SUMMER SESSION, 1902.

COURT OF SESSION.

Tuesday, May 13.

FIRST DIVISION.

[Exchequer.

WATSON BROTHERS *v.* INLAND REVENUE.

Revenue—Income-Tax—Succession to Trade, Manufacture, Adventure, or Concern—Trading Ship—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100.

The rules for the assessment of income-tax under Schedule D, contained in section 100 of the Income-Tax Act 1842, provide that where any person has "succeeded to any trade, manufacture, adventure, or concern," the profits thereof for income-tax purposes shall be taken on the average of the profits for the last three years.

A trading ship, which was employed in carrying cargoes between any ports where the freights appeared likely to be remunerative, was sold. At the time of the sale the ship was not under charter; no contracts for her employment were transferred to the purchasers, nor did they acquire any of the books kept by the sellers. *Held* that the purchasers had not "succeeded to" a "trade, manufacture, adventure, or concern," within the meaning of the Income-Tax Act.

This was a case stated for appeal by the Commissioners of Income-Tax at the instance of Watson Brothers, shipowners in Glasgow, owners of the steamship "Craigerne," who had been assessed for income-tax under Schedule D for the year ending 5th April 1901 in respect of the profits of the said ship, at a first assessment of £1000, and an additional first assessment of £2100.

In the case the following facts were set forth as admitted or proved—"(1) For ten years prior to the 13th day of December 1899 the 'Craigerne' belonged to R. R. Paterson and four other persons (hereinafter referred to as the late owners). The 'Craigerne' was managed by R. R. Paterson & Company. On the 13th day of December 1899 the 'Craigerne' was sold by the late owners to Henry James Watson and three other persons (hereinafter referred to as the present owners). None of the late owners are present owners. (2) When the sale took place the management of the 'Craigerne' was transferred from R. R. Paterson & Company, whose office is in Greenock, to the appellants, whose office is in Glasgow. While the 'Craigerne' belonged to the late owners and since she was acquired by the present owners she has been employed, not in trading between fixed ports, but in conveying cargoes between any ports where the freights agreed to be paid seemed likely to be remunerative. On the date of her delivery by the late owners to the present owners she was not under charter, and no contracts for the carriage of goods or other services were taken over by the present owners from the late owners. No debts due to or by the late owners were taken over by the present owners, nor were any books belonging to the late owners transferred to the possession of the present owners. The only property transferred for the price paid was the 'Craigerne' herself. (3) The assessments appealed against were made on the assumption that the business carried on by the present owners was a new concern, and that the assessments fell to be made on the average of the profits since their purchase of the 'Craigerne,' in accordance with the first proviso to the 1st rule of the 1st case of Schedule D contained in the 100th section of the Income-Tax Act of 1842.

"The appellants maintained that the owning of and trading with the 'Craigerne' as before set forth was an adventure or concern in the nature of trade to which the present owners succeeded within the meaning of the 4th rule applicable to the 1st and 2nd cases of Schedule D contained in the 100th section of the Income-Tax Act of 1842, and that the assessment should have been made on the average of the profits for three years preceding the 5th day of April 1900, in accordance with the 1st rule of the 1st case of Schedule D."

The first case under Schedule D of the Income-Tax Act 1842 comprises the duties chargeable in respect of any trade, manufacture, adventure, or concern in the nature of trade.

Paragraph 1 of the rules of such first case enacts—"The duty . . . shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, adventure, manufacture, or concern, upon a fair and just average of three years . . . provided always, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same."

Paragraph 4 of the rules applicable both to the first and second cases under Schedule D enacts—"If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership either by death or dissolution of partnership as to all or any of the partners or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid."

The Commissioners' decision was as follows:—"On a consideration of the facts and arguments submitted to them the Commissioners were of opinion, for the reasons stated in the note, that the present case does not fall within the provisions of the 4th rule applicable to the 1st and 2nd cases of Schedule D, and that the assessments are correctly made as on a concern set up and commenced within three years of the 5th day of April 1900. The Commissioners accordingly confirmed the assessments."

Note.—"In the Commissioners' view the present owners by the purchase of the 'Craigerne' acquired not a business or concern but machinery or plant to carry on a business or concern. A ship bought to replace another could be only so looked on, and the Commissioners are of opinion that the same view must be taken of a ship transferred from one owner to another, though she may have been the only ship which belonged to the vendor before the sale and the only ship owned by the purchaser after it.

"It may frequently be the case that a business or concern is transferred with the ship, and it may not matter whether this is done expressly or not, but in this case the present owners acquired nothing but the ship, not even the services of the vendor's manager, and it is not alleged that they derived any advantage from the business previously carried on by the late owners."

Argued for the appellants—There was here a case of succession to a trade, adventure, or concern. The ownership of a ship, if used for trading purposes, was a trade within the meaning of the Income-Tax Acts—*Attorney-General* v. *Borrodaile*, 1814, 1 Price 148. The transfer of such a trade was a succession in a question under the rules of Schedule D—*Ryehope Coal Company* v. *Foyer* (1881), 7 Q.B.D. 485. The sellers of the ship transferred their trade to the purchasers by selling the ship to them. The trade could not be carried on without the ship.

Counsel for the respondents were not called upon.

LORD PRESIDENT—The facts in this case are very short and very simple. For ten years prior to the 13th of September 1899 a steamship belonged to five individuals, and she was managed by a firm. On that date, 13th December 1899, the steamship was sold by the five individuals to four other individuals—in short, there was a sale of a corporeal moveable which happened to be a ship. It appears that the ship had not traded between any definite ports or upon any definite route, and it does not appear that she was engaged in any definite trade; but it is said that she took whatever freights were likely to be remunerative—in short, she seems to have been what in shipping language is called a tramp steamer. No contracts or debts were taken over by the purchasers from the sellers, nor were any books belonging to the sellers transferred to the purchasers. The only thing transferred was the ship. It is not said that the sellers gave to the purchasers any introductions to their past customers, or that there was any transfer of the machinery which would enable the purchasers of such a corporeal moveable to continue the trade of the sellers. If the books or a list of the customers of the sellers had been transferred, or if any introductions or recommendations had been given, the case might have been different; but the case which occurred seems to me to be the same as if the ship had been put up to auction and knocked down as a corporeal moveable to the highest bidder. The question then comes to be, whether the owning of and trading with the ship by the sellers was an

adventure or concern in the nature of a trade to which the present owners succeeded within the meaning of the 4th rule applicable to the 1st and 2nd cases of Schedule D contained in the 100th section of the Income-Tax Act of 1842, and whether the assessment should have been made on the average of the profits for three years preceding the 5th day of April 1890, in accordance with the 1st rule of the 1st case of Schedule D. I am of opinion that this question must be answered in the negative. The first part deals with the computation of duty in case of a change of partners—that is to say, where some change has taken place within a firm or within a partnership, which is treated as a continuing thing notwithstanding the change, and provisions are made for the assessment of such a case. The present case clearly does not fall within that, but it is contended that it does fall within the 2nd case in the 4th head, which bears that if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods, the duty payable shall be estimated in a particular way—the way there again being determined by reference to the previous history of that trade, manufacture, adventure, or concern, all upon the view that what was bought was a continuing adventure, with its prospects, its trade connections, and those other things connected with the past which result in the making of a profit. In short the case is treated as being analogous to a change in a partnership. But it appears to me to be clear that there is nothing of that kind in the present case. There is no succession here to any trade, manufacture, adventure, concern, or profession. There is simply the purchase of a corporeal moveable which may or may not be used in carrying on the same business, and which may be equally well used in a different trade, even if there had been any continuing course of employment, which it appears from the case there was not. In short, it seems to me that if the contention which is maintained on behalf of the appellants here were to prevail, it would equally apply to a horse bought in open market, or to a carriage knocked down at a sale, or to every corporeal moveable which might happen to change hands by purchase or transfer. For these short reasons it appears to me that the view taken by the Commissioners in this case is correct.

LORD ADAM—I am of the same opinion. It appears to me, with your Lordship, that this is a case simply of the purchase of a corporeal moveable, which the purchaser might use in any way he pleased. It appears to me that in order to succeed in this case the appellants must prove that what they succeeded to was a trade, manufacture, adventure, concern, or profession. Now, the only colour for the argument appears to me to be this, that this ship before she was transferred was being employed in the same way as she was employed after she was purchased by the appellants—that is to say, as your Lordship says, she was a tramp ship going from no particular port to no other particular port, but going wherever she could get paying freights — here to-day, and there to-morrow—and after the new owners acquired her she was employed in the same way. I do not think that is being employed in the same trade in the sense of the Act. Being employed in the same trade in the sense of the Act is being engaged in a particular trade, not in a mere trade *sui generis*—a trade in a regular line, it might be between A and B, carrying that on as a liner might be carrying on a particular trade, and if you purchased the rights to carry on that trade that would be succeeding to a "trade;" but to my mind "trade" in this part of the Act does not mean an occupation for a ship which any and every ship in the kingdom might follow in exactly the same way. That is not succeeding to a trade in the sense of the statute, and upon that ground I think the appellants are wrong.

LORD M'LAREN—In December 1899 the appellants purchased the ship called the "Craigerne" from Mr Paterson and certain other owners, and the question is, whether the appellants are to be assessed for income-tax on the supposition that the trade which they carried on by means of this ship is a new trade beginning with their purchase, or whether the appellants are the successors in business of the owners from whom the ship was purchased. Now, the question whether one set of owners are the successors in business of another set of owners is a pure question of fact, and on the facts as stated in this case I am unable to hold that the appellants did succeed to any cargo-carrying business which was carried on by Paterson and others, the late owners. The case states that no contracts for the carriage of goods or other services were taken over by the present owners; that no debts due to or by the late owners were taken over by the present owners; nor were any books belonging to the late owners transferred to the possession of the present owners. The only property transferred for the price paid was the "Craigerne" herself. While these statements negative all the ordinary incidents of partnership, there is no positive averment that any of the incidents of partnership came over from the one set of shipowners to the other set. Accordingly, the argument addressed to us was raised on the allegation that the mere ownership of a ship constituted a trade. Now, that is a proposition to which I am unable to give my assent. It will be admitted that if anyone keeps a yacht for his own pleasure and convenience, although no doubt he is a shipowner and is on the register as a shipowner, he is not therefore engaged in trade. His ship is not an income-producing subject, but a source of expenditure. Accordingly, the trade for which a man is liable to be assessed is the use of the ship for the carriage of goods or passengers, the hire of the ship

or the freight being profits of trade. According to the statements in the case, as I read them, this cargo-carrying trade was not transferred from the former owners to the present owners, but what was transferred was the *corpus* of the ship, and in my opinion that does not entitle the appellants to say that they were the successors in business of the persons from whom they purchased the "Craigerne."

LORD KINNEAR—I agree with your Lordships, and I think it is a very clear case. The only semblance of argument maintained by the appellants was founded on a misconception of the decision arrived at in the case of the *Ryehope Coal Company*. In that case it was decided that a company which had been formed for the purpose of continuing to work and carry on a going colliery were the successors in business of the persons who had carried it on previously for many years. But they had taken over what one of the learned Judges describes as "a mining concern," and had not merely acquired a piece of machinery.

The Court affirmed the decision of the Commissioners.

Counsel for the Appellants—Ure, K.C.—Constable. Agents — J. B. Douglas & Mitchell, W.S.

Counsel for the Respondents—Campbell, K.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor for Inland Revenue.

Wednesday, May 14.

FIRST DIVISION.

BRAID HILLS HOTEL COMPANY, LIMITED, PETITIONERS.

Company—Shares Issued as Fully Paid up—Authority to File Contract or Memorandum—Contract as to Shares Never Reduced to Writing—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Companies Act* 1898 (61 *and* 62 *Vict. c.* 26), *sec.* 1—*Companies Act* 1900 (63 *and* 64 *Vict. c.* 48), *sec.* 33.

Held that notwithstanding the repeal of section 25 of the Companies Act 1867 by section 33 of the Companies Act 1900, it was competent for the Court, under the provisions of section 1 of the Companies Act 1898, to authorise the filing of a contract, or memorandum in lieu of a contract, in cases where shares in a company had been issued as fully paid up, and authority *granted* to file such a memorandum in a case where shares had been issued as fully paid up for a consideration other than cash, but the transaction had not been embodied in any written contract.

The Companies Act 1867 enacts (sec. 25)—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

The Companies Act 1898 enacts (sec. 1)—"(1) Whenever before or after the commencement of this Act any shares in the capital of any company under the Companies Acts 1862 and 1890, credited as fully or partly paid up, shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract, or no sufficient contract, is filed by the Registrar of Joint-Stock Companies, in compliance with section 25 of the Companies Act 1867, the company, or any person interested in such shares, or any of them, may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the Registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall in relation to such shares operate as if it had been duly filed with the Registrar aforesaid before the issue of such shares. (2) Any such application may be made in the manner in which an application to rectify the register of members may be made under section 35 of the Companies Act 1862. . . . (4) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may in lieu thereof direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period, it shall, in relation to such shares, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the Registrar aforesaid before the issue of such shares."

The Companies Act 1900 enacts (sec. 33)—"(1) Section 25 of the Companies Act 1867, and the other enactments mentioned in the schedule to this Act, to the extent specified in the third column of that schedule, are hereby repealed. (2) No proceedings under section 25 of the Companies Act 1867 shall be commenced after the commencement of this Act."

The Braid Hills Hotel Company, Limited, presented a petition under section 1 of the Companies Act 1898, quoted *supra*, with regard to 95 ordinary shares, Nos. 8 to 102 inclusive, issued to William Ritchie Rodger.

The petition set forth that by feu-charter dated 17th and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh the 23rd, both days of October 1893, and re-recorded in said Register on 14th September 1894, granted by Peter Mowat, builder, Edinburgh, William Ritchie Rodger, S.S.C.,