

Saturday, February 25.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE v. ANDERSON.

Revenue — Income Tax — Occupation of Lands—Shootings and Fishings—Deductions—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 63, Schedule B, No. IX, Rules 2 and 3 — Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule B.

The tenant of farms and grazings, together with the right of fishing and shooting on the lands either by himself or those having his permission, let the fishing and shooting, but limited the number of guns and rods to be used, and reserved the control of heather-burning and the right to shoot rabbits and hares at certain seasons. The lease under which the tenant held the farms excluded assignees and sub-tenants. Provision was made in the let of the fishing and shooting for the sharing by the parties of the expense of a man to act as gamekeeper and as estate man, and for the use of the shepherds, when possible, for driving grouse. The tenant having been assessed for income tax under Schedule B of the Income Tax Acts as occupier of the farms and grazings claimed that the assessments should be reduced by the amount of the rent which he received from letting the shootings and fishings. *Held* that the tenant had not divested himself of the position of occupier of the lands and shootings under the lease, and was not entitled to the reduction.

The Income Tax Act 1853 (16 and 17 Vict. cap. 34) enacts—Section 2—“For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act. . . . —that is to say . . .”—Schedule B—“For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid. . . .”

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), the rules and cases of which for Schedule B of that Act were applicable to the above schedule, enacts—Section 63, No. IX—*First*—“The said duties, except where other provisions are made as aforesaid for estimating particular properties, shall be estimated according to the general rule contained in Schedule A, and shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns.” *Second*—“Every person having the use of any lands or tenements shall be taken and considered for the purposes of

this Act as the occupier of such lands or tenements.”

W. Miller, Surveyor of Taxes, Edinburgh, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts at Edinburgh reducing the assessments of William Watson Anderson, farmer, Colzium, Kirknewton, *respondent*, obtained a Case for appeal.

The assessments were made under Schedule B of the Income Tax Acts in respect of the occupancy of certain farm lands, and were reduced by the amount which the respondent received from letting the shootings of the lands.

The Case set forth—“The following facts were admitted or proved:—1. The respondent is tenant of the farms and grazings of Easter and Wester Colzium and West Cairns in the parish of Midcalders in the county of Midlothian. 2. The respondent's father William Watson Anderson, now deceased, rented the said farms and grazings from the respondent's grandfather John Anderson under a lease for ten years from Whitsunday 1899. The said lease provides, *inter alia*, as follows:—‘The said John Anderson . . . lets to the said William Watson Anderson and his heirs . . . [then followed an express exclusion of assignees and sub-tenants, legal or conventional, of every description] . . . all and whole the farms and grazings of Easter and Wester Colzium and West Cairns as at present occupied by the said William Watson Anderson, all lying in the parish of Midcalders and county of Midlothian, together with the right and privilege of fishing and shooting and killing game of every description, including hares and rabbits, on the said lands either by himself or those having his permission, and that for the full term and space of ten years from and after the term of Whitsunday Eighteen hundred and ninety-nine . . . for which causes and on the other part the said William Watson Anderson binds and obliges himself and his heirs, executors, and successors to content and pay to the said John Anderson and his fore-said or to any factor whom he may appoint the yearly sum of seven hundred and fifty pounds sterling.’ 3. By minute of agreement, dated 28th May and 10th June 1908, the said lease was extended for a further period of ten years from and after the term of Whitsunday 1909, when the respondent became joint tenant. . . . 5. The respondent's father the said William Watson Anderson died in 1913, when the respondent as survivor became sole tenant of the said farms and grazings. 6. The shootings over the aforesaid farms Easter and Wester Colzium and West Cairns were let by the tenants under the said lease to Messrs Bruce & Menzies from 1903-4 to 1912-13 inclusive at £100 per annum, and for 1913-14 at £150 per annum. 7. On the 17th November 1913 the respondent let the shootings to Messrs A. & H. Lawrie, 4 St Andrew Square, Edinburgh, for five years at £250 per annum, but reserved the right to shoot rabbits and white hares from 10th December to 1st April in each season. A copy of

the respondent's letter of the 17th November 1913 agreeing to let the shootings as aforesaid is annexed to and forms part of this case. 8. The respondent pays the rates on the farms and shootings, although Mr Alfred A. Lawrie appears as the occupier in the valuation roll.

"The Commissioners on consideration of the facts and arguments submitted to them were of opinion that the respondent's contentions were correct, and accordingly reduced the assessments under Schedule B for each of the years ended 5th April 1916 and 1917 to £500."

The letter of 17th November 1913 was in following terms:—"This is to state that I have let to Messrs A. & H. Lawrie, 4 St Andrew Square, Edinburgh, the shootings of Colzium for a period of five years (seasons 1914-15-16-17-18) at a rent of £250, to be paid in half-yearly sums of £125. A man will be engaged to act as gamekeeper for Messrs Lawrie and estate man for me. This man will do all work necessary as a keeper for the Messrs Lawrie at Colzium when not required by the shooting tenants. He will do whatever is required of him on the estate for me—he will be paid in equal share by me and the Messrs Lawrie, both parties to pay for upkeep of man's house in equal share. The Messrs Lawrie as shooting tenants of Colzium have also the right to fish (two rods) on Harperrigg reservoir, also shoot (two guns) round this reservoir. If the farm tenant of Colzium has a boat on the reservoir the Messrs Lawrie have the right to use this boat when required. I guarantee to allow my shepherds to grouse drive unless I find it absolutely impossible. I have full control of heather-burning. In order to keep down rabbits and white hares I have the right to shoot same after December 10th of each season to April 1st. All grouse butts on green land must be protected from sheep by wire netting—this is to prevent such a waste of valuable ground in rebuilding of butts each season."

Argued for the appellant—The Commissioners had gone behind the lease and taken a figure which depended on any arrangements the respondent might make from time to time to obtain profits out of the lands by allowing people to shoot over them. There was no warrant for what the Commissioners had done, and there would be no certainty in assessment if their decision was right. Schedule B was for assessing an occupier on certain benefits he gained from occupation and applied to such profits as these. By granting the letter by which the shootings were let the tenant had not parted with the occupancy of the lands and shootings. If it were so, "occupier" might be held to apply to the privilege of shooting with one gun or fishing with one rod. The word was to be interpreted in the technical meaning given to it by the statutes—*Governors of Sutton's Hospital in Charterhouse v. Elliot*, 1921, 33 T.L.R. 129; *Bent v. Roberts*, 1877, 3 Exch. Div. 66—and meant the person paying under Schedule A or some person in direct financial relationship with him—*Income Tax Act 1842*, section 190, Schedule G; section 60, Schedule A, No. 1; and

section 69 *Dowell's Income Tax Laws* (7th ed.), p. 200. The test for assessment under Schedule B was payment of rent. Persons other than those in the position of owners or tenants appeared to be excluded. So a tenant could not avoid assessment on the whole rent by holding the farms and shootings under separate leases—*Revell v. Scott*, 1895, 22 R. 772, 32 S.L.R. 585. "Occupier" and "lessor" were not synonymous (Schedule A, No. IV, Rule 3) unless the lessor was in financial relationship with the owner as his tenant—*Glasgow Billiard Rooms Company v. M'Call*, 1903, 5 F. 507, 40 S.L.R. 592. There was no provision for taxing a person in the position of this shooting tenant, and if the respondent's contention was right the machinery of the Acts would break down. (2) The fact that the shooting tenant's name was in the valuation roll could have no bearing on the question of assessment for income tax—*Armour on Rating*, 2nd ed., p. 7. (3) There was no proper sub-lease here, but if there were tenant could not be held to include sub-tenant—*MacGregor v. Clamp & Son*, 1914, 1 K.B. 288.

Argued for the respondent—The shooting tenant here had the use of the lands and was therefore the occupier in the meaning of the Acts—*Income Tax Act 1842*, section 63, Schedule A, No. IX, Rule 2. He had the actual use and that was the test. So a life-renter might be an occupier. The contention of the appellant introduced the principle of constructive occupation, which was not in accordance with the intention of the Acts. *Revell v. Scott*, *cit. sup.*, showed that there could be occupation for sport separate from agriculture. *Bent v. Roberts*, *cit. sup.*, and *Governors of Sutton's Hospital v. Elliot*, *cit. sup.*, were cases of occupation for services and did not apply. The document itself was decisive on the question of whether there was a lease of the shootings. The reservation of the right to shoot hares and rabbits was merely for the purpose of keeping down ground game and did not affect the question of occupation. The letter contained the proper terms of a lease of shooting, and if it was a lease the shooting tenant must be the occupier under Schedule B, No. IX, Rule 2. The letter could not be classed as merely the grant of a privilege. Further, tenant must be taken to include sub-tenant from the terms of the Act of 1842, section 69. The rent therefore fell to be deducted from the assessment. The shooting tenant ought to pay the tax, and could deduct it on paying the rent.

At advising—

LORD MACKENZIE—William Watson Anderson, farmer, Colzium, Kirknewton, appealed to the Commissioners of Income Tax against an assessment on £750 under Schedule B for the years ended 5th April 1916 and 1917 respectively in respect of the occupation of certain lands in the parish of Mid-Calder, and claimed that the amount should be reduced each year by the rent of £250 per annum which he received from sub-letting the shootings over the lands.

The Commissioners reduced the amount under Schedule B for each of the years to

£500. The respondent's contention, to which the Commissioners gave effect, is thus stated in the Case—"1. That under Rule IX (1), section 63, of the Income Tax Act 1842 the assessment under Schedule B should be made on the occupier for the time being, and further that under Rule IX (2) the occupier is deemed to be the person having the use of the subjects assessed. 2. That in this case the respondent is not the occupier of and has not the use of the shootings, which are in the occupation and use of Messrs A. & H. Lawrie."

The terms of the lease under which the respondent has right to occupy the subjects expressly excludes assignees and sub-tenants. The subjects let were—"All and Whole the farms and grazings of Easter and Wester Colzium and West Cairns, as at present occupied by the said William Watson Anderson, all lying in the parish of Mid-Calder and county of Midlothian, together with the right and privilege of fishing and shooting and killing game of every description, including hares and rabbits, on the said lands, either by himself or those having his permission." The rent was £750. On 17th November 1913 the respondent granted a letter to Messrs A. & H. Lawrie letting to them certain rights of shooting and fishing in connection with the subjects he had right to occupy under his lease for the seasons 1914-15-16-17-18. The respondent pays the rates on the farms and shootings, although Mr Alfred A. Lawrie appears as the occupier in the valuation roll.

It is material to note that the letter is not expressed in the terms of an ordinary shooting lease. The right of shooting over Colzium does not bear to be an exclusive right. As regards the right to shoot "round" the reservoir of Harperrig (whatever this may mean) liberty to do so is limited to two guns, although from the reference further on in the letter to grouse-driving it was plainly in contemplation that more guns would be required to shoot other parts of the ground. The liberty to fish is also limited to two rods. There is also express provision that the respondent is to have full control of heather-burning. This was necessary in order to protect the respondent's right of occupancy under his lease, for it contains this clause—"With regard to heather-burning, it is hereby conditioned and agreed that no more than one-tenth of the muirland shall be burned in any one of the last three years of this lease without special written consent from the proprietor or his foresaids." (The duration of the respondent's lease was to Whitsunday 1919.) The reservation to the respondent of the right to shoot rabbits and white hares after 10th December to 1st April squares with the inalienable right conferred on every occupier of land by the Ground Game Act 1880, section 1 (3), in the case of moorlands, which is the nature of the subjects here. The provision in the letter regarding a man engaged to act as gamekeeper shows that he was to be half gamekeeper, half estate man, his wages and the upkeep of his house being paid one-half by the respondent and one-half

by Messrs Lawrie. It is difficult from the way the letter is punctuated and printed to know what is meant by the phrase "when not required by the shooting tenants," but I should assume part of the keeper's work would be killing vermin as well as going out when the Messrs Lawrie were shooting. There is absent from the letter the usual obligation to shoot in a fair and sportsman-like manner and to leave a fair average stock of game at the termination of the lease.

The respondent argued to us that the question is not one of title but purely a question of fact—Who has the use of the lands? It is, no doubt, true that we have passed from the days when it was debated whether a shooting lease constituted a separate estate in land, and whether it was more of the nature of a delegation of a personal privilege than a tack. In *Stewart v. Bulloch* (8 R. 381, 18 S.L.R. 240) it was made clear that what a shooting tenant may have is a right of occupation of land. Of this the case of *Middleton* (3 R. 599, 13 S.L.R. 556) was a good example of an exclusive right, albeit for a particular purpose. The rent paid for the temporary transfer of this kind of incorporeal right has by a train of decisions been made to play all the parts which the law expects the rent of land to perform, from provision to widows to composition to superiors. The question here is of a different nature, and different also from the question considered in such cases as *Marquis of Huntly v. Nicol* (23 R. 610, 33 S.L.R. 432) and *Duke of Richmond v. Duff* (5 Macph. 310, 3 S.L.R. 176) which was the extent to which profit could be made out of a sporting privilege. The question here is to what extent, looking to the restrictive words in the original lease excluding assignees and sub-tenants, is it to be held that the respondent divested himself of the character of occupier under his lease. There is no difficulty such as there was in *Inland Revenue v. Scott* (22 R. 772) about an endeavour to avoid payment of the assessment by dividing the occupation into two leases. The case of *Duke of Richmond* (11 Macph. 981) does not appear to me to warrant the conclusion that the contention of the respondent is right. The character of the right possessed by the agricultural tenant and the character of the right of shooting communicated by him must be scrutinised. If an agricultural tenant were to let out his shooting to several persons at so much per gun, or his right to fish at so much per rod, such persons would not be regarded as occupiers of land, but more appropriately as persons having liberty to shoot or fish from the occupier of the land. The partial use of the subjects derived by the Messrs Lawrie from the occupier does not in my opinion divest the respondent of his position as occupier under the lease. The case is essentially different from that of *Middleton*, upon which the decision in *Inland Revenue* proceeded.

The respondent ought therefore to be taken and considered as the occupier of the lands and shootings. The determination of

the Commissioners is in my opinion wrong. The assessment of the Surveyor ought to be restored.

The LORD PRESIDENT and LORD CULLEN concurred.

LORD SKERRINGTON did not hear the case.

The Court reversed the determination of the Commissioners.

Counsel for the Appellant—Wark, K.C.—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Respondent—Henderson, K.C.—Guild. Agents—Guild & Guild, W.S.

HIGH COURT OF JUSTICIARY.

Monday, March 13.

(Before the Lord Justice-Clerk, Lord Salvesen, and Lord Ormidale.)

M'SHANE v. PATON.

Justiciary Cases—Complaint—Relevancy—Teacher Charged with Assaulting School-boy—Infliction of Corporal Punishment in School Hours and for School Offence—Review—Suspension—Competency.

An assistant schoolmistress was charged in a police court with assaulting a school-boy by striking him several blows on the hands with a leather belt. The complaint did not disclose that the relationship between the accused and the boy was that of teacher and pupil. The magistrate found the accused guilty of the charge. In a suspension it was admitted that the boy had been punished by the complainer for failing to bring a written excuse for his absence, and that his mother thereupon went, accompanied by him, to the headmaster to complain, that the master told the boy to go back to his class room, that the boy did not do so, and that on his being brought back by his mother the complainer inflicted on him as further punishment four strokes with the tawse, two on each hand. *Held* that an appeal against the conviction by way of suspension was competent, that the infliction of corporal punishment was justified in the interests of discipline, and conviction *quashed*.

Observed that the prosecutor ought to have set forth in the complaint the special relationship that existed between the accused and the boy, the nature of the punishment inflicted, and also the fact that it was administered in school hours for an offence that the boy had committed.

Annie M'Shane, assistant school teacher, Barrhead, *complainer*, was charged in the Burgh Police Court at Barrhead at the instance of James Boyd Paton, Burgh Prosecutor, *respondent*, upon a summary com-

plaint in the following terms:—"You are charged at the instance of the complainer that on 10th October 1921, in St John's School, Darnley Road, in the burgh of Barrhead, you did strike John Brophy, schoolboy, residing at 304 Main Street, Barrhead, several blows on the hands with a leather belt and assault him."

The complainer pleaded not guilty, and after evidence had been led the Police Magistrate found her guilty as libelled and sentenced her to a fine of £1 or ten days' imprisonment.

The complainer brought a bill of suspension in which she averred, *inter alia*—“(Stat. 4) The following are the facts elicited by the evidence at the trial, viz.—The boy John Brophy, who is eight years of age, was punished by the complainer on the morning of the date libelled for being absent on the preceding Friday without bringing an excuse from his parents. The evidence of the complainer was that on this occasion she administered one stroke across the palm of one of the boy's hands with a leather strap or 'tawse' such as is ordinarily used in schools for administering punishment. At the lunch interval the boy complained to his mother of having been punished. Prior to the reassembling of the school in the afternoon the mother of the boy came with him to the school, saw the complainer in the school yard, and complained to her that the boy had been unjustly punished as he had been absent with her knowledge and consent. The mother then took the boy with her to complain to the headmaster. This, however, took place without the complainer's knowledge. On the mother seeing the headmaster he told the boy to return to his class room, but instead of doing so the boy left the school building and went to the gate of the playground, where he was found by his mother fifteen minutes after the school had resumed. The mother took the boy to the complainer's class room and handed him over to the complainer. The complainer punished the boy for being late, and it is to the administration of this punishment that the complaint against her relates. She admitted having on this occasion administered four strokes in all with the same strap or 'tawse,' two on each palm. For the defence the headmaster of the school stated that the complainer had his authority to use the strap."

In his answers the respondent averred, *inter alia*:—"Denied except so far as coinciding with the following statement of facts proved at the trial—(1) The complainer is an assistant mistress in St John's Roman Catholic School, Barrhead, and John Brophy, a boy of eight years of age, was a pupil there. (2) The said John Brophy was on Friday, 7th October 1921, detained at home by his mother owing to his illness. (3) On his return to school on the morning of Monday, 10th October 1921, he explained to the complainer that he had been ill through a cold and had been detained by his mother, but he did not bring a written excuse. (4) The complainer on being asked by the Magistrate if the boy had ever played