from occupation not so described, though both are within Schedule B. The Act excludes from Schedule B not only dwelling houses, other than farmhouses, but warehouses and other buildings occupied for the purpose of carrying on a trade or profession (Rule 1(*b*)), indicating thereby that the income from "occupation" has reference to use of the lands as such. This would exclude from Schedule B and throw into Schedule D income from trades, professions and factory operations, although the buildings in which they are exercised do occupy some land. Rule 5 under Schedule B gives to a person occupying lands for purposes of husbandry only an option to be assessed under Schedule D, and also Rule 6, likewise, gives such a person, who has been charged under Schedule B, a right to be charged only on his actual profits of the year if he can show that they fell short of the assessable value. Rule 7 gives a person occupying woodlands the option, in certain circumstances, of being charged under Schedule D rather than Schedule B. It is to be noted that these options are given to the taxpayer, not to the Crown. Rule 8 contains special Rules for the assessment of lands occupied as nurseries or gardens for the sale of the produce. Rule 4 of Case III under Schedule D is the only express provision for an assessment under Schedule D extra to that under Schedule B; that Rule applies to cases where a dealer in cattle or in milk occupies lands which are insufficient

(¹) 9 T.C. 183 at p. 203. (²) 7 T.C. 517.

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for the keep of the cattle brought on the lands. It seems to follow that, but for this express provision, the Schedule B assessment would have covered all the profits in that Case.

If authority were needed, the provisions just quoted do at least show that profits of " occupation " include gains from the animal produce of the lands as well as the agricultural, horticultural or arboricultural produce of the soil, and the references to gardens, nurseries and woodlands show a scope of Schedule B beyond the use of the land and its products for the provision of food. Equally, it is obvious that the rearing of animals, regarded as they must be as products of the soil—since it is from the soil they draw their sustenance and on the soil that they live—is a source of profit from the occupation of land, whether these animals are for consumption as food, such as bullocks, pigs or chickens, or for the provision of food, such as cows, goats and fowls, or for recreation, such as hunters or racehorses, or for use, such as draught or plough horses. All these animals are appurtenant to the soil, in the relevant sense for this purpose, as much as trees, wheat crops, flowers or roots, though, no doubt, they differ in obvious respects. Nor is it now material towards determining what are products of occupation that farming has developed in its use of mechanical appliances and power, not only in such matters as ploughing, reaping, threshing, and so forth, but in such ancient methods of preparing its products as making cream, butter or cheese. The farmer is still dealing with the products of the soil and Schedule B covers the income. Hence, the elaborate, expensive and scientific equipment of the Appellant's stud farm is not adverse to his claim that the profits (if any) are exhaustively covered by Schedule B. But, in the present case, these points need not be laboured, because it is admitted by the Respondent that the land as a whole is properly assessed, as in fact it was, under Schedule B.

The question thus arises on what principle the Respondent claims to assess the services of the stallions, in relation to the mares sent by other owners, as separate profits or income not covered by Schedule B but taxable under Schedule D. It is clearly not relevant to say that what is in question is the receipt of fees and not the services for which they are paid, any more than a distinction can be drawn, in the case of an ordinary farmer, between the produce which he uses on the farm and the produce which, by selling, he turns into money. In fact, the services of the stallions are exactly the same in respect of visiting mares as in respect of the Appellant's own mares and exactly the same care has to be taken in the paddocks and boxes in the case of the visiting mares, while they remain at the farm, as in the case of his own mares. The fee which is received for the covering of the visiting mares corresponds to the gain which the Appellant has, or at least hopes to have, in respect of the foals of his own mares. But I think the similarity is deeper than that. The profit or income is,

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in truth, from the reproductive capacity of the animal and it is that which has the money value however realised, whether in cash or in kind. There is a natural tendency to think only of the procreative activity of the female animal, the mare, and ignore that of the male, the stallion. In the former case, the foal is delivered from the mare after a prolonged period of gestation; in the case of the stallion, the service is of brief duration, but it involves the use of the stallion's generative capacity, a use which will only be exercised about 30 or 40 times a year, and to the fulfilment of which there has gone all the care lavished in the stallion's breeding and constant maintenance. The stallion is, in truth, as much a product of the soil as a tree or plant, and its generative capacity is likewise a product of the soil. Indeed, in *Earl of Derby* v. *Aylmer*, [1915] 3 K.B. 374 at page 380(1), Mr. Justice Rowlatt draws the exact parallel between a stallion and a prolific tree, and speaks of the produce and reproduction of the animal or tree. On these grounds, I think that the service of the stallion is appurtenant to the soil and a profit of the occupation in every case, so that, in this regard, it is immaterial whether the service is to the Appellant's own mares or whether it is sold to strangers; in the latter case, the service is sold from the land and as a product of the land, just as much as bullocks, potatoes, fruit or eggs are sold from the land. Without the Appellant's stud farm, or some other such stud farm, the stallions could not live or exercise their generating functions. The value of these functions is inseparably connected with the occupation of the land. I understand that reasoning on these lines is the basis of the dissenting judgment of Lord Justice Romer and I agree with him that Schedule B covers the case and that there cannot be any further assessment under Schedule D.

It is, however, objected that this conclusion is not open to your Lordships because of the decision of this House in *Malcolm* v. *Lockhart*, [1919] A.C. 463(2). That would be true if the case contained a direct decision of principle governing the question now before your Lordships. But I do not find in it any such ruling. The Commissioners had found, as a fact, that the fees were outside Schedule B, but only in regard to fees for serving mares at outside farms away from Malcolm's farm. No claim was being made to assess outside Schedule B in respect of fees for serving mares of other farmers on Malcolm's farm. This House held, in effect, that it was impossible to say there was no evidence for the Commissioners' finding of fact and, though no specific mention is made of the distinction between serving mares at the stallion's home and serving mares at outside farms, the decision must be taken to be based on the special facts which involved that the fees in question were not a profit arising in respect of the occupation of that

(1) 6 T.C. 665 at p. 670. (2) 7 T.C. 99.

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particular farm. And it may be observed that there may, at least in theory, be cases in which the stallion, kept, say, at a stable or a mews and taken round to visit the mares, could not be regarded as appurtenant to any land. I cannot see any indication that the questions of construction discussed in the present appeal were ever considered, still less decided in that case. I am further in accord with the observations made on that authority by my noble and learned friend, Lord Buckmaster. The case of *McLaughlin* v. *Bailey* (*supra*)(1) cannot, I think, be distinguished in substance from the present case, but for the reasons explained I do not think it was rightly decided and I think should not be followed. No other authority cited is of direct relevance. It is true that in *Earl of Derby* v. *Aylmer* (*supra*), service fees, such as those in question here, were assessed under Schedule D as an assessment additional to the assessment under Schedule B on the stud farm, but it was there not contested that Schedule D applied and the case was only argued on the question whether the stallion could be regarded as "plant" and entitled as such to an allowance for depreciation. On that limited question, Mr. Justice Rowlatt, as above indicated, decided that the stallion was not plant, being analogous to a prolific tree.

The case of *Carlisle and Silloth Golf Club* v. *Smith*, [1913] 3 K.B. 75(2), was strongly pressed on behalf of the Respondent. That case, however, had no bearing on the relevant question here, namely, what is the meaning of occupation under Schedule B. The golf club had been assessed under Schedule D in respect of green fees received from visitors on a finding of fact that they were profits of a trade or business separate from the mutual enjoyment by the members of the golf course. The case was in some ways not dissimilar from that of *Coman* v. *Rotunda Hospital* (*supra*)(3) which has already been referred to. In neither of these cases did questions arise of assessment under Schedule B, nor was there any question of the natural produce of or the occupation of the soil.

I think the considerations I have elaborated above are conclusive to decide the case in favour of the Appellant.

Mr. King.—Before your Lordship puts the questions, may I ask your Lordships to make an Order that certain Income Tax which has been paid by the Appellant here upon these assessments may be returned, with interest. The Appellant in this case made a payment of Income Tax three years ago on the basis of these assessments which your Lordships have now held are erroneous and I ask your Lordships for an Order directing repayment.

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(1) 7 T.C. 508. (2) 6 T.C. 48 and 198. (3) 7 T.C. 517.

Viscount Buckmaster.—But we have no matter of that kind before us. You must get it back from the Inland Revenue authorities, surely.

Mr. King.—The matter has been debated on occasions before this House and an Order has been made.

Viscount Buckmaster.—Is it before us in the case?

Mr. King.—It only arises in the event of your Lordships deciding in favour of the Appellant.

Viscount Buckmaster.—Just think. We do not even know the facts. Apart from your statement, which, of course, we accept, none of the material is before us. Surely it must be a matter which you must go to the Inland Revenue to get back.

Mr. King.—The statute makes provision for repayment of tax.

Viscount Buckmaster.—I daresay it does, but we have not been asked for repayment.

Mr. King.—The only opportunity is for the Appellant to ask it at your Lordship's Bar.

Viscount Buckmaster.—No; if you are an Appellant, you might have asked it in your case and raised the whole thing. I do not understand why the Inland Revenue should refuse, if the facts are as you state.

Mr. King.—I do not think my learned friend would dispute that I am entitled to an Order if your Lordships think fit to make it.

Viscount Buckmaster.—Does or does not the Inland Revenue want an Order made?

Mr. Hills.—So far as the Order for repayment is concerned, I do not think there is any necessity for any Order, but there may be a necessity for my learned friend to get from your Lordships a statement of the rate of interest to be allowed on repayment of the tax. That is the real thing my learned friend may need from your Lordships. The Act says that if too much tax should be paid, the amount thereof shall be refunded with such interest as the High Court may allow. The Courts are often asked in these cases to fix a rate of interest.

Viscount Buckmaster.—I can understand that is a question for us, but I cannot help wishing this point were raised properly before us in the case. There is no reason why it should not have been. The real question is: you want to know what rate of interest you should have. When did you pay, and how much?

Mr. King.—In March, 1930, we paid £2,000.

Viscount Buckmaster.—Is that the whole sum?

Mr. King.—I am instructed that is the sum.

Viscount Buckmaster.—Does the Inland Revenue accept that figure?

Mr. Hills.—I do not know how much was paid, but the amount does not matter. The question is the rate of interest.

(*Their Lordships conferred.*)

Questions put:

That the judgment appealed from be reversed.

The Contents have it.

That this case be remitted to the Commissioners with a direction to discharge the assessment.

The Contents have it.

That sums paid in respect of the Income Tax relating to these two assessments be repaid by the Inland Revenue, together with interest at the rate of four per cent. from the date of payment.

The Contents have it.

That the Respondent do pay to the Appellant the costs here and below.

The Contents have it.

[Solicitors:—Gibson & Weldon for Rustons & Lloyd (Newmarket); Solicitor of Inland Revenue.]